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TAX DEVELOPMENTS OF 2022

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NOTABLE JUDGMENTS

NO RETROSPECTIVE APPLICATION OF THE FINANCE ACT 2019: ACCUGAS V. FIRS

The Abuja Division of the Federal High Court (the “FHC”) delivered a landmark decision where it held that the Finance Act 2019, which became law on 13 January 2020, should not apply to trading conducted by Accugas between January and December 2019. The decision of the FHC reaffirms that amendments to tax laws cannot be applied retroactively, except where the law expressly states so.

VAT versus CONSUMPTION TAX: FIRS V. AG LAGOS & ORS

The Court of Appeal in Lagos set aside the 2019 judgment of the FHC and upheld the powers of the FIRS to collect VAT on goods and services consumed in hotels, restaurants, and event centres in Nigeria as against the powers of the State government to impose and collect consumption tax on goods and services consumed within the State.

The court also held, inter alia, that the VAT Act being an existing federal law, had covered the field of consumption tax. Hence, its provisions should prevail over similar State laws, including the Hotel Occupancy and Restaurant Consumption Law of Lagos State, 2009.

The Supreme Court will make the final decision on this matter; in the interim, consumption tax is still being charged in Lagos State.



NOTABLE JUDGMENTS

PERMANENT ESTABLISHMENT RULE AND THE EXEMPTION OF STAMP DUTIES ON CONTRACTS WITH GOVERNMENT AGENCIES: NEW SKIES SATELLITES V. FIRS

The Tax Appeal Tribunal delivered a decision to the effect that a non-resident company can be said to have a permanent establishment (for the purpose of taxing its profits) in Nigeria if the services provided on its behalf by an unrelated party in Nigeria are integral to delivering its contract in Nigeria.

The TAT reaffirmed that stamp duty is not payable on instruments where government or an agency, department or parastatal of government has the obligation to stamp.

DEPOSIT OF DISPUTED TAX BEFORE AN APPEAL COMMENCES: INVESTMENT HOLDINGS LIMITED V. FIRS

On 24 August 2021, the Lagos Zone of the TAT, in *Multichoice Nigeria Limited v. FIRS*, held that paragraph 15(7) of the 5th Schedule to the Federal Inland Revenue Service (Establishment) Act, 2007 (“FIRS Act”) mandates the payment of a deposit before an appeal can be heard.

However, the Lagos Zone of the TAT, on 8 March 2022, reversed itself in the *Investment Holdings* appeal and held that paragraph 15(7) of the 5th Schedule to the FIRS Act does not mandate the payment of a deposit before an appeal can be heard by the TAT.

The TAT further held that Order III Rule 6 of the TAT Rules, which mandates payment of 50% of the disputed tax as a condition to instituting an appeal, contradicts paragraph 15(7) of the 5th Schedule to the Federal Inland Revenue Service (Establishment) Act, 2007 and, therefore, null and void because the FIRS Act is a superior legislation to the TAT Rules.

FINANCE ACT, 2021

The Finance Act 2021 took effect on 1 January 2022. It introduced statutory changes to the Capital Gains Tax Act, Companies Income Tax Act, Personal Income Tax Act, Tertiary Education Trust Fund Act, Customs & Excise Tariff (Consolidation) Act, Value Added Tax Act, Federal Inland Revenue Service (Establishment) Act, Tertiary Education Trust Fund (Establishment) Act and Nigeria Police Trust (Establishment) Act. A few notable amendments include:

a. Imposition of capital gains tax on the disposal of shares in a Nigeria company at the rate of 10%, except:

- the proceeds are reinvested in shares within the same year of assessment; or
- the proceeds from the disposal are less than N100 million in the year; or
- the shares are transferred between an approved borrower and lender in a regulated securities lending transaction.

b. The imposition of CIT on the profits of any company engaged in educational activities. Previously, the profits of companies engaged in educational activities of a public character were not subject to CIT.

c. The imposition of excise duty on non-alcoholic, carbobated and sweetened beverages.

d. The empowerment of the FIRS to appoint any person to withhold or collect VAT.

INTRODUCTION OF TAX INCENTIVES FOR STARTUPS AND INVESTORS BY THE NIGERIA STARTUP ACT 2022:

The Nigeria Startup Act, 2022, assented to by the president on 19 October 2022, introduced tax incentives for startups licenced by the National Information Technology Development Agency (licenced startups) and investors of the licenced startups. The following are peculiar incentives for startups:

- licenced startups are exempted from contributions to the Industrial Training Fund where it provides in-house training to its employees for the duration of the startup label;
- an investor in a licenced startup can enjoy an investment tax credit of 30% which can be applied against capital gains;
- a licenced startup can deduct its research and development expenses in full;
- gains arising from the disposal of the shares of a licenced startup are exempt from capital gains tax provided that the shares have been held for a minimum of 24 months; and
- foreign companies that provide technical, consulting, professional, or management services to a licenced startup enjoy a reduced withholding tax rate of 5% (instead of 10%), which is the final tax.

INTRODUCTION OF THE FEDERAL HIGH COURT (TAX APPEAL) RULES 2022:

The Federal High Court (Tax Appeal) Rules 2022 (the “Rules”) came into force on 10 January 2022 and repealed the Federal High Court (Tax Appeal) Rules 1992. The following are highlights of amendments made by the Rules:

- The requirement for a taxpayer to deposit the judgment sum into the Court as a condition for hearing an appeal.
- The introduction of electronic service of processes.
- The court is now empowered to abridge or extend the time of hearing.

REGULATIONS, CIRCULARS AND NOTICES

NON-INTEREST FINANCE (TAXATION) REGULATIONS 2022:

Upon approval by the Minister of Finance, The FIRS, pursuant to its powers under Section 61 of the FIRS Act, issued the Non-Interest Finance (Taxation) Regulations 2022(the “Regulations”).

The Regulations, with a commencement date of 1 April 2022, is divided into seven parts and provide clarity on the tax implications of 12 different non-interest financial instruments provided by authorised institutions such as Murabaha (cost plus mark-up), equity-based products such as Musharakah, lease-based products such as Ijaarah wa Iqtina (finance lease) and Ijaarah (operating lease), Sukuk.

CIRCULAR ON THE NATIONAL AGENCY FOR SCIENCE AND ENGINEERING INFRASTRUCTURE (“NASENI”) LEVY:

The circular issued by the FIRS clarifies the administration of the NASENI levy. The levy applies to commercial companies and firms in specific sectors with a turnover of ₦100,000,000 at the rate of 0.25% to be collected by the FIRS. The sectors covered are banking, mobile telecommunications, ICT, aviation, maritime, oil and gas sectors, particularly companies engaged in business activities that the primary regulators of the sectors regulate.

FIRS CIRCULARS ON THE IMPLEMENTATION OF THE PETROLEUM INDUSTRY ACT, 2021 (“PIA”):

Given the fiscal provisions of the PIA and to provide clarity on conversion, transition, compliance, apportionment and consolidation of cost and revenue and other issues needed for the smooth administration of the Act, the FIRS issued the following circulars:

- Clarification on the Fiscal Provisions of the PIA in Respect of Conversion, Transition and Compliance Matters;
- Clarification on Sundry Fiscal Provisions and other Related Matters under the PIA;
- Apportionment and Consolidation of Costs & Revenue under the PIA; and
- Clarification on Taxation of Production Sharing Contract and Incorporated Joint Venture Companies Operations under the PIA.

PUBLIC NOTICE APPOINTING TELCOS AND DEPOSIT MONEY BANKS AS VAT AGENTS:

Pursuant to the power of the FIRS to appoint any person as an agent for VAT collection, the FIRS issued a public notice appointing deposit money banks and some telcos as VAT withholding agents for taxable supplies made to them with effect from 1 January 2023. Thus, the deposit money banks and the telcos are required to withhold and remit VAT from the invoices of their suppliers.

CIRCULAR ON TERTIARY EDUCATION TAX:

Following the increase of the Tertiary Education Tax (“TET”) from 2% to 2.5% by the Finance Act 2021, the FIRS issued a circular on the administration of the TET. Notably, the circular provides that a company with tax returns due from 1 January 2022 is required to remit the new TET rate at 2.5% of its assessable profit.

The company shall continue to file its tax returns in accordance with section 55 of the Companies Income Tax Act.

CIRCULAR ON THE TAXATION OF COMPANIES ENGAGED IN SHIPPING, AIR TRANSPORT AND CABLE UNDERTAKINGS:

FIRS issued a circular which replaced its earlier circular of 3 June 2022 explaining the taxation of the income of foreign companies providing shipping or air transport in international traffic and cable undertakings. The circular explains the tax treatment of income earned by crew members of a ship or aircraft under domestic law and where there is a tax treaty.

PUBLIC NOTICE ON WHT PAID TO RESIDENTS OF TREATY PARTNERS UNDER THE VARIOUS DTAS:

The Minister of Finance, by this notice, discontinued the unilateral application of a uniform WHT rate of 7.5% on dividends, interest and royalties paid to residents of Nigeria's treaty partners under the Double Tax Agreements ("DTAs") between Nigeria and other countries. Accordingly, with effect from 1 July 2022, the domestic rate of 10% applies unless a lower rate is provided in a DTA.



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