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**A LEGAL APPRAISAL OF TAXATION OF ELECTRONIC COMMERCE IN NIGERIA**
**Abstract**

*Tax is merely imposed for public purpose and for raising general revenue for the State. Tax is charged and payable on all international, interstate and intra state supplies of goods and services. Consequently, all supplies which includes supplies into Nigeria from outside (import) and within Nigeria. Electronic commerce otherwise called E-commerce represents a new business model which operates with very few physical locations, involves customized inventories and storage needs are reduced. It involves less vertical integration and more outsourcing and fewer physical locations as used by a vendor. The servers used in e-commerce are not necessarily tied to a single physical location but can easily be relocated without any interruptions to business operations. Conventional tax legislations presuppose that taxes are levied on the residence and source based. Taxation of electronic commerce is imperative as the world is going digital and e-commerce is here to stay. Nonetheless, it will be an overstatement to say that the prospects of e-commerce will drive the economy to an enviable height. This paper examines the peculiar problems which the tax authorities face with the new innovation in modern business transactions with the existing laws vis-a-vis the collection of e-commerce tax. The paper adopted a doctrinal method of data collection using analytical approach in reviewing the tax laws, statutes, case laws, legal opinions of experts in textbooks and articles relevant to the subject matter of electronic transactions. The work revealed that the existing tax laws provide generally for any type of transactions, whether within and outside thereby making Nigeria one of the countries that provide for taxation of digital economy. The tax authorities have made an inroad towards harnessing the tax yield from electronic commerce. However, in order to fast track these mechanisms in use, the work recommended amendments to the existing tax laws to address the issues that had bedeviled the tax system for clarity of the provisions to the taxpayers and tax administrators and the challenges of inroad into artificial intelligence and digital economy.*

**Keywords:** ‘Taxation’, ‘Electronic Transactions’, ‘Reverse Charge’, ‘Residence’, ‘Source’.

**1. Introduction**

Tax is a compulsory contribution towards a country’s expenses raised by the government from people’s salaries, properties and supply of goods and services<sup>1</sup>. It is a way or process of exaction to support government.<sup>2</sup>The gradual shift from a physically-oriented commercial environment to internet based regime now known as e-commerce poses serious legal and regulatory issues in relation to taxation regimes. The development in information and communication technology had immeasurable impact on the way human beings interact. It ranges from simple social interactions to complex multinational transactions.

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<sup>1</sup>M Robinson, *Chambers, 21<sup>st</sup> Century Dictionary* (New Delhi, Allied Chambers (India) Ltd, 1999) p.32

<sup>2</sup>*United States v Buttler*(1936) 2276 US 1 at 61.....italicize the case

It has been opined that the taxation of e-commerce is a vexatious problem because it is difficult to establish the residence of buyers and sellers or where the transaction took place<sup>3</sup>. It is also the reasoning that the taxable basis of the transaction and the jurisdiction to which domestic law is subject to do not apply to electronic transactions. Hence, it is seen that the challenges stem from the very basic character of electronic commerce to be global, boarder less, virtual and anonymous.

Despite the views expressed by opinions molders, there are provisions in the Nigerian tax laws providing or charging incomes made globally to tax. In fact, the Companies Income Tax Act (CITA)<sup>4</sup> provides that income that accrues to any company anywhere on the globe is subject to Nigerian tax. The argument for and against the possible taxation of digital or electronic commerce and the difficulty in determining the location of the company abound<sup>5</sup>. The law<sup>6</sup> is any company involved in transmitting, emitting, or receiving signals, sounds, messages, images or data of any kind by cable, radio, electromagnetic systems or any other electronic or wireless apparatus to Nigeria in respect of any activity, including electronic commerce, application store, high frequency trading, electronic data storage, online adverts, participative network platform, online payments and so on, to the extent that the company has significant economic presence in Nigeria and profit can be attributable to such activity.

The digital transactions or electronic commerce is in the realm of supply of goods and services regulated by the Value Added Tax (VAT)<sup>7</sup>. The charging clause of the Act<sup>8</sup> provides that 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 goods and services, listed in the first schedule to this Act. More explicitly, the Finance Act<sup>9</sup> has provided that where the beneficial owner of the rights in or over the goods is a taxable person in Nigeria and the goods or right is situated, registered or exercisable in Nigeria and also for services provided to a person in Nigeria, regardless of whether the services are rendered within or outside Nigeria. Further up, under the Value Added Tax regime<sup>10</sup>, it is the reverse charge mechanism, which requires that VAT is to be paid for the goods and services supplied by the recipient rather than the supplier. When this mechanism is applied, the recipient of the goods and services makes the declaration of both their purchase (input VAT) and the suppliers' sale (output VAT) in their VAT return. Even the new amendment in CITA<sup>11</sup>, introduced that trade or business which comprises of the furnishing of

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<sup>3</sup> D A Ariyoosu, *Taxation of Electronic Commerce in Nigeria* (Ibadan: Stirling-Horden publishers Ltd, 2014) p.1 see M Ferguson, 'An internet, Business Framework for Government Agencies' in Syed Mahhubur Rahmen & Mahesh S Raisinghani (eds) *Electronic Commerce Opportunity and Challenges* (United States of America: Idea Group Publishing Company, 2000)375

<sup>4</sup> Companies Income Tax (Amendment) Act (CITA), No 11, 2007, s9, provides subject to the provisions of this Act, the tax shall each year of assessment, be payable at the rate specified in subsection (1) of the section 40 of this Act upon the profits of any company accruing in, derived from, brought into or received in Nigeria in respect of: (a) any trade or business for whatever period of time such trade or business may have been carried on.

(b) rent or any premium arising from a right granted to any other person for use or occupation of any property and ..... However, see the provisions of the Finance Act, 2019, sections 2 and 4 which amended section 9 of CITA

<sup>5</sup> E Ilamosi, *Taxing Digital Economy in Nigeria*, available at [http://www.businessdayonline.com/taxingdigital economy-Nigeria](http://www.businessdayonline.com/taxingdigital-economy-Nigeria).

<sup>6</sup> Finance Act 2019, section 4. This amended the former section 13 of CITA.

<sup>7</sup> Value Added Tax (Amendment) Act (VAT) No 53, 2007, s 2 but see Finance Act, 2019 s 33 for the amendment to section 2 of VAT.

<sup>8</sup> VAT Act, 2007, s.2, there was no restriction on the jurisdiction to collect from any source but the Finance Act under section 33 made specific provisions.

<sup>9</sup> 2019, s 33, which substitutes the former section 2 CITA with a new section 2(1) & (2) of CITA.

<sup>10</sup> *Ibid* sections 3,5, 12 and 14, the combined or community reading of the sections points to the facts that Value Added Tax is paid by the consumer of the said goods and services.

<sup>11</sup> Finance Act 2019, s 4 which introduced paragraph e to section 13 of CITA.

technical, management, consultancy or professional services outside Nigeria to a person resident in Nigeria to the extent that the company has significant economic presence in Nigeria.

## 2. Taxes imposed on Persons and Corporate entities in Nigeria

### 2.1 Personal Income Tax

The Personal Income Tax (Amendment) Act<sup>12</sup> regulates personal income tax in Nigeria. It is the National Assembly that has the powers to legislate on personal income tax.<sup>13</sup> The Constitution provides that the National Assembly can delegate to the States power to collect income tax.<sup>14</sup> In Nigeria, the Federal and State Government collect Personal Income Tax.<sup>15</sup> The Act<sup>16</sup> identifies taxable persons and chargeable income. Personal income tax is imposed on the income of all Nigerians or residents who derive income from inside and outside Nigeria. The residence of a tax payer determines his tax liability.<sup>17</sup> In other words, residency and source are the basis for the collection of personal income tax. In *Ecodril Nig v Awka-Ibom Board of Internal Revenue*<sup>18</sup>, the court held;

The basis for the imposition and/or collection of personal income tax in Nigeria is twofold “residence and source”. In other words, one of the bases of tax liability on the tax payer and the power of an appropriate tax authority to collect personal income tax is residence.

It is to be noted that the issue of whether the tax payer is resident in a particular jurisdiction is a question of fact which must be established in evidence. It is important that even the remittance of Pay As You Earn (PAYE), where it is not proved that the employees reside within jurisdiction, the employer will not be compelled to remit same.

### 2.2 Development Levy

This is a flat charge imposed on every taxable person typically within a State. Previously, the Act<sup>19</sup> provides that the levy is only to be collectable from individuals only and should not be more than a N100 (One hundred Naira) per annum on all taxable individuals. However, the provisions of the schedule to the Taxes and Levies<sup>20</sup> empowered the State to levy Economic Development levy only. The Act<sup>21</sup> did not fix the rate for it. This was done in accordance with the intention of the States to charge above N100 as stipulated. During the period before the amendment of the schedule, the States in order to circumvent the rate as was provided under that Act, made consolidated laws that were all embracing in name of developing levy. In Cross River State, it was passed as Urban Development Tax, Tenement rate, Sanitation levy and Refuse collection charges. In *AG. Cross River State & Anor v Ojua*<sup>22</sup>, the

<sup>12</sup> Personal Income Tax Act (PITA) as amended No 20; 2011

<sup>13</sup> Constitution of the Federal Republic of Nigeria, 1999 as amended (CFRN) s.4 (2), item 59, part 1 of Exclusive Legislative List, second schedule to the Constitution. It provides that only the National Assembly can legislate on taxation of incomes, profits, and capital gains except as otherwise prescribed by the constitution.

<sup>14</sup> CFRN, 1999 as amended, items 7 and 8 D, Concurrent Legislative List, part II second schedule to the Constitution.

<sup>15</sup> Taxes and Levies (Approved list for Collection) Act, No 21, 1998.

<sup>16</sup> PITA, No 20, 2011, Ss 2 and 3

<sup>17</sup> *Ibid* First Schedule

<sup>18</sup> (2014) 2 All NTC 13 at 31

<sup>19</sup> Taxes and Levies (Approved List for Collection) Act Cap T<sup>2</sup> LFN 2004 schedule, part II, item 8

<sup>20</sup> The schedule to the Taxes and Levies (Approved List for Collection) Act (Amendment) Order, 2015, item 23

<sup>21</sup> *Ibid*

<sup>22</sup> (2011) 5 TLRN1, See also *AG Ondo v AG Federation* (2002) 9 NWLR (pt.772)222

Law<sup>23</sup> passed by the State House of Assembly was declared null and void as the State Government usurped the functions allocated to the Local Government by the Constitution.<sup>24</sup>

The Court of Appeal, however, held that the promotion of tourism which could be said to be the *raison d'être*<sup>25</sup> for the enactment of the Urban Development Authority Law could conveniently have been added to the functions to be performed by the Local Governments. In the alternative, the State should look for the other sources of revenue not meant for the local governments to enable it realize the objectives of the Urban Development Authority Law. The Local Governments are to successfully discharge their responsibility such as construction and maintenance of roads, street lightning, drains, parks, gardens and open spaces which are necessary for tourism to thrive, the power to generate funds from privately owned houses must not be taken away from them.

In *Institute of Human Right & Humanitarian Law v AG Rivers State & ors*<sup>26</sup> the court held that the only levy closest to the levies provided for in the Social Services Contributory Law is development levy for individuals only which is not more than N100 per annum on all taxable individuals. It turned out that as a result of abuse of the said Development Levy by State Governments, the then Minister for finance, Dr. Ngozi Okonjo Iwuala amended the schedule to the Taxes and Levies Act<sup>27</sup> to accommodate the position of the State Governments. This has however been nullified by the Supreme Court in *Uyo Local Government v Akwa Ibom State Government*.<sup>28</sup>

### **2.3 Companies – Companies Income Tax**

The Companies Income Tax<sup>29</sup> is imposed on all limited liability companies in Nigeria except companies engaged in petroleum operations. The tax is payable upon the profits of any company accruing in, derived from, brought in or received in Nigeria.<sup>30</sup> A Nigerian or non-Nigerian Company is chargeable to tax on the profits received in or derived from Nigeria on the contract agreement in respect of which are executed or signed outside Nigeria or because the money connected with such profits were paid outside Nigeria.<sup>31</sup> In *Offshore v FBIR*,<sup>32</sup> the court on this note held;

The plaintiff has got a trade or business in Nigeria, to wit, the oil drilling contracts in Nigeria. By a clause in the said contract agreement, the plaintiff chose to perform its side of its agreement with Shell Bp which is to be performed in Nigeria, then the plaintiff have a trade or business in Nigeria.

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<sup>23</sup> Urban Development Tax Law, Cap U3, Laws of Cross River State, 2004

<sup>24</sup> It is clear from the provisions of paragraph 1 (b) and (j) of the fourth schedule read together with the provisions of section 7 (5) of the Constitution that the intendment of the Constitution is that only Local Government Councils have the power to assess and impose rates on privately owned property, the court rightly declared the Urban Development Tax Law Cap U3 Laws of Cross River State 2004 to be inconsistent with sections 4(7) and 7(5) of the 1999 Constitution read along with paragraph D 10 of the second schedule and paragraph 1 (b) & (j) of the fourth Schedule to the 1991 Constitution.

<sup>25</sup> (2011) 5 TLRN1

<sup>26</sup> 9 ALL NTC 1

<sup>27</sup> Schedule to the Taxes and Levies (Approved List for Collection) Act (Amendment) order 2015

<sup>28</sup> (2020) LPELR-49691(CA).

<sup>29</sup> Companies Income Tax (Amendment) Act (CITA) No 11, 2007

<sup>30</sup> CITA, 2007, s.9

<sup>31</sup> Finance Act, 2019 s4 which amended Section 13 by introducing a new paragraph (c), (e), the proviso and a new subsection 4.

<sup>32</sup> (1976) 2 All NTC 67 at 93

In *Reiss v FBIR*,<sup>33</sup> the court held that a Nigerian company acting as the agent of foreign company in respect of transactions carried outside Nigeria can only be liable to tax on the income it derived from the transaction.

#### 2.4 Transactions (Goods and Services) - Value Added Tax

Value Added Tax (VAT) is a consumption tax on goods and services. The extant law is the Value Added Tax Act.<sup>34</sup> The tax is chargeable and payable on the supply of goods and services<sup>35</sup> except goods exempt.<sup>36</sup> The tax is administered and managed by the Federal Inland Revenue Service.<sup>37</sup> In *FIRS v Gazprom Oil & Gas*,<sup>38</sup> the court reversing the decision of Tax Appeal Tribunal held;

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

The non-resident company is obligated to include the tax in its invoice.<sup>39</sup> The person to whom the goods and services are supplied in Nigeria shall remit the tax in the currency of the transaction.<sup>40</sup> It is to be noted that since payment of VAT is imposed on the consumer, it follows that the non-residents company (which is the ultimate consumer of 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.<sup>41</sup>

### 3. Overview of Electronic Commerce

Electronic Commerce or E-commerce encompasses transactions that involve the exchange of goods and services by electronic means.<sup>42</sup> It is generally considered to involve the use of electronic systems such as the internet and other computer networks to facilitate the production, distribution, sale and delivery of goods and services.<sup>43</sup> It then means that transactions are occurring *via* the telephone, telex, fax, automated teller machine (ATM); Credit Card, Debit Card, television shopping and delivery of government services over the internet. E-commerce refers to the use of communications technology

<sup>33</sup> (1977) 2 All NTC 309 at 334

<sup>34</sup> Value Added Tax (Amendment) Act (VAT), 2007

<sup>35</sup> VAT Act, 2007, S.2

<sup>36</sup> *Ibid* s 3

<sup>37</sup> *Ibid* s 7 (1)

<sup>38</sup> (2016) 39 TLRN 38 at 53-54

<sup>39</sup> VAT Act, 2007 s 13A, and Finance Act, s.37 which amended section 14 of VAT and introduced new section 3 & 4

<sup>40</sup> Finance Act, 2019.

<sup>41</sup> *Ibid* s. 37 particularly the new subsection 4 of VAT.

<sup>42</sup> A Sanni, Taxation of E-commerce – Issues and Challenges of Tax Administration, The Practitioner and Taxpayers, published by Department of Commercial and Industrial Law, University of Lagos, Nigeria – (Grayson Publishers, 2002) p12.

<sup>43</sup> C McClure, 'Taxation of Electronic Commerce in the European Union'. *Hoover Institution, Stanford University, Peter Scisco Press Electronic Commerce*; Microsoft (R) *Encrerta* (R) 2009 Microsoft Corporation, 2008, 07-24787875-6 Us Treasury Department (1996;13:2.1) p.55.

particularly the internet to buy, sell and market goods and services to customers or end-users.<sup>44</sup> E-commerce has been defined by the Organization for Economic Corporation and Development (OECD) as the sale or purchase of goods and services, conducted on computer networks by methods specifically designed for the purpose of receiving or placing order.<sup>45</sup> The goods or services are ordered by those methods, but the payment and the ultimate delivery of goods and services do not have to be conducted online. An e-commerce transaction here can be between enterprises, households, individuals, government and other public and private organizations. The United Nations Commission on International Trade Law (UNCTRAL) defined e-commerce as exchange of every kind of data message in the scope of commercial activities.<sup>46</sup>

E-commerce involves online shopping where buying and selling activities takes place *via* the internet. Others are e-procurement involving internet-based sales transactions between businesses, including reverse auctions that facilitate online trade between a single business purchaser and many sellers and digital market places that facilitate online trading between multiple buyers and seller. Others are on-line catalogs, displaying images of good, which permit web users around the world to select and order books, wine, and other products which are available to users through the internet and standard telecommunications network such as legal, accounting, medical and other consulting services, which subscribers can access for a fee using an electronic password to obtain access to service providers website. Video conferencing meant before for large scale business is now made possible with the introduction for inexpensive desktop video cameras that can be connected to a personal computer. The Securities trading is currently offered by some stockbrokerage firms, mutual funds transfer and other e-commodities. Banking business is now conducted *via* electronic channels and internet receiving and payment of money, bills are now done electronically.

The ways which electronic commerce transactions take place include:<sup>47</sup> Business to Business (B2B). The sale of a product or service between businesses-sale between Anderson Ltd to Life is Eazi Ltd. Business to Consumer (B2C). The sale of a product or service from a business to a consumer-from life is Eazi to Enny money. Consumer to Business (C2B); the sale from a consumer to a business of something they need or want. For instance, Enny Money selling eggs to fertility business. Consumer to Consumer (C2C). The sale of goods and services between consumers-sale of hair extensions from Sisi Shakara to Enny Money. Business-to-Administration (B2A). It encompasses all transactions conducted between and companies and public administration. This involves a large amount and variety of services particularly in the areas such as fiscal, social security, employment, legal documents and registers. Consumers-to-Administration (C2A). This encompasses all electronic transactions conducted between individuals and public administration.

#### **4. Determination of Whether E-Commerce Transactions are Taxable in Nigeria.**

Nigerian E-commerce market is rapidly expanding. Initially, the report showed that e-commerce was growing at a rate of 16.8% per year globally while in Africa, it is put at 28.5% making it the fastest growing sector in the world.<sup>48</sup> By 2015, Nigerian e-commerce sector remained the largest e-commerce sector in Africa valued at \$13 billion and now growing at a rapid pace of 25% annually.<sup>49</sup> A Broll

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<sup>44</sup> C Opara, 'Taxation of E-Commerce', *Global Journal of Politics and Law Research*, vol 2, European Centre for Research Training and Development, United Kingdom, October 2014 p.2

<sup>45</sup> Organization for Economic Corporation and Development (OECD), Manual 2014 on The Challenges of Taxation of Digital Economy.

<sup>46</sup> United Nations Commission on International Trade Law (UNICTRAL) 1996. Para 15.

<sup>47</sup> E McLure 'Taxation of Electronic Commerce in the European Union' *op. cit.*

<sup>48</sup> A Sanni, *Current Law and Practice of Value Added Tax in Nigerian* (Lagos: Grayston Publishers, 2012), 24

<sup>49</sup> H Uwakwe, 'Prospects and Challenges of E-Commerce in Nigeria', *The Punch Newspaper*, 7<sup>th</sup> February. 2016.

shopper segmentation Report 2016 showed that 64% of Nigerians surveyed often purchase products online while 83% regularly use the online shopping application for product searches.<sup>50</sup> A major online shops retail platform, konga, currently has about 25,000 merchants today with platform.<sup>51</sup> Other online retail platforms such as Jumia, Dealdey, Payporte and mail for Africa are similarly patronized by thousands of online buyers and utilize by the online sellers.<sup>52</sup>

E-commerce by implication is thriving in Nigeria and has become more preferred than traditional commercial transactions. In ascertaining whether the transactions are liable to VAT, the foremost and indeed crucial questions are did the transaction give rise to a supply<sup>53</sup> of either goods or services? Was it for a consideration<sup>54</sup> and is the supply within the supply of goods and services exempted by the VAT Act.<sup>55</sup>

If the first two questions are answered in the affirmative and the last in the negative, then such a transaction is subject to Value Added Tax. All supplies of goods and services made within and /or into Nigeria (for consideration of money or money's worth) in so far as they are not within the category of the exemption are liable to VAT. The New Finance Act<sup>56</sup> introduced VAT on cellular network supply and the charge remains 7.5% at first, Nigerians raised alarm on the new inclusion to their tariff network charge per calls and SMS. The New Finance Act did not exclude services of telecommunication business for tax.<sup>57</sup>

## 5. Taxation of E-Commerce in Nigeria

Nobody shall be taxed without clear provision of the law for that purpose and every Act of parliament must be read according to the natural construction of its words. Hence, a tax statute is to be strictly constructed. In *Halliburton West Africa Ltd v FBIR*,<sup>58</sup> it was held that it is of public policy that a court of law should interpret the law in a just way and to serve public interest. VAT is charged and payable on all international,<sup>59</sup> interstate<sup>60</sup> and intra-state<sup>61</sup> supplies of goods and services. Consequently, all supplies entail supplies into Nigeria from outside Nigeria (import), within Nigeria (inter-state and intra state) and supplies made from Nigeria to outside Nigeria (exports). However, the last of the supplies, that is, supplies made from Nigeria to outside Nigeria are expressly exempted bearing in mind the territorial nature of tax law.<sup>62</sup>

<sup>50</sup> E Eniola, 'Taxation of Business in Nigeria', <http://www.lawyard.ng/taxseris-by-eniola-e-commerce> accessed on 20/05/2021.

<sup>51</sup> *Ibid*

<sup>52</sup> *Ibid*

<sup>53</sup> VAT Act, 2007, s.46 defined supply to mean any transaction whether it is sale of goods or the performances of a service for consideration, that is for money or money's worth. The use of the word supply in the context of section 2 VAT makes the Basis of VAT on all goods and services to be on the availability of goods and services within Nigeria. In other words, this is the destination principle incorporated in the charging provision. See also the Finance Act, 2019, s. 33

<sup>54</sup> VAT Act, 2007, s 5 (1) (a)

<sup>55</sup> *Ibid* s 3

<sup>56</sup> Finance Act, 2019, s34.

<sup>57</sup> Finance (Miscellaneous Provisions) Act 2019 (FA, 2019). S.4 particularly the new subsection (c).

<sup>58</sup> (2006) 7 CLRN 138

<sup>59</sup> *Offshore International SA v Federal Board of Inland Revenue* (2011) 4 TLRN 58

<sup>60</sup> *AG Ogun State v Aberugba* (1985) 1 NWLR (pt.3) 395

<sup>61</sup> *Supra*

<sup>62</sup> VAT Act, 2007, S3 and paragraph 6 of the First Schedule to the Act. See also *Boucher v Lawson* (1815) CAS TH 8, ER 53

It is now established that Value Added Tax (VAT) is generally levied on all goods and services bought and sold for use or consumption within Nigeria. In *VODACOM Business Nig. Ltd v FIRS*,<sup>63</sup> it was held that in virtually all jurisdiction like Nigeria, electronically supplied services (intangible) are liable to tax in the place of supply which is the place where the services was supplied or are used and consumed or enjoyed.

By the provisions of the Finance Act,<sup>64</sup> the taxable services are the services that are rendered in Nigeria by a person physically present in Nigeria at the time of provision of same and services provided to a person in Nigeria, regardless of whether the services are rendered within or outside Nigeria. By the extant provisions of VAT Act,<sup>65</sup> the following transactions were highlighted to be subject to VAT in Nigeria;

- (a) The supply of goods and services within Nigeria (including inter-state and intra-state acquisition of goods and services in Nigeria.
- (b) The supply of services if the recipient is established to be within Nigeria.
- (c) The supply of goods from outside Nigeria.

However, the Act<sup>66</sup> lists medical services, services rendered by Community Banks, People's Bank, Mortgage Institutions, plays and performances conducted by educational institutions as part of learning and all export services as the only services exempt from VAT. Furthermore, services rendered to diplomats are zero rated, this not subject to VAT.<sup>67</sup> In other words, the services that are exempt from VAT are those listed which are outside the VAT bracket, *expressio unius est exclusio alterius*. In *Vodacom Business Nig Ltd v FIRS*,<sup>68</sup> the Appellant contracted with a Netherlands based company (the NSS) for the supply of satellite in Nigeria. The appellants through the transponder located in Nigeria got the service transmitted to it in Nigeria. In the contract, the supplier, (NSS) contracted its VAT liability to the Appellant. The Respondent assessed the Appellants to the assessment and when the Respondent refused to revise the assessment, the Appellant filed the appeal at the Tax Appeal Tribunal against the assessment. The Tax Appeal Tribunal dismissed the appeal. Dissatisfied with the judgment of the Tax Appeal Tribunal, the Appellant appealed to the Federal High Court and raised the following issues:

Whether the services (or the transactions arising from the contract) are liable to VAT and alternatively, whether the requirement of registration is a condition precedent for its VAT liability.

The case of the Appellant Company was analyzed by the court thus.<sup>69</sup> The Appellant had argued that the Tribunal's finding was anchored on its reliance on "usage or receipt" of service as a means of determining the Appellant's VAT liability rather than the location of supply of the service as stipulated in the VAT Act. He argued that by the Value Added Tax Act, Cap VI Laws of the Federation of Nigeria, 2004, a service supplied by a non-resident person to a person inside Nigeria is only subject to VAT if the service is indeed rendered in Nigeria.

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<sup>63</sup> (2018) 35 TLRN 1

<sup>64</sup> Finance Act, 2019, s. 33.

<sup>65</sup> VAT Act, 2007 S2

<sup>66</sup> *Ibid*, part ii of the First Schedule to the Act.

<sup>67</sup> *Ibid* part III of the First Schedule to the Act

<sup>68</sup> *Supra*

<sup>69</sup> *Supra* at 22

This argument is that physical act of rendering the service has to be performed in Nigeria for it to be liable to pay VAT and that where the service is rendered from outside Nigeria but only received in Nigeria then the transaction will certainly not be one subject to VAT in Nigeria. This argument did not consider the impact of section 2 of VAT Act. It makes every service in Nigeria liable to VAT except the services exempt. It is the law that express mention of services exempt such as exported services implies that any other service is liable to VAT. This is in tandem with the rule of statutory interpretation expressed in the maxim; *expressio unis est exclusio alterius*; meaning the exclusion of every other thing not mentioned.<sup>70</sup> It has to be noted that the use of the word supply in the context of section 2 of VAT Act makes the basis of charge of VAT on all goods and services within Nigeria. In other words, this is the destination principle incorporated in the charging provision of VAT.

It follows that since tax is territorially enforced, the word supply as it has to do with international trade into Nigeria means good and services supplied in Nigeria. This is against the view that e-commerce or transaction is not taxable in Nigeria as a result of the principle of location. Had the law makers intended to restrict or qualify or even make a distinction between the place of supply (origin) and the location of the supply (destination), it could have been obvious from the law (VAT).

## 6. Liability of Intangible Services to Pay Value Added Tax

The major principle considered in determining the tax liability of an income earned by foreign entities is physical presence or permanent establishment traditionally. The Companies Income Tax Act<sup>71</sup> provides that the profits of a company other than a Nigerian company from trade or business shall be deemed derived from Nigeria if that company has a fixed base of business in Nigeria to the extent that the profit is attributed to the fixed base. A major challenge is to determine at what point such non-resident company will be seen to have conducted business in Nigeria, since it does not require a physical presence in Nigeria to conduct its business transaction. This is particularly so when the customers that complete transactions on online platforms may not be aware of the exact location of the digital goods and services they are consuming.

Another serious challenge is that the rule has not addressed many of the challenges posed by this new world of bits and bytes. A company with internet transactions may maintain all of its records in digital form. An external or outside auditor could be confronted with a database filled with computer code; Even if the auditor gains access to the digital records, he may not be able to differentiate the transactional records from other stored digital data (which in any event may be encrypted) unless the company cooperates and organizes all of its data for the auditor.<sup>72</sup>

In order to widen the tax net, the tax authorities in Nigeria have sought to give effect to the interpretation of existing legislation to tax digital transactions. The charging provision of the law<sup>73</sup> which states that the tax shall for each year of assessment, payable upon the profits of a company accruing in, derived from, brought into or received in Nigeria should be applicable to digital transactions of non-resident companies. Where a Nigerian taxpayer transacts business with a non-resident entity, the taxpayer is required to deduct the VAT at source and remit to FIRS.<sup>74</sup> The tax authorities have been pushing to

<sup>70</sup> *PDP & Anor v INEC & ors* (2001) 1 WRN 1 at 70

<sup>71</sup> CITA 2007, S.13 (2) (a), however, see, Finance Act, s.4 which is all encompassing by introducing new subsections (C) and (e).

<sup>72</sup> M Riezenman, *Beneath the Internet: Explosive Growth Drives Improvements to the infrastructure* (United States: IEE Spectrum, 2001, p54

<sup>73</sup> CITA, 2007 S.9(1)

<sup>74</sup> T. Oyedele; *Insight on Taxation and Fiscal Policy* (London: Bloomsburg publication Plc, 2015) p3

implement the Reversed charge mechanism which mandates such as customer to account for VAT on the transactions. In *VODACOM Business Nig Ltd v FIRS*,<sup>75</sup> the court held;

Reversed charge is a mechanism under which VAT is required to be paid for the goods and services by the recipient rather than the supplier when the supplier is not resident in the country where the supply takes place. When the reverse charge is applied, the recipients of the goods and services make the declaration of both their purchase (Input/VAT) and the supplier's sale (output VAT) in their VAT return.

This explains that in International trade, VAT is based on the destination principle, which means that exports are free of VAT and imports are taxed on the same basis and at the same rates as local production. The only issue that arises is that most of the users of these services are individuals in diverse areas in Nigeria; enforcement could be quite difficult except if the authorities can find ingenious ways to track such transactions and tax them electronically.<sup>76</sup> This may be curbed by charging the VAT rates through the banks used for the transactions and remitting it to the appropriate authorities.

#### **7. Registration as a condition Precedent for Payment of VAT in Nigeria.**

The requirement of registration of a non-resident company for the payment of VAT, the Act<sup>77</sup> provides that registration by non-residents companies for the purpose of this Act, should be for a non-resident company that carries on business in Nigeria to register for the tax with the Service, using the address of the person with whom it has subsisting contract, as its address for purpose of correspondence relating to the tax. Further, it<sup>78</sup> provides that the Service has a duty to inform by notice, determining and directing the companies operating in the oil and gas sector to deduct vat at source and remit same to the service. A non-resident company shall include the tax on its invoice for the supply of taxable services and the person to whom the services are supplied in Nigeria shall withhold and remit the tax directly to the currency of payment.<sup>79</sup> A company is a non-resident company, the law states:

if it is either a foreign company unincorporated in Nigeria but present in Nigeria on the basis that it has applied and obtained exemption or a foreign entity outside Nigeria but transacting business with person (s) in Nigeria.<sup>80</sup>

Interpreting this provisions in relations to tax, courts have giving it an interpretation that will not defeat the main object of the tax legislation.<sup>81</sup> In doing this, the court has resorted to the position in other jurisdiction like the United Kingdom where the approach is to relax the requirement of registration for non-resident company outside their jurisdiction as the supplier of goods and services for the purpose of accounting for the VAT. The court interpreting the provisions of CAMA<sup>82</sup> in *VODACOM BUSINESS V FIRS Nigeria Ltd* held:

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<sup>75</sup> (2018) 35 TLRN 1

<sup>76</sup> In *VODACOM Buisness v FIRS Nig Ltd (supra)* the Appellant was supplied in Nigeria Satellite network bandwidth capacities for consideration as shown in the content document and the supply not being within the exempted services was held to be liable to VAT in Nigeria. The supply of Satellite Network bandwidth capacities is an imported service because it is supplied by a person outside Nigeria to a person inside Nigeria.

<sup>77</sup> Finance Act, 2019, s. 36; VAT Act, 2007, S 10 (1) and (2). But the Finance Act added new (2), (3) and (4) subsections to section 10 of VAT.

<sup>78</sup> Finance Act, *ibid*, s.36.

<sup>79</sup> *Ibid*.

<sup>80</sup> Companies and Allied Matters Act, Cap -20 Laws of the Federation of Nigeria, 2004, s 59.

<sup>81</sup> The reasoning in that interpretation will indeed be a fine opening and gratuitous escape route for VAT evasion. All that the supplier needs to do is to refuse to register to be excused from the liability. This is not the purpose of the Act.

<sup>82</sup> Companies and Allied Matters Act, Cap C20 LFN 2004

In the former case where the non-resident company is physically resident in Nigeria, albeit unincorporated in Nigeria, to this kind of non-resident company; the requirement of register is strictly constructed because such company is within Nigeria and tax authorities can readily proceed against them for failure to register to account for VAT on all supplies made or received in Nigeria subject to VAT. In the latter case where it is the non-resident company, the requirement to register is relaxed because the tax authorities cannot easily proceed against the non-resident company without incurring so much administrative burden on the non-resident company.<sup>83</sup>

It is to be noted that the practice where services are supplied from outside Nigeria, the recipient is treated as the supplier of the services, if the recipient of the supplies receives the supplies in Nigeria in line with the purpose and object of the VAT Act. A cardinal quality of VAT is flexibility; this means the system of taxation should be flexible and dynamic to ensure that they keep pace with technological and commercial development. In a world driven by information technology making e-commerce (virtual business) trendy, quickly dispensing with the actual presence of the parties, a business located anywhere in the world can supply services (usually intangible) to everywhere and anywhere on earth.

### **8. The International Dimension**

The OECD International VAT/GST Guidelines<sup>84</sup> stated that the destination principle should apply to internationally traded services and intangibles. In essence, VAT/GST should be levied on the consumer's jurisdiction rather than the supplier's jurisdiction. The guidelines recommend that for the business to business (B2B) supplies, the implementation of a reverse charge mechanism, that is, business customers are liable to pay VAT/GST in his jurisdiction instead of non-resident suppliers. By this provision a service is rendered in Nigeria if it is received by a person in Nigeria from outside Nigeria. Hence, all that is important is that the recipient in Nigeria received the supplies for business purposes.

### **9. Conclusion**

Electronic transaction is liable to tax particularly VAT in Nigeria. Where a non-resident company has no place of business in Nigeria, the administrative burden of registering in Nigeria ought not to apply. The reverse charge mechanism should be applied which only requires the VAT registered customer to account for the tax on supplies received from the foreign trader. When the reverse charge is applied, the recipient of the goods or services makes the declaration of both their purchase (input VAT) and supplier's sale (output VAT) in their VAT return. International trade VAT is based on the destination principle, this means that exports are free of VAT and imports are taxed on the same basis and at the same rate as local production.

### **10. Recommendations**

By the application of International concept of virtual place of business that is, where business is operated from a website, the place of business would be deemed to be website. This would mean that residence basis of taxation under our law should be extended to include business carried on in the cyber space to serve as residence of the business for the purposes of taxation. This will amend the position under sections 9 (1) and 13 (2) (a) of CITA.

Establishment of a virtual tax enforcement agency is imperative and the agency should work in collaboration with Nigerian communications commission and Banks in order to have a complete access to the e-invoice system, online information platforms and set an online payment standard in Nigeria. The United Nations intervention is very necessary towards enacting a legislation to commonly address non-taxation of

<sup>83</sup> (2018) 35 TLRN 1

<sup>84</sup> OECD International, VAT/GST Guidelines published on 12<sup>th</sup> April 2017. This is though not bound on national courts/tribunals

multinational digital companies. This will help in maintaining accord between the OECD and the European Union for there to be a consensus between countries.