



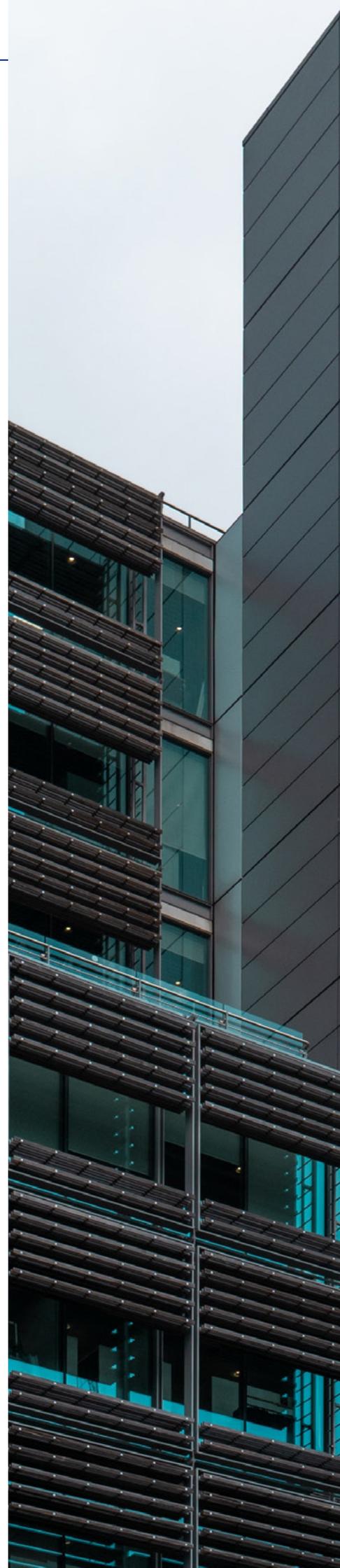
Matters Arising from Implementation of Finance Act, 2020

August 2021

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Preface

The annual enactment of the Finance Acts clearly shows the Federal Government's commitment to review the extant tax laws and make progressive changes to Nigeria's fiscal frameworks to align them with economic realities and global best practices, and facilitate economic growth and development.

We have reviewed the vast changes to the extant laws by the Act and provided a comprehensive analysis of the impact on taxpayers in various sectors of the Nigerian economy in our e-book titled *Finance Act, 2020: Impact Analysis*, published in February 2021.

In June 2021, the Federal Inland Revenue Service (FIRS), commendably updated its earlier Information Circulars of April 2020 on Finance Act, 2019 with changes made by Finance Act, 2020 and issued new Circulars to provide guidelines on new amendments introduced by Finance Act, 2020.

The Information Circulars provide guidance on the implementation of the Finance Acts and we have dedicated a chapter each in this publication to commentaries on each Circular. This publication should however be read in conjunction with our e-book: *Matters Arising from Implementation of Finance Act, 2019*. For quick reference, we have provided the weblink to each Information Circular at the end of each Chapter of the publication and in the Appendix thereto.

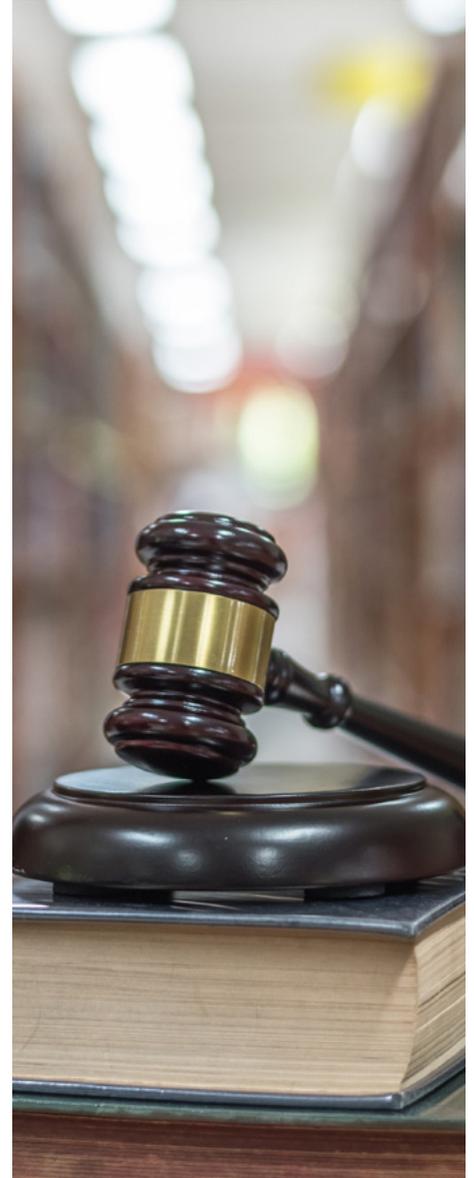
We hope that the FIRS will consider the commentaries in this publication and revise the conflicting provisions of some of the Circulars to align them with the provisions of the Act.

As usual, we welcome feedback from our readers, please reach us by email on ng-fmtaxenquiries@ng.kpmg.com



Wole Obayomi

Partner & Head,
Tax, Regulatory & People Services



Glossary

AE	Approved Enterprise
CGT	Capital Gains Tax
CIT	Companies Income Tax
DTT	Double Taxation Treaty
EDT	Excess Dividend Tax
EEZ	Exclusive Economic Zone
EMT	Electronic Money Transfer
EPZ	Export Processing Zone
FHC	Federal High Court
FIRS	Federal Inland Revenue Service
FTZ	Free Trade Zone
HMofBNP	Honourable Minister of Finance, Budget and National Planning
ICSAC	International Companies engaged in Shipping, Air transport and Cable undertakings
LFN	Laws of the Federation of Nigeria
MNE	Multinational Enterprise
NEPZAA	Nigeria Export Processing Zones Authority Act
NIPOST	Nigerian Postal Service
NRC	Non-resident Company
NRI	Non-resident Individual
NRP	Non-Resident Person
OGEFZA	Oil and Gas Export Free Zone Act
PAYE	Pay-As-You-Earn
PE	Permanent Establishment
PIT	Personal Income Tax
QCE	Qualifying Capital Expenditure
REIC	Real Estate Investment Company
REIS	Real Estate Investment Scheme
RTA	Relevant Tax Authority
SDA	Stamp Duties Act
SEC	Security and Exchange Commission
SEP	Significant Economic Presence
TP	Transfer Pricing
VAT	Value Added tax
WHT	Withholding Tax

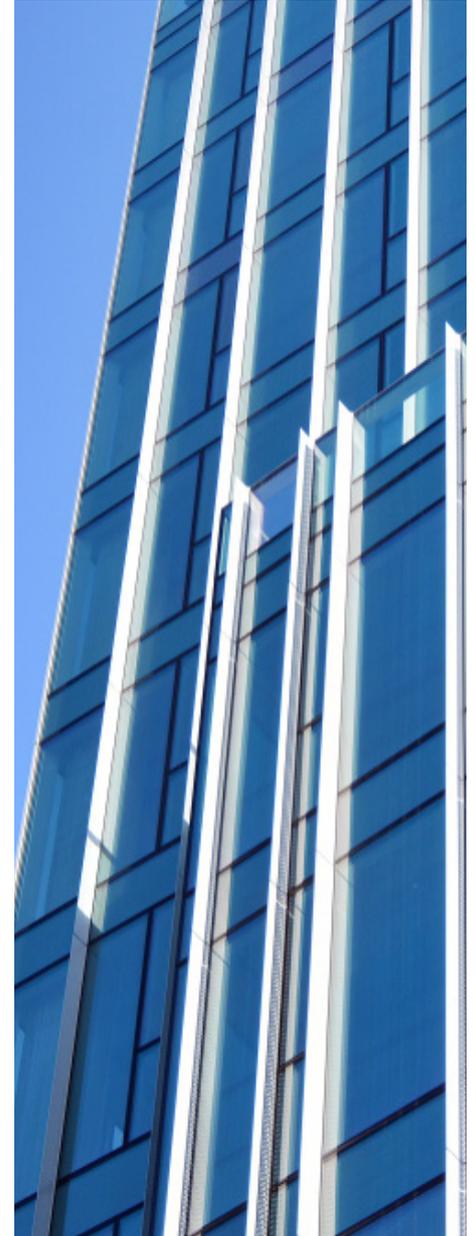
Introduction

The Federal Inland Revenue Service (FIRS or "the Service") recently issued the following Information Circulars numbered 2021/05 - 18 ("the Circulars"):

- Information Circular on the Claim of Tax Treaties Benefits in Nigeria ("Tax Treaties Circular");
- Guidelines for Filing Income Tax Returns by Foreign Companies ("Foreign Companies Circular");
- Taxation of Non-Residents in Nigeria ("NRC Circular");
- Clarification on the Implementation of the Value Added Tax Act ("VAT Circular");
- Clarification on the Provisions of the Capital Gains Tax (CGT) Act ("CGT Circular");
- Clarification on Commencement and Cessation Rules, and Business Reorganization: - Sections 29 of CITA, 32 of CGTA, Section 24 & 25 of PITA and 42 of VATA (as amended by the Finance Act) ("Business Reorganization Circular");
- Clarifications on Sundry provisions of the Finance Act 2020 relating to Companies Income Tax Act (CITA) ("CITA Circular");
- Clarifications on the Provisions of the Stamp Duties Act ("Stamp Duties Circular");
- Clarification on the Taxation of Seafarers and Onshore or Offshore Platform Workers ("Seafarers Circular");
- Taxation of Companies Engaged in Shipping, Air, Transport and Cable Undertakings ("Shipping Circular");
- Guidelines for Filing of Income Tax Returns by Approved Enterprises within the Export Processing and Free Trade Zones (FTZs) ("FTZ Circular");
- Clarification on the Amendment to Section 16 of CITA in Relation to Taxation of Insurance Companies ("Insurance Taxation Circular");
- Circular on Tax Implications of Operation of Real Estate Investment Companies ('REIC') in Nigeria ('REIC Circular'); and
- Clarification of the Provisions of the Finance Act, 2020 relating to Personal Income Tax (PIT) ("PIT Circular")

The Circulars are aimed at providing guidance to stakeholders on the interpretation of the amendments to the extant tax laws by Finance Act, 2020 ("the Act"), assist taxpayers to understand their obligations under the various tax laws amended by the Act and improve their compliance with the laws.

However, there are matters arising from the clarifications and guidance provided in the Circulars that may have unintended consequences. This publication contains analysis of those issues and highlights the key areas requiring further consideration and clarifications from the FIRS.





**Wole
Obayomi**
Partner

1 Claim of Tax Treaties Benefits in Nigeria

The Tax Treaties Circular was issued based on the provisions of the Double Taxation Agreements between Nigeria and other countries, and the relevant extant tax laws. This Circular provides clarification on the available treaty benefits, eligibility requirements and procedure for computing and claiming tax treaty benefits by eligible companies in Nigeria.

The updated Circular, which replaces the *FIRS Information Circular No. 2019/03* issued on 4 December 2019 on the same subject, retains the clarifications provided in the replaced Circular and includes the relevant application forms for the implementation of tax treaties for both Nigerian and Foreign residents. Please refer to our [Tax Alert Issue No 12.1 of 5 December 2019](#) for our comments on the Tax Treaties Circular.

Click [here](#) to read and download the FIRS' updated Tax Treaties Circular





**Wole
Obayomi**
Partner

2 Filing of Income Tax Returns by Foreign Companies

This Circular clarifies the requirements for filing income tax returns by foreign companies based on the provisions of Section 55 of the CIT Act, Cap C21 LFN 2004 (as amended).

The key issues from the Circular are discussed below:

2.1 Legal Basis and Definition of Terms

Sections 9 and 13 of CITA provide the legal basis for the taxation of profits derived by foreign companies from Nigeria. Section 105 of CITA defines a foreign company, also referred to as a “non-resident company” or “company other than a Nigerian company” in the CITA, as “any company or corporation (other than corporation sole) established by or under any law in force in any territory or country outside Nigeria.”

2.2 Determination of Profits of Foreign Companies Liable to Tax in Nigeria

The profits of a foreign company are deemed to be derived from Nigeria and therefore liable to income tax under the following circumstances:

- the foreign company has a Permanent Establishment (PE) or fixed base in Nigeria, to the extent that such profit is attributable to the PE or fixed base;
- the foreign company does not have a fixed base of business in Nigeria, but habitually operates a trade or business through a dependent agent;
- it habitually maintains a stock of goods or merchandise in Nigeria from which deliveries are made

by a person on behalf of the company;

- it transmits, emits or receives signals, sounds, messages, images or data of any kind by electronic or wireless apparatus in Nigeria to the extent that the company has significant economic presence (SEP)¹ in Nigeria and profit can be attributable to such activity;
- the foreign company’s trade or business or activity involves a single contract for surveys, deliveries, installation or construction;
- the trade or business comprises of the furnishing of technical, management, consultancy or professional services outside of Nigeria to a person resident in Nigerian to the extent that the company has SEP in Nigeria.



¹ The SEP Regulations (i.e., the Companies Income Tax (Significant Economic Presence) Order, 2020) provides that a foreign company shall have a SEP in Nigeria in any accounting year where it derives ₦25million annual gross turnover or its equivalent in other currencies from any or combination of the digital activities stated in the Regulations.

Further, a foreign company would qualify as having a SEP in Nigeria, even where its annual gross turnover is less than the stipulated threshold where it uses Nigerian domain name (.ng) or registers a website address in Nigeria; or has a purposeful and sustained interaction with persons in Nigeria by customizing its digital page or platform to target persons in Nigeria, including reflecting the prices of its products or services in Nigerian currency or providing options for billing or payment in Nigerian currency.

2.3 Due Date for Filing Returns

Foreign companies whose profits are liable to income tax in Nigeria are required to file annual income tax returns within the earlier of 6 months after their first accounting year end or 18 months after the date of commencement of business in Nigeria. The Circular noted that the income tax returns must be in the format prescribed under Section 55 of the CITA.

In addition, eligible foreign companies are required to comply with the provisions of the *Income Tax (Transfer Pricing) Regulations, 2018* (TP Regulations) regarding TP compliance, including maintaining contemporaneous TP documentation where they meet the transaction threshold prescribed in the TP Regulations.

2.4 Contents of Income Tax Returns

In line with Section 55(1)(a) of CITA and TP Regulations, the Circular outlines the following documents that must accompany a foreign company's income tax returns:

- i. Consolidated audited financial statements of the company's global operations;
- ii. Audited financial statements of the Nigerian operations, attested by an independent qualified or certified accountant in Nigeria;
- iii. Tax computation schedules based on the profits attributable to its Nigerian operations, including capital allowance computations;
- iv. A true and correct statement, in writing, containing the amount of profits from each and every source in Nigeria;
- v. Duly completed CIT self-assessment form;
- vi. Evidence of payment of tax in Nigeria; and
- vii. Completed TP declarations and disclosures forms.



Eligible foreign companies are required to comply with the provisions of Section 63 of CITA relating to accounting records and bookkeeping. Further, the Circular notes that the presentation/reporting currency, which would be used for tax assessment and payment, shall be the dominant currency of transactions.

2.5 Capital and Investment Allowance

The Circular provides that a foreign company may claim capital allowance on a qualifying capital expenditure under the following conditions:

- i. It must own the relevant assets as at end of the basis period and the economic benefits of the assets must reside in the Nigerian operations; and
- ii. The assets must be located in Nigeria and "in use" for the Nigerian trade or business as at the end of the basis period.

Consequently, a foreign company can only claim capital allowances on its assets that are located in Nigeria and used exclusively for its Nigerian operations. Where an asset owned by the Nigerian

operations is used temporarily for purposes other than the Nigerian operations, the capital allowance claimable shall be restricted to the proportion attributable to the Nigerian operation, in line with Paragraphs 15 and 19 of the Second Schedule to CITA.

Further, foreign companies are required to submit the details of capital allowances (where applicable) computed on qualifying capital expenditure incurred for its Nigerian operations. The computations shall include the classes of assets utilised in each tax year, dates of acquisition of the relevant assets, rates, and amount of initial and annual allowances computed on the assets, and tax written down values of the assets. The companies are also required to show the details of the capital allowances claimed on the relevant assets for each tax year in a form and in the format provided by the FIRS.

Finally, foreign companies must notify the FIRS of the arrival and departure of fixed assets acquired for Nigerian operations not later than 30 days before and after the departure and arrival of the asset, respectively.

2.6 Tax Computations

The Circular notes that the computation of the total profit, including details of adjustments made to the accounting profit before tax, must be in line with the relevant provisions of the CITA. Therefore, foreign companies are required to include all incomes generated by, for or through its Nigerian operations in the income tax computations. Similarly, only expenditures that are wholly, reasonably, exclusively, and necessarily incurred for the purpose of earning the Nigerian income shall be tax deductible.

2.7 Tax Losses

The Circular clarifies that foreign companies may carry forward tax losses indefinitely to be relieved against future profits, provided that the total loss available for relief does not exceed the actual loss incurred, and such losses relates exclusively to the Nigerian operations.

2.8 Filing of Returns with Passive Income

The Circular clarifies that withholding tax (WHT) suffered by a foreign company shall constitute the final tax on passive income such as rent, interest, dividend and royalty or income from technical, management, consultancy or professional services provided to a person resident in Nigeria, to the extent that the foreign company does not have any other form of taxable presence in Nigeria. Consequently, the company is not required to prepare and/or file any CIT tax returns based on the provisions of Section 55 of CITA, once it can show evidence of WHT deduction on the income.

Comments

The provisions of the FIRS Circular are mostly consistent with the relevant tax laws and provide further clarification on tax compliance for foreign companies that earn passive incomes from Nigeria.

However, the FIRS may need to revisit the current tax compliance procedure for the foreign companies captured in the SEP Regulations. The requirement to extract a sub-set of the global audited financial statements for the purpose of preparing the accounts for its Nigerian operations maybe arduous. This is because there is currently no generally acceptable accounting standard for allocating common costs among multiple jurisdictions. The adopted method should be a simple and more effective tax system to ensure a fair and equitable allocation of profits and costs among the competing jurisdictions. The methodology for the system, which would be included in subsequent legislative amendments, should increase the level of certainty in the taxation of foreign companies in Nigeria and encourage voluntary compliance. The method should ensure that taxpayers can easily determine and incorporate their tax cost into their pricing model, allow for seamless compliance, and lend the FIRS to efficient tax administration.

The proposed tax system, which could be similar to the erstwhile deemed income tax regime, may apply a predetermined tax rate on the gross revenue earned by the affected foreign companies from services provided to Nigeria companies for each tax year, in line with the provisions of the SEP Regulations. We are aware that Nigeria's tax laws currently apply a similar basis of taxation to certain incomes derived by foreign companies from Nigeria. For instance, the 10% withholding tax suffered by a foreign

company constitutes its final tax on income derived from professional, management, consultancy and technical services provided to Nigerian customers (to the extent that the foreign company does not have any other form of taxable presence in Nigeria).

To ensure that the system is effective, the tax rate (which will be subject to periodic revision to reflect current economic realities) will be determined after a comprehensive study of the financial performance of Multinational Enterprises (MNEs) involved in the provision of digital, technical, professional, management or consultancy, services in select jurisdictions around the world. For instance, if it is determined that the effective tax rates² of most of the MNEs in the study is 25%, a tax rate of 7% (i.e. 30% of 25%) of gross revenue can be implemented for the affected companies. Thus, the affected companies, as defined in the CITA and SEP Regulations, will be required to file income tax returns that apply 7% tax rate to the gross revenue derived from services provided to Nigerian consumers, provided that they meet the prescribed revenue threshold. This will dispense with the need for affected companies to prepare complex audited financial statements for their Nigerian operations, as the companies may simply be required to get their Nigerian revenue attested by an independent qualified or certified accountant in Nigeria.

Please click [here](#) to read and download the FIRS' Circular

²Effective tax rate could be defined, in this context, as a percentage of the tax paid to the company's accounting profit before tax.

3 Taxation of Non-Residents in Nigeria



**Wale
Ajayi**
Partner

This Circular provides guidelines on the application of the extant tax laws to non-resident individuals and companies. The key issues from the Circular are discussed below:

3.1. Tax Residence

3.1.1 Individual tax residency

In line with the provisions of the PITA, Cap P8, LFN, 2004 (as amended), an individual is deemed resident in Nigeria for tax purposes if that individual:

- i) is domiciled in Nigeria.
- ii) is in Nigeria for periods amounting to an aggregate of 183 days or more, inclusive of annual leave or temporary period of absence, within a twelve-month period.
- iii) has access to a permanent place for domestic use in any part of Nigeria.
- iv) serves as a diplomat or diplomatic agent of Nigeria in another country.

Individuals deemed to be resident in Nigeria are liable to tax on their worldwide income as provided under Section 3 of the PITA. However, non-resident individuals (NRIs) are subject to tax only on income derived from a trade or business carried out in Nigeria, subject to the exemptions prescribed under Section 6 of PITA. Section 10 of PITA also provides the conditions wherein an employment income of a NRI will be deemed to be derived from and taxable in Nigeria.

3.1.2 Corporate tax residency

A company is resident in Nigeria if it is formed, incorporated, or registered under any law in Nigeria. Based on the provisions of the CITA, a Nigerian company is liable to tax on its worldwide income irrespective of where the profits have arisen, and whether or not they have been brought into or received in Nigeria.

On the other hand, a Non-Resident Company (NRC) is liable to tax on its profits where it engages in any trade or business as defined under Section 13(2)(a) to (d) of the CITA. In addition, the 10% withholding tax suffered by a foreign company constitutes its final tax on income derived from rent, interests, dividends and royalties as well as income from technical, management, consultancy or professional services rendered to persons resident, to the extent that the NRC has a SEP in Nigeria.

The Circular also differentiates between a Nigerian branch and a Nigerian subsidiary of a NRC. Based on the Circular, a branch of a NRC will constitute a fixed base for

the NRC under CITA and/or a PE under the Double Tax Treaties (DTTs), while a subsidiary is a Nigerian resident company and is subject to tax in Nigeria on its worldwide income. Additionally, a subsidiary will only create a taxable presence for the NRC in Nigeria where any of its profits is derived through any of the following operations of the subsidiary:

- a. the NRC uses the premises or facilities of the subsidiary for its own business to the extent that the premises or facilities constitute a PE or fixed base for the NRC; or
- b. the NRC authorises the subsidiary to carry out its business wholly or partly in Nigeria on its behalf to the extent that the subsidiary is deemed an agent of the NRC; or
- c. the NRC carries on business jointly with the subsidiary or any other entity in Nigeria.

3.1.3 Taxation of diplomats

The official income and emoluments of a diplomat or consular officer is liable to tax only in the diplomat's home country in line with the Vienna Convention on Diplomatic Relations. Consequently, the official emoluments of Nigerian diplomats serving abroad are liable to tax in Nigeria, while that of foreign diplomats in Nigeria are exempt from tax in Nigeria. However, a foreign diplomat or consular officer in Nigeria is liable to tax on any income derived from Nigeria, other than its official emolument. Further, the incomes of Nigerian citizens working in foreign embassies or international organisations located in Nigeria are liable to PIT.



3.2 Taxation of business expenses

Sections 24 to 28 of CITA provide the basis for treatment of business expenses for CIT purposes. Specifically, Section 24 of CITA limits allowable expenses to those “wholly, exclusively, necessarily and reasonably incurred” by the business in the production of its chargeable income for the relevant tax year.

The Circular included inputted interest on fund not being a loan directly or specifically obtained for Nigerian operations, royalties due to related persons, head office charges, fees or other similar payments for use of patents or other rights owned by a member of the MNE group, commission or management fees charged by the head office or member of the MNE group for services rendered to the Nigerian operations, and interest on loans from the head office or member of the MNE group to the Nigerian operations, as notional costs which are not allowable as tax deductions. However, there are no provisions in the extant laws and regulations that expressly preclude the deduction of the listed costs for CIT purpose.

Specifically, Section 24(a) of the CITA provides that any sum payable by way of interest on debt borrowed or employed as capital in acquiring the profits of a Company is tax deductible, subject to the restrictions provided in the Seventh Schedule to the CITA³. Further, the TP Regulations contains provisions that deal with the pricing of transactions between connected persons to ensure that the pricing is consistent with the “arm’s length principle.”

Similarly, the National Office for Technology Acquisition and Promotion Act provides the conditions for application and approval of fees for royalties, use of trademark and patent licences, management and



technical services to ensure that they are not arbitrary. Therefore, the express exclusion of the above expenses as non-allowable deductions is inconsistent with the provisions of the extant laws, and amounts to amendment of the law, which is the exclusive preserve of the National Assembly. We urge the FIRS to revise its position in line with provisions of the applicable laws and regulations to avoid unnecessary disputes with taxpayers.

3.3 Taxation of income derived from Nigeria

Section 13(2) of CITA provides the following basis for the taxation of the profits of a NRC in Nigeria:

3.3.1 Fixed base

NRC or NRI that has a fixed base from which it carries on business in Nigeria is liable to tax on profits attributable to that fixed base, subject to the exemptions provided in the relevant Acts.

The Circular also defines a fixed base to mean “a physical presence of the non-resident company in Nigeria” or “a specific place where trade or business activities including construction, services of a managerial, professional, technical, or consultancy in nature, etc. are rendered or carried out in Nigeria, regardless of the degree or time of such activity.” The key consideration noted in the Circular is that the space or facility must be available for the use of the non-resident entity. However, facilities

used solely for the storage/display of goods or for the collection of information would not constitute a fixed base for the NRC or NRI.

3.3.2. Agency relationships

Based on the Circular, an agency relationship exists when a NRC carries on business in Nigeria through an authorised person acting on its behalf. Therefore, the profit derived by the NRC through the agent will be subject to taxes in Nigeria which would be taxed separately from the profit or commission paid to the agent.

The FIRS also notes that “carrying on a trade or business” is not limited to the conclusion of a whole transaction cycle, but includes any activity that will contribute to the conclusion of a trade or business, such as initiation or securing orders, negotiation of terms of the business, rendering services, maintenance of stock of goods or merchandise from which deliveries are made, etc.

3.3.3. Digital activities

In line with Section 13(2)(c) of CITA, NRCs carrying on digital activities in Nigeria are liable to tax in Nigeria to the extent that they have SEP in Nigeria. The Circular outlines the conditions for SEP in Nigeria, as provided in the CIT (SEP) Order, 2020 (please refer to our [Newsletter of June 2020](#)).

³The Seventh Schedule restricts the interest expense claimable on debt borrowed or employed as capital in acquiring the profits of Company to 30% of the Earnings Before Interest, Tax, Depreciation and Amortisation. However, any excess interest can be carried forward for a maximum of 5 years.



3.3.4. Single Contract

The Circular notes that the entire profit from a trade or business involving a single contract for surveys, deliveries, installations, or constructions carried out in Nigeria is subject to tax in Nigeria, regardless of whether the project is split between in-country and out-of-country components. The FIRS provided illustrations in the Circular demonstrating instances where a turnkey project may be split between onshore and offshore components which are carried out by separate entities to buttress its position.

There are still debates on what would qualify as a "single contract" especially as there are currently two subsisting and conflicting Federal High Court (FHC) judgments on the issue.

The comments and illustrations provided by the FIRS aligns with the earlier judgment of FHC in March 2014 between *Saipem Contracting Nigeria Ltd & Others v FIRS & Others* (Suit No: FHC/L/CS/1081/09). In the case,

the FHC judge noted that the contracts awarded by a Nigerian customer to three (3) different Saipem entities engaged separately for the design, fabrication, supply and installation of a product in the country was a "single contract" because it was prepared and executed on a single document. This is notwithstanding that the contract clearly stated the responsibilities of all parties and the corresponding fees separately in the single document. Therefore, the profits from both the offshore and onshore aspects of the project were derived from Nigeria and liable to tax in Nigeria.

However, another FHC provided a different judgment in the case between *JGC Corporation vs FIRS* (Appeal No. FHC/L/4A/14) in September 2015. The key difference which led to the ruling was that the contract between the Nigerian customer and the related JGC entities were documented separately in two different documents. The FHC judge noted that the existence of separate contracts for both the in-country and out-of-country

aspects of the projects should be examined separately to determine their liability to tax in Nigeria.

We are aware that both judgments have not been overturned by a higher court. We are of the opinion, however, that the method of documentation should not be the basis for determining whether a contract is single or not. To the extent that no party has overall responsibility for the execution of the project and/ or provides warranties on behalf of the other contracting parties, the contract should not qualify as a "single contract."

3.3.5. Selected services provided by NRCs

The Circular notes that the profit of a NRC from technical, management, consultancy, or professional services provided to a person resident in Nigeria is liable to tax in Nigeria to the extent that the NRC has SEP in Nigeria. However, WHT deducted on the income would constitute the final tax applicable to the profit of such NRCs.

The Circular further reiterates that the following payments made to NRCs are exempt from WHT in Nigeria, in line with the provisions of the law:

- i) Payments to an employee of the person making payment under a contract of employment.
- ii) Payments for teaching in or by an educational institution, except where the training was not organised by that institution.
- iii) Payments by a foreign fixed base of a Nigerian resident, other than those payments reimbursable by the Nigerian company.

3.4. Permanent establishment in DTTs

The Circular notes that where Nigeria has a DTT with an NRC's resident country, the NRC's liability to tax in Nigeria will be determined by the provisions of such DTT. Therefore, the NRC will only be liable to tax in Nigeria if it has a PE in Nigeria, and only its profits that is attributable to the PE will be taxable in Nigeria, in line with the provisions of the relevant DTT. Consequently, where a DTT exists but the NRC has no PE in Nigeria, the provisions of the SEP Order will not apply to the NRC. This will lay to rest the ensuing controversy in some quarters on this matter.

The Circular defines a PE as *"a fixed place of business through which the business of an enterprise is wholly or partly carried on"* and provides the following conditions for a fixed place to qualify as a PE:

- i) it has a geographical location and a degree of permanence which may range from 30 days to 12 months.
- ii) it must be used for carrying on business activity of the NRC.
- iii) the NRC carries on its business either wholly or partly at the fixed place.

Further, the Circular provides other scenarios that could constitute a PE for a NRC, other than a fixed place of business, as follows:

- i) The NRC provides services through its employees or other persons.
- ii) It engages a dependent agent in Nigeria, which habitually concludes contracts, business or habitually plays the principal role leading to the conclusion of contracts or business either in its name or in the name of the foreign owner on a routine basis.

- iii) It carries on business through a closely related person (company, individual etc.), which may be independent, but acts exclusively or almost exclusively on behalf of the NRC.
- iv) A foreign insurance company that collects premium or insures risks situated in Nigeria.

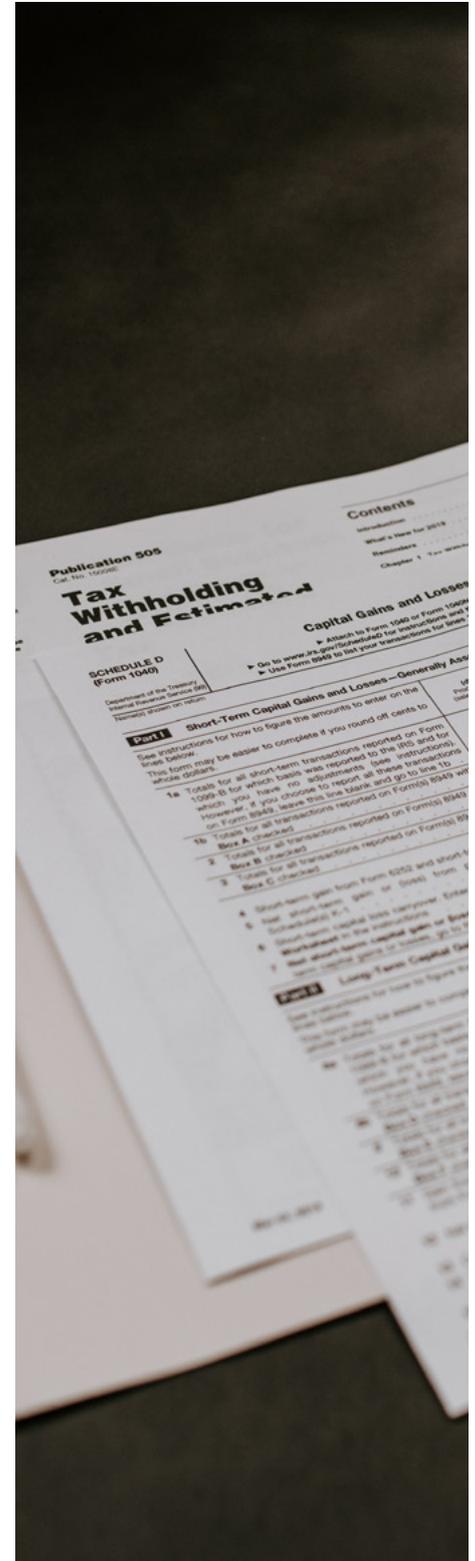
3.5. Turnover basis of taxation

Prior to 2014, the FIRS assessed NRCs and NRIs to tax on deemed profit/ turnover basis, in line with the provisions of Section 30 of CITA and Section 7 of PITA, respectively. However, the FIRS, in 2014 directed all taxpayers, including NRCs, to file their tax returns on actual profit basis in line with the provisions of Section 55 of CITA to improve its oversight on their activities and minimize tax leakages.

Notwithstanding, the FIRS in its Circular reemphasises its power by CITA and PITA to assess taxable persons on the deemed turnover basis under certain circumstances, such as:

- i) where the business produces either no assessable profits, or assessable profits which are less than the FIRS may expect from that business, or
- ii) where the true amount of the assessable profits of the business cannot be ascertained.

Based on the Circular, the FIRS notes that it currently applies 20%, on both resident companies and NRCs, as a fair and reasonable percentage, based on Government's policy.



3.6. Other issues addressed in the Circular

- i) Income from dividend, interest, rent, and royalties received by NRCs are subject to WHT, which is the final tax at 10% and 7.5% for NRCs in a treaty country.
- ii) The illustrations provided by the FIRS correctly confirmed, in line with the provisions of the enabling laws, that the applicable WHT rate for construction contracts, other than those for roads, bridges, buildings or power plants, is 5%. This is based on the principle that whatever is omitted is meant to be excluded. The rationale is that if the Legislature had intended to subject all construction contracts to 2.5% WHT rate, it would have done so explicitly. Therefore, taxpayers that have the obligation to deduct WHT on such contracts should pay attention to this to avoid unnecessary exposure to interest and penalty.
- iii) Companies are required to obtain a clearance certificate from the FIRS in order to remit funds out of Nigeria.
- iv) CGT at the rate of 10% is applicable on the disposal of chargeable assets by resident companies and NRCs. Therefore, persons who dispose of a chargeable asset are required to self-assess, pay, and file a return of the chargeable gain by 30 June and 31 December of the same year.
- v) The Circular outlines the tax jurisdiction of NRCs, NRIs, diplomats, and other Nigerians working in embassies and international organisations located in Nigeria. Further, the Circular provides that Nigeria has the first right to tax incomes brought into Nigeria. However, relief will be granted for tax paid in the country where the income arose.
- vi) Based on the provisions of Section 55 of CITA and Section 41 of PITA, every person, including persons not liable to tax or companies exempt from incorporation in Nigeria, is required to file self-assessment returns with the relevant tax authorities, otherwise the statutory penalties shall apply to defaulters.

Comments

Most of the provisions of the Circular are in line with the relevant tax laws governing the administration of taxes applicable to resident and non-resident persons in Nigeria.

However, there are still concerns on the administration of the deemed income assessments by the FIRS, as the practice appears to be discretionary. The laws provide the conditions which must be determined and verified before the turnover basis of taxation may be applied. Therefore, it is hoped that the FIRS, in exercising its power under relevant provisions of the laws, would carry out the required audit procedures, information/ document verification and/ or benchmarking analysis that will form the basis for the assessment. This will ensure that the taxpayers are assessed on a "fair and reasonable" basis as provided in the laws.

Please refer to our publication on [Investment in Nigeria Issue No. 6.1 of 2 June 2021](#) for our comments on the applicable taxes in Nigeria and the relevant legal bases.

Please click [here](#) to read and download the FIRS' Circular





Ajibola Olomola
Partner

4 Implementation of the Value Added Tax Act

The VAT Circular updates and replaces *FIRS Information Circular 2020/02* of 29 April 2020 on FIRS' interpretation of amendments to the VAT Act by Finance Acts, 2019 and 2020. For our comments on FIRS' interpretation of the provisions of Finance Act, 2019, please refer to our [Tax Alert, Issue No. 6.8 of 18 June 2020](#).

We have summarised below, our comments on the key updates provided in the revised VAT Circular and practical issues associated with the implementation:

4.1 Definition of Goods and Services

Finance Act, 2020 amended the definition of goods to include *"all forms of tangible properties, movable or immovable, but does not include, land and building, money or security"*. It also defines services as *"anything, other than goods, or services provided under a contract of employment; and includes any intangible or incorporeal (product, asset or property) over which a person has ownership or rights, from which he derives benefits, and which can be transferred from one person to another, excluding interest in land and building, monies or securities"*.

The FIRS' position, which is consistent with the provisions of the law, is that the supply of land and building (commercial or private) and interest therein (in the form of rent or lease) are exempt from VAT. However, the Circular provides that the exemption does not preclude the following transactions from being chargeable to VAT:

- Supply of chargeable goods and services in relation to such land and building.
- Services incidental to the supply of the land and buildings, such as survey, valuation, agency and other services incidental to sales and lease of the land and/ or building.
- The use of land and building for any form of hospitality service or business including, but not limited to, monies paid for supply of hotel accommodation space or short stay (sublets) are liable to VAT.
- All fees/ commission (including survey, agency, valuation, legal and other related fees/ commission) incidental to supply and processing of interest in land and building.

The reference to supply of chargeable goods relating to land and building being liable to VAT is ambiguous. Therefore, the FIRS may consider using illustrations to provide clarification and avoid unnecessary disputes that may arise from misinterpretation.

4.2 Place of Supply Rules

Finance Act, 2020 introduced *"place of supply"* rules for incorporeal property, and expanded on the rules for services, in addition to those provided in Finance Act, 2019. Specifically, the Act provides that a supply of incorporeal property is deemed to be made in Nigeria where the *"exploitation of the right is made by a person in Nigeria; the right is registered in Nigeria; assigned to or acquired by a person in Nigeria, regardless of whether the payment for its exploitation is made within or outside Nigeria, or the incorporeal is connected with a tangible or immovable asset located in Nigeria"*. Therefore, services connected with existing immovable property located in Nigeria will be deemed as supplied in Nigeria for VAT purpose.



4.3 Time of Supply Rules

According to the Circular, the time of supply for VAT purposes is the earlier of when an invoice or receipt is issued, or payment of consideration is due or received by the supplier in respect of that supply. The Circular further outlines the rules for determining time of supply where invoices are not issued between connected persons, and in transactions involving periodic and instalment payments, based on the provisions of the VAT Act.

4.4 Registration requirements for NRCs

In addition to the registration requirements introduced by Finance Act, 2019, Section 10(3) of the VAT Act was amended to empower the FIRS to appoint an agent to withhold and remit VAT on payments to NRCs for taxable goods and services.

The Circular notes that the FIRS will issue detailed guidelines to NRCs on the operations of VAT in line with its powers under Section 10(5) of the VAT Act.

4.5 Attribution for Allowable Input VAT

Section 17 of the VAT Act limits the allowable input VAT deductible to the "...tax on goods purchased or imported directly for resale and goods which form the stock-in-trade used for the direct production of any new product on which the output tax is charged."

Typically, a taxpayer's input VAT claimed may not be directly linked to the sales and output VAT charged in the same month, due to timing differences between purchase of materials and sale of finished products. However, based on the VAT Circular, the FIRS requires taxpayers to claim only allowable input VAT that is directly linked/ attributable to the goods sold during the month.

Failure to make such an attribution constitutes an offense in line with Section 27 of the VAT Act.

Currently, the FIRS has configured its e-filing platform (TaxPro-Max) to automatically limit input VAT claimable to 75% of allowable purchases even though the VAT Act does not provide for only the input VAT incurred in the same month of sale to be claimed against the output VAT. This is because the cost of goods purchased and allocated from inventory in a given month may not directly relate to sales made in that month. Therefore, the FIRS' position requesting taxpayers to make an attribution in respect of deductible input VAT in a month is not consistent with the provisions of the law. Also, the request may be unrealistic given the cashflow dynamics of trade. We urge the FIRS to revise its position to align with the provisions of the VAT Act and business exigencies.

4.6 VAT Forms

The Circular also prescribed the relevant forms to be used by taxpayers for monthly VAT filing as follows:

- *Form VAT 002*: used for declaring the net VAT payable in line with Section 15(1) of the VAT Act as amended by Finance Act 2019.
- *Form VAT 002A*: used for declaring Output VAT withheld by Ministry, Statutory body or Other Agency of Government and Companies operating in the Oil and Gas sector.
- *Form VAT 002B*: used to self-account for VAT in line with the provisions of Section 14(3) and 14(4) of the VAT Act as amended by Finance Act 2019.
- *Form VAT 002NRC*: used by Non-Resident Persons (NRP) to declare the Output VAT charged on taxable supplies made to Nigerian customers and withheld by Nigerian customers

(as applicable). This clarifies the position of the FIRS that NRPs are required to file monthly VAT returns.

With the migration of all tax compliance services to TaxPro Max, it is expected that the forms will be deployed and accessed on the e-filing portal.

4.7 Exempt Items

The Circular outlines the goods and services exempted from VAT, including those introduced by Finance Act, 2020. Further, the Circular reemphasizes the powers of the Honourable Minister of Finance, Budget and National Planning (HMoFBNP or "the Minister") to amend, vary or modify the list of exempt items in the First Schedule based on Section 38 of the VAT Act.

However, recent court judgements have cast doubt on the legality of amendments made by various agents of the executive arm of the government, such as the Minister, pursuant to the powers conferred on them by provisions of the relevant Acts. For instance, the FHC, in *The Registered Trustees of Hotel Owners and Managers Association of Lagos vs Attorney-General of the Federation & HMoF*, nullified the *Schedule to the Taxes and Levies (Approved List for Collection) Act (Amendment) Order, 2015*, stating that the Minister is not authorized to amend, vary or modify the provisions of laws of the Federation under the Constitution.

Comments

We commend the FIRS on its detailed Circular on the interpretation of the amendments to VAT Act by Finance Acts, 2019 and 2020. However, it is hoped that the FIRS will update its position in areas that are inconsistent with the VAT Act to avoid unnecessary disputes with taxpayers.

Please click [here](#) to read and download the VAT Circular.



Wole Obayomi
Partner

5 Provisions of Capital Gains Tax Act

The FIRS' Circular provides guidance on the interpretation of the amendments to the CGT Act Cap C1, LFN, 2004 (as amended) (CGTA). The Circular reiterates the definition of chargeable persons and assets in line with the provisions of CGTA and provides explanation and illustration of other key issues.

The key issues from the Circular are discussed below

5.1 Disposal and Location of Assets.

Based on the provisions of the CGTA, disposal is recognized for CGT purposes where any *“capital sum is derived from a sale, lease, transfer, an assignment, a compulsory acquisition, or any other disposition of assets, notwithstanding that no asset is acquired by the person paying the capital sum...”*

5.2 Ships and Aircraft used in International Traffic

Finance Act, 2020 amended the provisions for taxing the gains derived from the sale ships and aircraft used in international traffic based on their residency of the owner or interest holder.

Prior to the enactment of Finance Act, 2020, capital gains on disposal of all ships and aircraft (used locally and internationally) was determined based on the residency of their owners. However, the amendment to Section 24(f) of the CGTA restricts the residency rule to only ships and aircraft *“used in international traffic.”* Therefore, gains derived

from the disposal of ships and aircraft or the right or interest in the ship or aircraft used in international traffic is chargeable to CGT in Nigeria, regardless of whether the ship or aircraft is not physically situated in Nigeria at the time of the disposal.

Relatedly, ships or aircraft used in Nigeria for purposes *other than international traffic* are subject to CGT upon disposal, irrespective of whether the owner or alienator is a resident of Nigeria or non-resident, or whether the disposal took place in Nigeria or not.

5.3. Compensation for loss of office

Based on the provisions of Section 36 of the CGTA, compensation for loss of office up to a maximum of ₦10million is exempt from CGT. Therefore, any sum above the ₦10million threshold will be subject to CGT accordingly.

The Circular states that the applicable CGT should be computed and deducted from the sum due before the net payment is made to the individual. The CGT deducted shall be remitted on or before the 10th day of the following month, in accordance with the Pay-As-You-Earn (PAYE) Regulations of the PITA.

5.4. Filing of CGT Returns

The amendment to Section 31 of the CGTA introduced a timeline for filing CGT returns. Consequently, taxpayers who dispose chargeable assets during the year are required to self-assess, file the CGT returns

and pay the resultant CGT by 30 June and 31 December of the same year to the relevant tax authority.

Finance Act, 2020 provides a compliance structure for filing of CGT returns by introducing due dates for filing self-assessed CGT returns. The Act is silent on the time of disposal of assets for the relevant due dates provided, which the Circular has now clarified.

Based on the Circular, the CGT due on chargeable assets disposed of from 1st December in a year to 31st May of the following year must be filed not later than 30th June of that following year. Similarly, the CGT returns for assets disposed of from 1st June to 30th November each year, must be filed not later than 31st December of the same year.

For ease of reference, the FIRS provided the CGT returns form and relevant schedules as an appendix to the Circular.

Comments

We commend the FIRS for providing the much-needed clarification on the asset disposal period for the respective due dates for CGT returns provided in the Act. Taxpayers are therefore advised to take note of the timelines for filing provided by the FIRS to avoid unnecessary penalty for late filing of CGT returns and/ or payment of CGT liabilities.

Please click [here](#) to read and download the FIRS' Circular.





**Ajibola
Olomola**
Partner

6 Commencement and Cessation Rules and Business Reorganization

The updated Circular replaces the *FIRS' Circular No: 2020/06* of 29 April 2020 on the same subject and provides guidance on the interpretation of the amendments to the commencement and cessation rules under the CITA and the PITA.

The Circular retains the relevant clarifications in the replaced Circular and includes clarifications on recently amended provisions under PITA.

For our comments on clarifications contained in the replaced Circular, please refer to our *Tax Alert, Issue No. 6.8 of 18 June 2020*.

The key issue in the updated Circular is discussed below:

6.1 Commencement and Cessation of Trade or Business

PITA hitherto provided special rules for determining the assessable income of individuals from a trade, business, vocation or profession in the first three years of business and in the last two years of business. These rules, which were referred to as the “*Commencement*” and “*Cessation*” rules, respectively, had often resulted in double taxation of profits earned in one or more financial years by the individual during these periods.

Finance Act, 2020 amended Section 24 of PITA to modify the commencement and cessation rules and eliminate the issue of double taxation of certain profits of the individuals. Consequently, individuals and partnerships, corporation sole and entities taxable under PITA are now required to determine their basis period on preceding year basis (PYB) from their first accounting period. Similarly, their final tax returns based on the profits derived from the beginning of the final accounting period to the date of cessation, and the tax due (if any) will be payable within three months from the date of cessation of business.



The amendments are similar to the provisions introduced by Finance Act, 2019 to modify the same rules in CITA for companies and ensure uniformity in the taxation of companies and individuals regarding new trades in Nigeria.

The *FIRS' Circular* provides transition guidelines for entities within their commencement period and entities whose basis period fall in periods before and after Finance Act, 2020 was passed. It also provides illustrations to demonstrate how the basis period is to be determined under the CITA and PITA, and scenarios where two sets of tax returns could be filed in a calendar year.

Comments

The introduction of simplified rules for taxpayers in commencement and cessation by Finance Acts, 2019 and 2020, fosters the Federal Government's drive towards ease of doing business in Nigeria. In addition, the tax concessions for related company restructuring arrangements will likely result in an increase in the level of such arrangements which can only be positive for the Nigerian economy.

Please click [here](#) to read and download the *FIRS' Circular*



**Wole
Obayomi**
Partner

7 Sundry provisions of Finance Act, 2020 relating to Companies Income Tax Act

The CITA Circular replaces the FIRS Information Circular 2020/04 of 29 April 2020. The Circular provides updated guidance on the implementation of sundry provisions of Finance Act, 2020 relating to CITA.

We have highlighted the key updates to the CITA Circular as follows:

7.1 Charge of Tax on Interest Relating to Foreign & Agricultural Loans and Certain Reliefs

Finance Act, 2020 amended the conditions for the grant of tax waiver on interest on loans granted for agricultural purposes under Section 11 of CITA as follows:

- (i) Replaced the term “*agricultural trade or business*” with “*primary agricultural production*,” which is subsequently defined in Section 11(4) of CITA as “*primary crop production comprising the production of raw crops of all kinds, but excluding any intermediate or final processing of crops or any other associated manufactured or derivative crop product.*”

- (ii) Reduced the minimum moratorium period required for exemption of interest and loans granted by banks to companies engaged in primary agricultural production from 18 months to 12 months. However, the rate of interest on the loan must not exceed the base lending rate at the time the loan was granted, re-financed or otherwise restructured.

7.2. Minimum Tax

Finance Act, 2020 granted a temporary reduction of the minimum tax rate from 0.5% to 0.25% of gross turnover for tax returns that fall due on any date between 1 January 2020 to 31 December 2021.

The CITA Circular defines gross turnover as “*the gross inflow of economic benefits during the period arising in the course of the operating activities of an entity when those inflows result in increase in equity, other than increases relating to contributions from equity participants, including sales of goods, supply of services, receipt of interest, rents, royalties or dividends.*”

7.3. Donations

Donations made in cash or kind to any government fund in respect of a pandemics or natural disaster shall be tax deductible. However, the amount allowable is restricted to a maximum of 10% of the assessable profit after the deduction of other allowable deductions.

7.4. Payment of Additional Assessment

Section 77 of CITA was amended to reduce the timeframe within which taxpayers must settle an undisputed assessment from 60 days to 30 days. Therefore, where an assessment becomes final and conclusive due to the failure of the taxpayer to file a formal objection within the statutory 30-day period, or the assessment has been agreed by the taxpayer or determined on objection or appeal, the additional liability must be settled within 30 days of the service of the relevant assessment by the FIRS.

Please click [here](#) to read and download the FIRS Circular.



8 Provisions of the Stamp Duties Act



Nike James
Partner

The Stamp Duties Circular replaces the FIRS' *Information Circular No: 2020/05* of 29 April 2020 on the same subject and provides updates on the interpretation of recent amendments to the Stamp Duties Act ("SDA" or "the Act") Cap S8 LFN, 2004 (as amended) by Finance Act, 2020. For our comments on Circular 2020/05, please refer to our [Tax Alert, Issue No. 6.8 of 18 June 2020](#) to access and download our e-book on [Matters Arising from the Implementation of Finance Act 2019](#).

We have provided below our comments on the key updates contained in the Circular.

8.1 Definition of Stamp

Finance Act, 2020 amended the definition of "stamp" in Section 2 of the SDA as "*an impressed pattern or mark by means of an engraved or inked die, an adhesive stamp, an electronic stamp or an electronic acknowledgement for denoting any duty or fee, provided that the Service shall utilize adhesive stamp produced by the Nigerian Postal Service pursuant to its enabling Act*". However, the Circular erroneously retained the erstwhile definition of stamp provided in Finance Act, 2019.

Further, the Circular included "*adhesive (revenue) stamp*" as a mode of denoting stamp duties rather than the adhesive stamp produced by the Nigerian Postal Service (NIPOST) as provided in the law. This may be read to suggest that adhesive stamps produced by the FIRS are also

acceptable for denoting stamp duties, which is contrary to the explicit provisions of Finance Act, 2020.

It is important to note that the inclusion of adhesive stamps produced by NIPOST by Finance Act, 2020 was to resolve the long-standing dispute between NIPOST and FIRS on the competent authority to print adhesive stamps used for stamping dutiable instruments. It is therefore pertinent that the FIRS' clarification on the implementation of the SDA is consistent with the definition contained therein to avoid unnecessary confusion.

8.2 Stamp Duties on Electronic Documents

The FIRS reiterated the applicability of stamp duties on electronic instruments, such as agreements drafted and executed online without any physical document, e-mail correspondence communicating the terms and conditions of an agreement etc. In addition, the Circular, extends the interpretation of receipts to include all electronically generated receipts and any form of electronic acknowledgment of payments, such as POS receipts, Automated Teller Machine (ATM) print-outs, e-mails, short message service (SMS), instant messages (IM), any internet-based messaging service, WhatsApp message, etc.

The Circular further provides various illustrations to demonstrate key considerations for determining

that an electronic document executed outside Nigeria has been received into Nigeria. These include the ability to access, retrieve or store such documents stored on a server outside Nigeria or a cloud facility using any electronic means in Nigeria.

It is still unclear how the FIRS intends to enforce collection of stamp duties, especially on documents executed on personal and internet messaging apps without the risk of a possible breach of Nigeria Data Privacy and Protection Laws and Regulations.

8.3. Electronic Money Transfer Levy

Finance Act, 2020 introduced the Electronic Money Transfer Levy ("EMT levy" or "the levy") to replace the erstwhile stamp duty charge on bank deposits and transfers. EMT levy of ₦50 is to be charged on all deposits and transfers in any bank or financial institution from ₦10,000 and above. The Act also provides that the Minister shall make regulations for the administration of the levy.

Further, Finance Act, 2020 deleted the provision of Finance Act, 2019 which exempts monies paid or transferred electronically between accounts of the same owner within the same bank from stamp duties. We believe the deletion was inadvertent as the views expressed at subsequent stakeholders forum on Finance Act, 2020 organized by the Federal Ministry of Finance, Budget and National Planning showed that the deletion was not intended. Perhaps in a bid to correct the error, the FIRS in the Circular ignored the erroneous deletion and re-stated the exemption from stamp duties of same account transfers within same bank. While this is a laudable initiative, an appropriate amendment to the SDA is required to give the re-statement the full legal backing of law.



**STAMP
DUTY**

The Circular also provides that the EMT levy should be remitted in accordance with the administrative procedures prescribed in the Electronic Transfer Levy Regulations 2021. However, the Regulation has not yet been published as at time of this publication. It is hoped that the HMoFBNP will do so as soon as possible to provide guidelines on the administration of the levy, to enable Banks remit the EMT levy collected, so far, from their customers.

8.4. Stamp Duties on Loans, Credit Facilities and other instruments

8.4.1. Loan Facilities

In addition to the comments made in its Circular of 29 April 2020, the FIRS provided additional clarifications on exemption of loan facilities with a one-year tenure, bank overdraft and loans raised for working capital purposes, from stamp duties. These clarifications are in line with the extant provisions of the SDA.

However, the indication of 0.125% as the applicable stamp duty rate for loan agreements is contrary to the provisions of the SDA. Based on the SDA, the 0.125% rate applies to Loan Capital (the specified dutiable instrument for Loan capital is the "CAC Statement") and not loan agreements, which were not specifically mentioned in the SDA. Therefore, in our opinion, loan agreements should be treated in like manner as other agreements not specifically listed in the SDA, which attracts a nominal stamp duties rate of 15 kobo.

Further, the FIRS provided clarification on situations where certain documents will be required to be up-stamped. For instance, where a loan is advanced in excess of the amount

covered by a duty already paid, then the security document should be up-stamped to cover only the increase in value, based on the provisions of the SDA.

8.4.2. Lease Agreements

The FIRS also corrected the inconsistency of its initial Circular with the SDA, regarding the applicable stamp duty rate for lease agreement. The Service had previously stated a flat rate of 6% on all lease agreements. However, the new Circular is now in alignment with the various rates stipulated in the SDA. The Circular further imposes the obligation to pay the duty on the lessee/ tenant.

8.4.3. Cheque Leaflets

The Circular stated a stamp duty rate of ₦1.00 per cheque leaflet, contrary to the provisions of the SDA. Although we are aware that this rate is currently used in practice, it should be noted that the Act clearly provides for a rate of 2 Kobo per cheque leaflet.

8.5. Stamp Duties on Contracts

The Circular maintains its view that all corporate entities, including Ministries, Department and Agencies, are required to charge stamp duties on all contracts. However, the FIRS made certain amendments to its initial Circular of 29 April 2020, which imposed 1% of the contract amount as the duty payable. The new Circular is silent on the rate applicable to

contracts. However, the silence may likely be as a result of the controversies surrounding the legality of the 1% rate levied on contracts, which is not consistent with the provisions of the SDA.

The Circular further defined a 14-day timeframe within which to remit the stamp duty upon execution of a contract. This timeframe varies from the 40 days stipulated in the SDA for payment of stamp duty on contracts executed within Nigeria to 30 days, if the contract was executed outside Nigeria. Therefore, an imposition of a 14-day timeframe is tantamount to amending the law, which is the exclusive reserve of the National Assembly. The FIRS should therefore revise its Circular in subsequent updates to align with the provisions of the law.

In addition, the updated Circular provides that the stamp duties on contract should be remitted to the relevant tax authority, and not just the FIRS as stipulated in the initial Circular. This clarification aligns the Circular with the provisions of the SDA, which empowers the relevant State tax authorities to collect the duty on instruments executed between individuals.

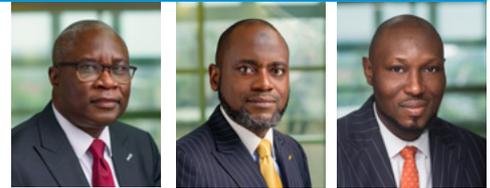
Comments

The amendments to the Circular to correctly align some of the FIRS' earlier positions with the SDA is a welcome development. However, there are still some clarifications provided in the revised Circular which are inconsistent with the provisions of the SDA. It is hoped that the FIRS will update its position in these areas to avoid unnecessary disputes with taxpayers.

Please click [here](#) to read and download the FIRS' Circular



9 Taxation of Seafarers and Onshore or Offshore Platform Workers



Wale Ajayi
Partner

Ayo Salami
Partner

Martins Arogie
Partner

The *FIRS Circular No.: 2021/13* ("the Circular") of 3rd June 2021 provides clarification on the taxation of seafarers, onshore and offshore platform workers.

The key provisions of the Circular are discussed below:

9.1. Definition of seafarer, platform worker and Nigeria

The Circular defines a seafarer as: "a person who assists in the navigation and operation of a vessel at sea and includes officers and seamen (ratings)"; and a platform worker as: "a person engaged on any facility, installation, structure, ship or place used for any activity in connection with the exploration or exploitation of natural resources on Nigerian subsoil, seabed, territorial waters or continental shelf. It includes, but not limited to, workers engaged on onshore or offshore drilling rig, oil platform or any other non-oil onshore or offshore platforms."

Further, the Circular defines Nigeria to the effect that Nigerian territory includes riparian or littoral states, Nigeria's territorial waters and the Exclusive Economic Zones (EEZs). In this regard, the Circular clarifies that the boundaries of a littoral state end at the low water mark. Also, that the territorial waters and EEZs are subject to the exclusive jurisdiction of the Federal Government.

9.2. Taxation of income of seafarers and offshore platform workers

The Circular provides that the following rules, which are essentially based on the residency and employment rules in the PITA, and DTTs, will apply to the taxation of the income of seafarers and offshore platform workers.

• Nigerian residents:

An individual is a resident of Nigeria for tax purposes if he has a permanent place available for his domestic use in any part of Nigeria; if he is in Nigeria for a period or periods amounting to an aggregate of 183 days (including annual leave or temporary periods of absence) or more in any twelve-month period; or serve as a diplomat or diplomatic agent of Nigeria in another country.

Residence is defined as "a place available for an individual's domestic use (in Nigeria) on a relevant day, and does not include any hotel, rest-house or other place at which he or she is temporarily lodging unless no permanent place is available for his or her use on that day."

The Circular stipulates that seafarers or platform workers qualify as Nigerian residents for tax purposes where they have a permanent place available for their domestic use in any part of Nigeria, regardless of the duration of stay in Nigeria. Therefore, they are liable to tax in Nigeria on their worldwide income.

• Seafarer:

Based on the provisions of Section 10(5) of the PITA, the income of a seafarer is derived from Nigeria only during any period in which the individual is serving under articles signed in Nigeria or is performing stand-by duty on board a ship preparatory to his signing articles in Nigeria. This excludes income derived from employment in the Nigerian Navy or the Nigerian Ports Authority.

The Circular clarifies that any individual, including a non-resident individual, who signs articles in the territory of Nigeria as a seafarer, whether for a Nigerian or non-Nigerian vessel, is liable to income tax in Nigeria on the income derived under such articles.

• Platform worker:

The general rule in this regard, based on the provisions of Section 10 of the PITA, is that employment income is derived from Nigeria and wholly taxable in Nigeria where the duties of the employment are wholly or partly performed in Nigeria, or the employer is in Nigeria or has a fixed base in Nigeria.

Consequently, the employment income of resident or non-resident platform workers would be liable to tax in Nigeria where either their duties of employment are wholly or partly performed in Nigeria, or the employer is resident in Nigeria or has a fixed base of business in Nigeria.





Further, the Circular provides the conditions where the income of a platform worker will not be subject to tax in Nigeria, even though the duties of his employment are performed wholly or partly in Nigeria as follows:

- i) the duties are performed on behalf of an employer who is in a country other than Nigeria and the remuneration of the employee is not borne by a fixed base of the employer in Nigeria; and
- ii) the employee is not in Nigeria for a period amounting to an aggregate of 183 days, including annual leave or temporary period of absence, or more in any twelve-month period commencing in a calendar year and ending either within that same year or the following year; and
- iii) the remuneration of the employee is liable to tax in that other country under the provisions of the DTT with that other country.

- **Where there is application of the incentives under DTA**

Where the seafarer or platform worker is a resident of a country with which Nigeria has a DTT, their income will be taxed in line with the provisions of the relevant DTT.

9.3. Relevant Tax Authority (RTA)

- **Residents:**

The worldwide income of seafarers or offshore platform workers resident in Nigeria will be subject to tax by the tax authority of the State where he is resident.

- **Itinerant worker:**

Itinerant seafarers or platform workers who have spent 183 days in Nigeria or are liable to income tax in Nigeria but do not have a place of residence in Nigeria, or are not residents of a state in Nigeria will be taxed based on the provisions of Paragraph 4 of the First Schedule of PITA as follows:

- i) where their employer is in Nigeria, the RTA will be the State in which the principal office of the employer is located in Nigeria;
- ii) where the employer is not in Nigeria, the RTA is the FIRS, in line with the provisions of Section 2(1)(b) of the PITA.

- **Non-residents:**

The tax on the income of non-resident seafarers and platform workers shall be collected by the FIRS, in line with the provisions of Sections 2(1)(b)(iv) and 2(2) of PITA.

Comments

The taxation of seafarers and offshore platform workers operating within the Nigerian territorial space but not resident in any state has been a subject of controversy from a personal income tax perspective. There have been issues around whether this category of individuals should be liable to tax in Nigeria and, if so, the RTA to collect the taxes. This Circular provides the much-needed clarity on these issues.

The Circular also clarifies what constitutes the boundaries of a littoral state, which has been a subject of dispute by several States and escalated to the apex court in Nigeria. While the *Allocation of Revenue (Abolition of Dichotomy in the Application of the Principle of Derivation) Act, 2004* provides that 200-meter water depth contiguous to a State shall be deemed to be a part of that State for the purpose of computing the revenue accruing to the Federation Account, the Supreme Court ruled in the case of *Attorney General of the Federation v. Attorney General of Abia State & 35 Ors.*, that the low-water mark forms the boundary of the land territory of the States. The FIRS' position aligns with the Supreme Court's decision and should put paid to littoral states' tax authorities demanding Pay-As-You-Earn tax due to the FIRS and vice versa.

Lastly, the Circular delineates between the taxing rights of the State Boards of Internal Revenue and the FIRS. This will resolve the problem of potential multiple taxation of income of workers on offshore oil platforms and inherent issues with taxing rights arising from controversies in respect of individuals living and working within the EEZ.

Click [here](#) to read and download the FIRS' Circular

10

Companies Engaged in Shipping, Air, Transport and Cable Undertakings



Tayo Ogungbenro
Partner

Femi Babem
Partner

The FIRS' Circular on the above subject ("the Circular") intends to clarify the basis for the taxation of International Companies engaged in Shipping, Air transport and Cable undertakings ("ICSACs" or "the Companies") in Nigeria, pursuant to the amendments made by Finance Act, 2020 to the CITA and the CGT Act.

Some of the key issues from the Circular are discussed below:

10.1. Liability to Income Tax

Section 13(1) of CITA provides that Nigerian Companies engaged in shipping or air transport business, or cable or wireless transmission undertakings are chargeable to tax on their worldwide income. Section 14(1) of CITA further provides guidance on the taxation of ICSACs in Nigeria.

The Circular, therefore, addresses taxation of NRCs engaged in shipping, air transport and cable undertakings only, and outlines rules for taxing the income of ICSACs in line with the relevant provisions of CITA.

10.2. Taxation of ICSACs in Treaty Situations

The Circular clarifies the sharing of taxing rights between Nigeria and the treaty partners pursuant to the *FIRS' Circular 2021/05 on Claim of Tax Treaties Benefits in Nigeria*. Please refer to Chapter One for our comments on the implementation of tax treaties for foreign airlines or shipping companies in Nigeria.

10.3. Tax Returns – Applicability of the Provisions of Section 55 of CITA

The Circular provides that a NRC that is involved in the carriage of passengers, mails, livestock or goods loaded into ships or aircraft in Nigeria, is required to file annual tax returns with the FIRS based on the provisions of Section 55 of CITA.

It is important to note that Section 55(1A) of CITA, which was introduced by Finance Act,



2020, provides that, "Where any company other than a Nigerian company derives profit from or is taxable in Nigeria under section 13(2) of this Act, such company shall be required to submit a return for the relevant year of assessment ..." (emphasis ours).

The focus of the above Section is on NRCs that derive profit from Nigeria, or are taxable in the country, under Section 13(2) of CITA. ICSACs are taxable under Sections 14 and 15 of the CITA, and not under Section 13(2) of the Act. Thus, the provisions of Section 55(1A) of the CITA, particularly the requirement for NRCs to submit audited accounts, should not apply to these companies.

Historically, international shipping and airline companies have generally filed their tax returns on deemed profits basis, notwithstanding the provisions of Section 55 of the CITA. This is because the companies are required under Section 14 of the CITA, to pay income tax on the full profits arising from their carriage of passengers, mails, livestock or goods loaded into ships or aircraft in Nigeria. Further, due to the peculiar nature of the shipping and aviation industries, and their low profit margins, the companies either filed returns reflecting a tax of 2% of their outbound freight income, or determined their taxable profits in Nigeria using their global financial statements and the adjusted profit ratio and depreciation ratio specified in Section 14(2) of the CITA.

These basis for tax filing has been adopted by international shipping and airline companies (and accepted by the FIRS) over the years due to the following practical challenges associated with preparing financial statements for their Nigerian operations and filing their tax computations on actual profits basis:

- i) There is no acceptable accounting standard for allocating and/ or recognizing the costs of vessels and aircraft calling at seaports/ airports in Nigeria and other countries, for Nigerian financial reporting purposes.
- ii) The basis for determining the portion of an ICSAC's operating costs (such as crew charges, fuel expenses, meals, etc.) that relates to its Nigerian operations, given that the full cost of operating a ship or aircraft in international traffic is not incurred exclusively in one country.
- iii) The basis for determining the capital allowances claimable on the highly mobile assets utilized by ICSACs in Nigeria and other jurisdictions. For example, what would be the basis for identifying the assets that would qualify as qualifying capital expenditure (QCE) on which capital allowances would be computed by an ICSAC's Nigerian operations? Would these be the assets that came into Nigeria during the relevant basis period, or assets that were in the country at the end

of the basis period? Would the related capital allowances computed on such QCE be claimed in full or apportioned? At what point will the assets be regarded as having been disposed of for Nigerian tax purposes?

Curiously, the Circular provides that capital allowances computation would be limited to *“qualified capital expenditures incurred for Nigerian operations only.”*

In our view, the FIRS may need to engage with stakeholders in the shipping and airline industries on these issues, with a view to providing detailed and pragmatic guidance on grey areas.

10.4. Determination of “Fair Percentage” for Taxation of ICSACs

Section 14(3) of CITA provides that where the provisions of Section 14(2) of the CITA cannot be satisfactorily applied, an ICSAC's profits to be deemed to be derived from Nigeria may be computed on a fair percentage of its outbound freight income derived from Nigeria. The basis for determining this fair percentage is not specified in CITA but is expected to reflect the business realities of the international shipping, airline and underground cable industries. This is especially important considering that these industries are generally recognized as high-risk, high-cost and low-margin industries.

Interestingly, the Circular indicates that the assessable profits of ICSACs will be computed at the rate of 20% of their outbound freight, when Section 14(3) of CITA is applied. This begs the question of whether the “fair percentage” stipulated in the Circular reflects the business realities of ICSACs and would ensure that the Companies are fairly taxed as contemplated by the CITA.

10.5 Non-applicability Section 14 of CITA to Non-freight Income

The Circular clarifies that Section 14 of the CITA is not applicable to non-freight income, such as income derived from demurrage and detention, local charges, stevedoring, clearing and forwarding, cargo handling, container leasing, storage, agency, etc. Hence, where a foreign shipping or air transport company earns such income from Nigeria, the profits derived by the company will be taxable under Sections 9 and 13(2) of CITA and will also be liable to VAT.

Further, the Circular includes provisions on the taxation of companies engaged in the leasing of vessels and ships on *“time or voyage basis”* or *“demise or bare-boat basis”*, or in the dry or wet lease of aircraft. In this regard, the Circular emphasizes that the income derived from the leases qualifies as non-freight income, and refers affected companies to the provisions of *FIRS Information Circular No. 2010/01*, published on 12th April, 2010, and titled *“Guidelines on the Tax Implications of Leasing.”*

The FIRS' position on the taxation of the income from leasing or charter of ships or aircraft would potentially raise questions on the appropriate characterization of such income in certain cases.

For instance, where a foreign airline is engaged by a foreign government to evacuate its citizens from Nigeria, would the income derived by the airline constitute freight income or lease income (non-freight income) for Nigerian tax purposes? Would the tax treatment depend on whether the foreign airline ordinarily engages in international traffic to and from Nigeria? Would the tax treatment change if the *“charterer”* were a Nigerian individual or logistics company, or even

the passengers to be airlifted? Would the characterization of the arrangement change if the chartered international flight was for in-bound carriage (rather than outbound carriage) of passengers?

In our view, the characterization of the income derived from leasing and charter arrangements may not be as straightforward as the Circular suggests. Thus, such arrangements may need to be evaluated based on the specific nature and characteristics of the contractual arrangement, and whether or not the vessel owner or *“lessor”* engages in international traffic in the ordinary course of its business, amongst other criteria.

10.6 CGT Implications for ICSACs

The Circular outlines the implications of Section 24 of the CGT Act as amended by Finance Act, 2020 to ICSACs. Please refer to Chapter Five for our comments on the implication of CGT on ship and aircraft used in international traffic.

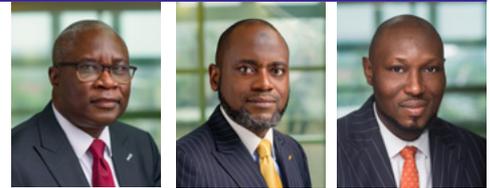
Comments

The issuance of the FIRS' Circular is a welcome development and aligns with global best practice in tax administration. However, it would be expedient for the FIRS to further engage with ICSACs and tax practitioners on the grey areas noted above in order to enhance the level of simplicity, certainty and fairness of the Companies' taxation in Nigeria and improve their voluntary compliance with relevant tax law provisions. Industry players may also need to actively engage the FIRS on these issues to arrive at workable solutions.

Please click [here](#) to read and download the Circular.

11

Guidelines for Filing of Income Tax Returns by Approved Enterprises within the Export Processing and Free Trade Zones



Wale Ajayi
Partner

Ayo Salami
Partner

Martins Arogie
Partner

The provisions of sections 58 and 59 of Finance Act, 2020 amended the provisions of sections 18(1)(a) of the Nigeria Export Processing Zones Authority Act (NEPZAA) and Oil and Gas Export Free Zone Act (OGEFZA). Pursuant to the amendment, Approved Enterprises (AEs) within the Export Processing Zones (EPZs) and Free Trade Zones (FTZs) are now required to file CIT returns with the FIRS in line with section 55(1) of the CITA (as amended).

Further to these amendments, the FIRS has issued *Information Circular No. 2021/15 of 3rd June 2021* ("the Circular") to "clarify the mandatory filing obligations of approved enterprises operating within the Zones" and "provide guidance on the tax obligations of approved enterprises operating in the relevant Zones".

We have provided below, a summary of the key provisions of the Circular and our comments on the implications for AEs operating in EPZs and FTZs:

11.1. Scope of licences issued by the Authority:

The Circular reiterates the incentives granted AEs and the implications of AEs who fail to satisfy the conditions precedent to the claim of the incentives as follows:

- Licences issued by Zone Authorities or Management are only valid **within** the relevant Zones. Therefore, AEs that carry on business in the customs territory are required to comply with the applicable tax laws.
- Unapproved enterprises or AEs with expired or withdrawn licences are liable to comply with all tax obligations imposed by the three tiers of Government, even if they have ongoing operations within the Zones. In other words, they would not enjoy the tax exemptions in the NEPZAA and OGFEZA.

11.2. Submission of tax returns by AEs to the FIRS

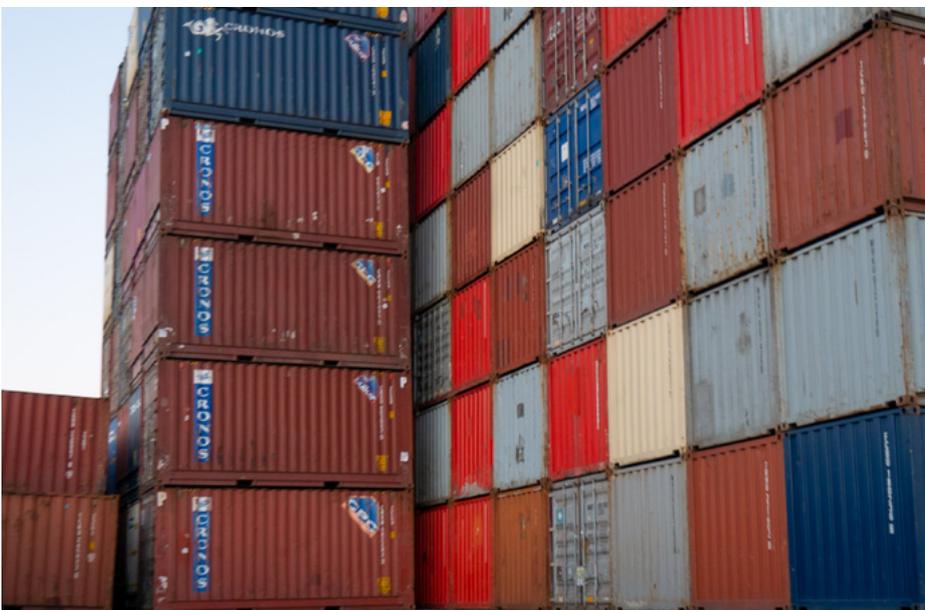
Pursuant to the amendment introduced by the Act, AEs are now obligated to file CIT returns, whether or not they are liable to CIT on their income, and the returns should be filed with or without notice from the FIRS.

11.3. Contents of the CIT returns to be submitted to the FIRS

The CIT returns required to be submitted by AEs would comprise the following:

- i) Audited financial statements
- ii) Tax and capital allowances computations
- iii) A true and correct statement in writing containing the amount of profit from each and every source, where applicable
- iv) Duly completed self-assessment form as prescribed by the FIRS and attested to by a Director or Secretary of the AE.
- v) Evidence of payment of the whole or part of the tax due (if any), into a collecting or designated bank.
- vi) Schedules showing the computation of profits arising from transactions carried out within the Customs Area and with other countries (i.e. outside the Customs Area).

The tax returns are to be submitted to selected Medium Tax Offices within the geographical zones where the offices are situated (please refer to our [Tax Alert Issue No. 4.2 of 2 April 2021](#) for details).



11.4. Other statutory obligations of AEs

In addition to filing income tax returns, AEs are also required, amongst other compliance obligations, to register with the FIRS and obtain a Tax Identification Number, maintain proper books of accounts and accurate records of employees, comply with TP regulations, pay income tax on transactions within the customs territory, deduct and remit WHT from custom territory transactions and PAYE tax from their employees' emoluments.

11.5. Penalty for non-compliance

Section 18(1)(a) of the NEPZAA and OGEFZA (as amended) stipulate that the penalties enumerated in the CITA and FIRS Establishment Act would apply for failure of AEs to comply with the provisions of the amendments.

Comments

The overarching objectives of the Act's amendments to the NEPZA and OGEFZA are to facilitate transparency and effective monitoring of AEs' transactions, prevent abuse of the exemption status granted to them and ensure that no tax revenue due to the government is lost. It is pertinent to note that AEs' tax exemption status remains intact, to the extent that their activities are performed within the EPs and FTZs.

The FIRS' position on the scope of licences is consistent with the decision of the Tax Appeal Tribunal (TAT) in *Nigerdock Nigeria Plc FZE v FIRS*. The TAT held that the tax exemption provided under sections 8 and 18(1) of the NEPZAA would only apply to FTZ operators, where their operations are exclusively executed within the Zones. The TAT also held that FTZ operators carrying on revenue-generating activities outside the Zones are liable to pay the taxes applicable to such activities.



While we commend the FIRS for providing much-needed guidance on this matter, a few issues identified below would need more clarity:

- i) There may be concerns around the requirement for AEs to present schedules showing profits arising from transactions with other countries as part of their tax returns, especially since this is neither expressly required by Section 55 of the CITA⁴ nor the charging Section 9 of the same law⁵. It would therefore appear that the FIRS may be overreaching its powers by imposing an obligation on AEs that CITA has not prescribed. In this regard, the exclusion of this schedule should not invalidate a tax returns as the audited accounts would typically show the split of income earned within and outside the FTZ.
- ii) The FIRS have via the Circular also included the requirement for AEs to comply with TP Regulations, as part of "other statutory obligations

of AEs." Clearly, the amendment introduced by the Act is restricted to the provision of Section 55(1) of CITA alone and should, therefore, not be extended to TP Regulations. Is the FIRS taking the position that since the entire TP system rests on the operation of CITA, then any amendments to an extant law which brings AEs under the purview of section 55(1) will automatically imply full application of TP Regulations to AEs? We concede that AEs would most likely engage in intercompany transactions worthy of reporting under the Nigerian TP Regulations. However, the FIRS should reconsider its position in the absence of any express inclusion of the requirement to comply with TP Regulations in the amendment to relevant section 18(1)(a) of NEPZAA and OGEFZA.

Please click [here](#) to read the FIRS's Circular.

⁴We suspect that this was done to place AEs on the same pedestal as Nigerian companies, whose profits are deemed to accrue in Nigeria wherever they have arisen and whether or not they have been brought into or received in Nigeria.

⁵Section 9 only requires tax to be paid upon the profits of any company "accruing in, derived from, brought into or received in Nigeria". Thus, where profits from transactions with other countries do not meet these four criteria, it is outside the Nigerian tax net.

12

Amendment to Section 16 of Companies Income Tax Act in Relation to Taxation of Insurance Companies



Nike James
Partner

This Circular updates and replaces the *FIRS' Information Circular No. 2020/08* of 29 April 2020. It also provides FIRS' guidance on the implementation of the revised rules for the taxation of life and non-life insurance businesses in Nigeria.

The Circular restates the amendments from Finance Act, 2019 on the removal of restrictions on the carrying forward of losses; deduction of reserve for unexpired risks based on time apportionment basis; tax deductibility of claims and outgoings; and the removal of the onerous minimum tax rules that applied exclusively to insurance businesses. For more information on the above, please refer to our *Tax Alert, Issue No. 6.8 of 18 June 2020* to access and download our e-book on *Matters Arising from Implementation of Finance Act, 2019*.

Additionally, the Circular discusses the amendments made by Finance Act, 2020 to the provisions of Section 16 of CITA as follows:

- Definition of gross premium for non-life insurance business for minimum tax purposes
- Definition on gross income for life insurance business for minimum tax purposes
- Temporary reduction in minimum tax rate from 0.5% to 0.25%

We have provided our comments on the key issues discussed in the Circular below:

12.1 Definition of Gross Premium for minimum tax purpose

12.1.1. Non-Life Insurance Business

Finance Act, 2019 provides for a minimum tax of 0.5% of gross premium payable for non-life insurance businesses for any year of assessment. However, the absence of a definition for the term "gross premium" in CITA created a debate on what should constitute gross premium for minimum tax purpose. To manage this gap, the FIRS had defined gross premium in its Circular of April 2020 as the "total premium received and receivable," i.e., gross premium written (excluding premium returned to the insured). The definition proved inadequate as it was interpreted to include premiums for risks underwritten outside the current financial year or underwritten by other reinsurers.

Subsequent amendments by Finance Act, 2020 sought to resolve this issue by introducing a new subsection 16(13), which defines "gross premium" as "total premiums written, received and receivable, excluding unearned premium and premium returned to the insured". This clarification consequently eradicated the risks of subjecting the income that was not earned by the insurer or that does not relate to the current period, to minimum tax. However, the amendment failed to address the issue relating to premium paid outwards to reinsurers for underwriting risks that cannot be covered by the insurance company. It is important to note that such outward premium does not constitute incomes to the insurance businesses and thus, should be excluded from the definition of gross premium for minimum tax computations.

Further, notwithstanding the amendments in Finance Act, 2020, the



application of minimum tax provisions on non-life insurance companies is still not the same as with other companies taxed under the CITA. While other companies are permitted to exempt franked investment income for minimum tax purpose, non-life insurance companies do not enjoy the same incentive. This has resulted in an uneven playing field for non-life insurance companies when compared to other businesses governed by the provisions of the CITA.

It is, therefore, expected that the above issue will be considered and addressed in the next Finance Act.

12.1.2. Life Insurance Business

Similar to the above, Finance Act 2020 defines gross income for life insurance businesses as *“total income earned by a life insurance business including all investment income (excluding franked investment income), fees, commission and income from other assets but excluding premiums received and claims paid by reinsurers.”*

This definition is clearly an improvement of the erstwhile definition contained in Finance Act, 2019 and eliminates the issues of taxation of franked investment income, premiums received, and claims paid by reinsurers.

However, in providing clarification on deduction of the exempt incomes from the gross income, the FIRS has introduced a condition for deduction of franked investment income, especially dividends

which have suffered WHT deduction at source. The condition requires the insurance company to provide evidence of WHT deduction on the dividend. Although this condition is not unreasonable, given that *‘franked investment income’* is an income that has suffered WHT deduction, the FIRS should note that investors do not always receive the WHT credit notes for deduction on their dividend income. Therefore, while the companies or their registrars might have remitted the WHT on the total dividends paid to their shareholders to the relevant tax authorities, the beneficiaries do not receive the relevant WHT credit notes as at when due. It is hoped that the implementation of the TaxPro-Max system will improve the ease of processing and issuance of WHT credit notes to beneficiaries to avoid unnecessary disputes regarding the claim of the incentive introduced by the Finance Acts.

In the meantime, it behoves the affected insurance companies to proactively request and collect the evidence of WHT deductions on their dividend income from their investee companies to ensure that they benefit from the incentive.

12.2 Inclusion of Dividend Distribution from Actuarial Revaluation in Gross Income for Life Insurance Business

The FIRS retained the *“dividend distribution from actuarial revaluation,”* as one of the elements of gross income for a life insurance business in the format prescribed in its Circular.

It should be noted that the income was only relevant under the erstwhile accounting standard (i.e., Statement of Accounting Standard) where there was a separation between policy holders and shareholders' funds, and required the *‘distribution’* of surpluses from the former to the latter fund. However, with the adoption of the International Financial Reporting Standards, the distributions from actuarial revaluation no longer applies. Therefore, the inclusion of the income in the tax format of life insurance companies and the provision of Section 16(3) of CITA appear obsolete. We urge the FIRS to update its format to reflect current realities in subsequent amendments and Circulars.

Comments

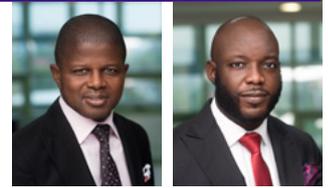
The periodic release of Circulars by the FIRS to provide guidance to taxpayers on amendments introduced by Finance Acts demonstrates significant progress in Nigerian tax administration. However, while the amendments introduced, so far, have significantly resolved the onerous provisions for insurance businesses, it is hoped that the FIRS will push for legislative amendments to address the issues identified above.

Please click [here](#) to read and download the Insurance Taxation Circular.



13

Tax Implications of Operation of Real Estate Investment Companies in Nigeria



Tayo Ogungbenro
Partner

Femi Babem
Partner

The FIRS *Information Circular No: 2021/17* replaces the previous Circular 2020/07 on the above subject and provides guidance on the application of the provisions of the CITA with respect to the operations of Real Estate Investment Companies (“REIC” or “the Company”) in Nigeria.

Prior to the enactment of Finance Act, 2019, REICs were assessed to CIT under the general tax rules in CITA. The strict application of the general rules did not consider the peculiar operating structure of REIC and results in disputed tax positions for the companies. Finance Act, 2019, therefore, introduced specific framework for taxation REICs in Nigeria.

We have highlighted the key provisions of the Circular below:

13.1. Profits/incomes exempted from CIT

Section 23 of the CITA provides that dividend and rental income earned by a REIC and paid out under a qualified Real Estate Investment Scheme (REIS) are exempt income for CIT purpose. Therefore, the incomes shall be deducted from the total dividend paid in determining the net amount that will be liable to CIT. However, other incomes, such as gains from disposal of assets and fees or commission not related to REIS, will be subject to CIT. The primary conditions for a qualified REIS are:

- that not less than 75% of the dividend and rental income earned annually should be distributed to the shareholders
- the distribution to the shareholders must be done within 12 months following the end of the financial year in which the incomes were received.



The above conditions appear to stem from the Security and Exchange Commission (SEC) rules guiding the operations of REIS in Nigeria. The distribution criteria for REIS as specified in Rule 510 of the SEC’s Consolidated Rules and Regulations (as amended) provides that REIS must make an annual distribution of not less than 75% of its rental or dividend income. Therefore, if the dividend or rental income earned by the REICs is not distributed to shareholders as provided above, such incomes would not qualify as tax-exempt income.

While the Circular reaffirms the provisions of Section 23 1(s) of the CITA, it does not provide clarity on the timing of claim of the tax exemption, i.e., whether the claim should be done on an actual year basis or a preceding year basis. Our view on this issue is that the exemption can be claimed in the

relevant tax year that the dividend is declared by the REIC, subject to the exemption conditions provided in the law and availability of the necessary supporting documents.

13.2. Deductible expenses

The Circular clarifies that dividend paid by the REICs to its shareholders would qualify as a deductible expense in ascertaining the assessable profits of the REIC. However, the portion of the dividend paid to shareholders that is related to any exempt rental and dividend incomes would not qualify as a deductible expense. Further, expenses incurred by a REIC for the purpose of earning any exempt rental and dividend incomes would not qualify as a deductible expense.

However, the Circular failed to provide guidance on how it intends to administer the expense deductibility rule to REICs.

13.3. Applicability of the excess dividend tax (EDT) provision to REIC

The amendments to Section 19 of the CITA by Finance Act 2019, provides that distribution made by a REIC to its shareholders are exempt from EDT, regardless of whether they are paid out of current or prior year's profit. However, the Circular limits this exemption to only REICs that fulfil the conditions specified in Section 23 of CITA, including the redistributing at least 75% of the dividend and rental income from a REIS to shareholders within 12 months from when the income was received.

Clearly, the Circular contradicts the provisions of Section 19 of the CITA, as Section 19 of CITA which does not impose any restriction for exemption of income for EDT purposes. Further, the conditions imposed by the Circular appear moot given that REIC that does not meet the conditions for exemptions specified in Section 23 of the CITA will be required to pay CIT on its total profits. Consequently, the provisions of Section 19 would not apply to any dividend distributed thereafter.

13.4. WHT on dividend distributed/ paid by a REIC

The Circular provides clarification on the WHT implications for dividends distributed by a REIC as follows:

- dividend distributed or paid by a REIC from a qualified REIS to a REIC shareholder would be exempted from WHT.
- dividend distributed or paid by a REIC from a qualified REIS to a non-REIC shareholder would be liable to a 10% WHT.
- dividend distributed or paid by a REIC from a non-qualified REIS to its shareholder would be liable to a 10% WHT.

Any dividend received after deduction and remittance of the appropriate WHT would be considered as franked investment income in the hands of the shareholder, in line with Sections 80 (5) and (6) of CITA.

Comments

REIS provides an attractive investment vehicle in Nigeria as evidenced by the emergence of digital real estate investment platforms in recent years. Therefore, the issuance of guidelines to clarify the tax implications for REICs is a step in the right direction. However, we hope the FIRS will address the contentious areas highlighted above to avoid any potential tax disputes. This will further improve the attractiveness of the sector to both local and foreign investors.

Please click [here](#) to read and download the REIC Circular.



14

Provisions of Finance Act, 2020 relating to Personal Income tax



**Wale
Ajayi**
Partner

The FIRS' PIT Circular provides clarification on the provisions of Sections 6, 20, 33, 37, 48, 73, 86, 89, 93, 106A and 108 of PITA (as amended).

We have provided below, a summary of the key aspects of the Circular:

14.1. Profit of a Trade or Business of Furnishing of Services Carried out by a Non-Resident.

The Circular reemphasizes the provision of the new Section 6A of the PITA that 10% WHT suffered by NRIs, executors and trustees will constitute the final tax on income earned from technical, management, consultancy or professional services provided to a person resident in Nigeria, to the extent that they do not have SEP in Nigeria. Finance Act, 2020 requires the HMofBNP to define what would constitute SEP for NRIs in Nigeria through an Order. However, the Order is yet to be published. Expectedly, the Circular could not address the conditions that would qualify an NRI for SEP in Nigeria. We expect the FIRS to update the Circular once the SEP Order for persons taxable under the PITA is issued by the HMofBNP.

Nonetheless, the Circular clarifies that the Nigerian beneficiary of the services provided by the NRI will be responsible for the deduction and remittance of the WHT due at appropriate rate to the FIRS.

14.2. Deductions Allowed - Contribution to Pension, Provident or Retirement Fund

In line with Finance Act, 2020, the Circular reiterates that contributions to a pension, provident or other retirement benefits fund, society or scheme, recognised under the Pension Reform Act are allowable deductions for PIT purposes.



14.3. Gross Income

Finance Act, 2020 introduced "gross income" to replace the term gross emoluments for the purpose of PIT computations. Section 33(2) of PITA defines gross income as "income from all sources less non-taxable income, franked investment income, National Housing Fund contribution, National Health Insurance Scheme contribution, life assurance premium, National Pension Scheme contribution, gratuities, allowable business expenses and capital allowances."

Based on the amended definition, the Circular provides the format for determining the gross income for employees and individuals with other sources of income for purpose of computing the PIT due. However, in the illustration provided, the FIRS prorated the annual tax payable by an individual from employment income by twelve months to arrive at the monthly tax remittances. The method adopted by the FIRS would only be accurate where the employee earns a fixed monthly salary throughout the year. However, where the monthly salary of the employee varies, it would be appropriate to compute the PIT payable on a monthly basis.

14.4. Insurance Premium Relief

Finance Act, 2020 introduces Section 33(3) in the PITA which allows an individual to claim the annual life insurance premium or contract of deferred annuity paid by him on his life, or the life of his spouse, as an allowable deduction for PIT purposes.

The Circular states that the individual can claim as an allowable deduction, the premium paid for his life insurance and or that of his spouse. This clarification implies that an individual can claim both his and his spouse's premiums contrary to the provisions of Section 33(3) of PITA. However, the Circular is silent on whether both spouses can claim a single premium in any year of assessment.

14.5. Exemption of Minimum Wage from Tax

Finance Act, 2020 exempts the income earned by individuals with minimum wage or less from the payment of PIT.

This clears the ambiguity of determining the minimum wage exemption by indicating the annual equivalent of ₦360,000. This implies that if an employee with a monthly minimum wage of ₦30,000 earns above ₦30,000 by way of overtime in any month, his entire annual income will be subject to PIT.

Comments

Most of the clarifications issued by the FIRS in its Circular are in line with the provisions of PITA relating to the taxation of individuals.

Employers are advised to review and update their payroll systems to assess the impact of the new provisions on their employees, payroll compliance and reporting obligations for compliance purposes.

Click [here](#) to read and download the FIRS Circular

Conclusion

It should be noted that circulars, guidelines and regulations of government agencies, such as the FIRS, merely provide their view and interpretation of the related statutory provisions on a subject matter. Hence, such circulars and publications are not legally binding and enforceable. The tax laws remain the enforceable legal basis for taxation in Nigeria. Therefore, taxpayers must ensure strict compliance with the relevant laws to avoid any sanctions.

In light of the foregoing, it is hoped that, where there is a conflict between any of the FIRS' Circulars and the applicable tax laws as highlighted in this publication, the FIRS will revise the affected Circulars to fully align its positions with the provisions of the tax laws.

Please click the links below to access other related publications:

- [Finance Act, 2019: Impact Analysis e-book](#)
- [Matters arising from implementation of Finance Act, 2019](#)
- [Finance Act, 2020: Impact Analysis e-book](#)



Appendix

- *Information Circular on the Claim of Tax Treaties Benefits in Nigeria*
- *Guidelines for Filing Income Tax Returns by Foreign Companies*
- *Taxation of Non-Residents in Nigeria*
- *Clarification on the Implementation of the VAT Act*
- *Clarification on the Provisions of the CGT Act*
- *Clarification on Commencement and Cessation Rules, and Business Reorganisation: - Sections 29 of CITA, 32 of CGTA, Section 24 & 25 of PITA and 42 of VATA (as amended by Finance Act)*
- *Clarifications on Sundry provisions of Finance Act 2020 relating to Companies Income Tax Act*
- *Clarifications on the Provisions of the Stamp Duties Act*
- *Clarification on the Taxation of Seafarers and Onshore or Offshore Platform Workers*
- *Taxation of Companies Engaged in Shipping, Air, Transport and Cable Undertakings*
- *Guidelines for Filing of Income Tax Returns by Approved Enterprises within the Export Processing and FTZs*
- *Clarification on the Amendment to Section 16 of CITA in Relation to Taxation of Insurance Companies*
- *Circular on Tax Implications of Operation of 'REIC' in Nigeria*
- *Clarification of the Provisions of Finance Act, 2020 relating to PIT*



Key Contacts



Wole Obayomi

Partner & Head

Tax, Regulatory & People Services
KPMG in Nigeria
T: +234 803 402 0946
E: wole.obayomi@ng.kpmg.com



Adewale Ajayi

Partner & Head

Tax, Energy & Natural Resources and
Managed Services
KPMG in Nigeria
T: +234 803 402 1014
E: adewale.ajayi@ng.kpmg.com



Ajibola Olomola

Partner & Head

Tax, Deal Advisory and M&A
KPMG in Nigeria
T: +234 803 402 1039
E: ajibola.olomola@ng.kpmg.com



Tayo Ogungbenro

Partner & Head

Tax, Consumer and Industrial Markets
& Transfer Pricing Services
KPMG in Nigeria
T: +234 803 402 1016
E: tayo.ogungbenro@ng.kpmg.com



Ayo Salami

Partner

Tax, Energy & Natural Resources
KPMG in Nigeria
T: +234 802 864 6604
E: ayo.salami@ng.kpmg.com



Olanike James

Partner & Head

Tax, Financial Services, Deal Advisory
and M&A
KPMG in Nigeria
T: +234 803 402 1051
E: nike.james@ng.kpmg.com



Olufemi Babem

Partner

Tax, Energy & Natural Resources and
Consumer & Industrial Markets
KPMG in Nigeria
T: +234 803 975 4131
E: olufemi.babem@ng.kpmg.com



Martins Arogie

Partner,

Tax, Energy & Natural Resources
KPMG in Nigeria
T: +234 703 403 6318
E: martins.arogie@ng.kpmg.com

home.kpmg/ng

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