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Matters Arising from Implementation of Finance Act, 2021

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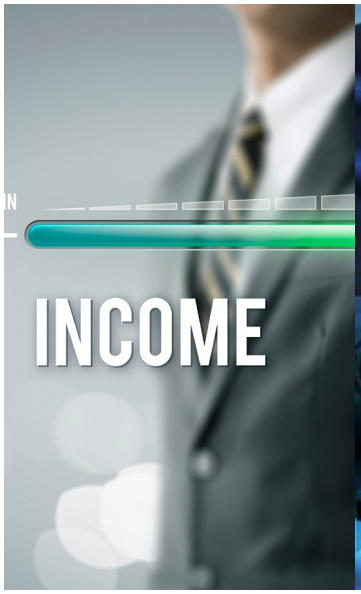

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Preface

The enactment of Finance Act, 2021 reinforces the Federal Government's commitment to periodic review of the extant tax laws and progressive changes to Nigeria's fiscal frameworks to align them with changing economic realities and global best practices.

We have reviewed the vast changes to the extant laws by the Act and provided a comprehensive analysis of their impact on taxpayers in various sectors of the Nigerian economy in our e-book: ***Finance Act, 2021: Impact Analysis*** published in February 2022.

In April 2022, the Federal Inland Revenue Service commendably updated its earlier Information Circulars of June 2021 issued further to Finance Act, 2020 with changes made by Finance Act, 2021.

The Information Circulars provide guidance on the implementation of Finance Act, 2021 and relevant parts of Finance Act, 2020 by way of update. We have summarized the provisions of each Circular and provided commentaries thereon in each chapter of this publication. This publication should be read in conjunction with our e-book on ***Matters Arising from Implementation of Finance Act, 2020.*** For quick reference, we have provided the weblink to each Information Circular at the end of each Chapter of the publication and the Appendix for the convenience of our readers.

We hope the fiscal authorities will find our commentaries useful on matters arising from the implementation of Finance Act, 2021 and its predecessor with a view to aligning the provisions of some of the Circulars with the Finance Acts and initiating future reforms.

As usual, we welcome feedback from our readers on this publication. Please reach out to us by email via ***ng-fmtaxenquiries@ng.kpmg.com***

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Glossary

AE	-	Approved Enterprise
CGT	-	Capital Gains Tax
CIT	-	Companies Income Tax
DTA	-	Double Tax Agreement
DTT	-	Double Tax Treaty
EDT	-	Excess Dividend Tax
EEZ	-	Exclusive Economic Zone
EMT	-	Electronic Money Transfer
EPZ	-	Export Processing Zone
FA	-	Finance Act
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
IFRS	-	International Financial Reporting Standard
LFN	-	Laws of the Federation of Nigeria
MNE	-	Multinational Enterprise
MTO	-	Medium Tax Office
NEPZA	-	Nigeria Export Processing Zones Authority
NIPOST-		Nigerian Postal Service
NRC	-	Non-resident Company
NRI	-	Non-resident Individual
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
TIN	-	Tax Identification Number
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 2022/01 - 14 ("the Circulars"):

- Clarification on Filing and Payment of Companies Income Tax ("Tax Filing Circular")
- Sundry provisions of the Finance Act 2020 relating to Companies Income Tax Act (CIT ACT) ("CIT Circular")
- Clarification on the Exemption of Small Companies from Income Tax ("Small Companies Taxation Circular")
- Clarifications on the Provisions of Capital Gains Tax (CGT) Act ("CGT Circular")
- Clarification on the Tax Implications of the Operation of Regulated Securities Lending Transaction ('SEC Lending') In Nigeria ("SEC Circular")
- Guidelines on the Tax Treatment of Non-Governmental Organisations (NGOs) ("NGO Circular")
- Clarification on Section 16 of Companies Income Tax Act in relation to Taxation of Insurance Companies ("Insurance Taxation Circular")
- Clarification on the Implementation of the Value Added Tax (VAT) Act ("VAT Circular")
- Information Circular for the Administration of the National Agency for Science and Engineering Infrastructure Levy ("NASENI Circular")
- Information Circular for the Administration of Nigeria Police Trust Fund Levy ("NPTF Circular")
- Information Circular for the Administration of the Tertiary Education Tax ("TET Circular")
- Taxation of non-residents in Nigeria ("NRC Circular")
- Provisions of the Finance Act, 2021 relating to Personal Income tax ("PITA Circular")
- Information Circular on the Claim of Tax Treaties Benefits and Commonwealth Tax Relief in Nigeria ("Tax Treaties Circular")

The FIRS also issued the following Public Notices in relation to amendments introduced by Finance Act, 2021:

- Public Notice on the Mandate of the FIRS as the primary agency of the Federal Government for Tax Administration
- Public Notice on Deployment of Automation of Tax Administration Solution
- Public Notice on Charge of CGT on Proceeds from Disposal of Shares Pursuant to the Amendment of Section 30 of the CGT Act

The Circulars and Public Notices are aimed at providing guidance to stakeholders on the interpretation of the amendments to the extant tax laws by Finance Act, 2021 ("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.

Chapter One

Clarification on filing and payment of Companies Income Tax

The Federal Inland Revenue Service (FIRS) Information Circular No. 2022/01 ("the Circular" or "the FIRS Circular") provides guidelines on relevant provisions of the Companies Income Tax (CIT) Act relating to taxation of companies and payment of additional liabilities arising from an assessment.

The key issues from the Circular are discussed below:

1.1. Scope of Profits of a Nigerian Company that is subject to income tax in Nigeria

Based on the provisions of Sections 9 and 13(1) of CIT Act, Nigerian companies (i.e., companies incorporated in Nigeria) are subject to income tax in Nigeria on their worldwide income whether or not such income accrued in, or was derived from, brought into, or received in Nigeria. The Circular correctly highlights this point and illustrates how this interpretation would apply to passive incomes, such as rent, dividends, and interests, that are earned outside Nigeria and retained in foreign bank accounts outside Nigeria.

However, the Circular did not make any reference to the exemption in Section 23(k) of CIT Act in respect of passive incomes that are brought into Nigeria through government-approved channels. Thus, taxpayers that are not familiar with the exemption may erroneously conclude that such passive incomes would always be taxable in Nigeria.

Accordingly, it is important to clarify that Section 23(k) of CIT Act specifically exempts dividend, interest, rent, or royalty derived by a company from a country outside Nigeria, from Nigerian CIT where such passive incomes are brought into Nigeria through "Government approved channels".

CIT Act defines "Government approved channels" as *"the Central Bank of Nigeria and any bank or corporate body appointed by the Minister as authorised dealer under the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act or any enactment replacing that Act."*

Therefore, even though the provisions of Sections 9 and 13(1) of CIT Act apply to the worldwide income of Nigerian companies, some of the income streams may not suffer income tax in Nigeria where they meet the conditions for income tax exemption.

1.2 Timeline for payment of income tax liabilities

Section 3.0 of the Circular highlights the fact that Section 77 of CIT Act permits companies to pay the income tax due in respect of a self- assessment in one lump sum or in instalments, provided the final instalment is paid by the due date of filing.

The FIRS Circular also states that payment of any tax due on account of an additional assessment, revised assessment, or any other instance where a notice of assessment is served on a company, must be made within 30 days of service of such notice. Therefore, taxpayers opting for instalment payment of a self-assessed or FIRS-assessed tax liability must ensure that the final instalment is paid by the 30th day of service of the notice. However, where such taxpayers wish to apply for an extension of the payment timeline, they must submit the application before the expiration of the initial due date, and state the proposed instalment payment plan with evidence of payment of at least the first instalment. In this instance, penalty and interest charges will start to accrue after the initial due date of payment even where the instalment payment plan is approved by the FIRS.

It is important to clarify that the FIRS' comments in Section 3.0 of the FIRS Circular on the timeline for the payment of taxes due in respect of an additional assessment, should be read together with the FIRS' clarification in Section 3.1.1 of the Circular on collection of tax in case of an objection or appeal. This is because the statutory 30-day period for the payment of assessed tax liabilities only applies to assessments that are not being contested by a taxpayer or that have otherwise become final and conclusive.

However, Section 77(2) of CIT Act specifically provides that the collection of tax in any case where notice of an objection or appeal has been given by a taxpayer shall remain in abeyance until such objection or appeal is determined. Therefore, taxpayers are not under any obligation to settle a FIRS assessment notice for additional tax liability in respect of which a valid notice of objection or appeal has been filed.

Notwithstanding, it is imperative that companies settle the undisputed portion of any assessment notice that is being contested within 30 days of service of the notice of assessment, and include the evidence of payment of that undisputed tax liability in their notice of objection or appeal.

Commentary

We commend the FIRS for providing clarification on the requirements for payment and filing of CIT returns as provided in the Act. The timelines for filing and payment of CIT should be noted and respected by taxpayers to avoid payment of penalties and interest for late filing and payment. .

Please click **here** to read and download the Circular.

Chapter Two

Clarification on sundry provisions of Finance Act relating to Companies Income Tax Act

The FIRS' Information Circular No. 2022/02 ("the Circular" or "the FIRS Circular") replaces Information Circular No. 2021/11 of June 2021 and provides updated guidance on the implementation of sundry provisions of Finance Act, 2021 as it relates to CIT Act.

We have highlighted the key updates to the Circular below:

2.1. Exclusion of educational institutions from companies exempted from income tax

Section 23(1)(c) of CIT Act previously exempted from income tax, the profits of "any company engaged in ecclesiastical, charitable or educational activities of a public character in so far as such profits are not derived from a trade or business carried on by such company".

Section 7(a) of Finance Act, 2021 amended the above provision by deleting the reference to companies engaged in "educational activities" as a specific category of organizations whose profits are exempted from income tax. Essentially, based on the amendment, profits derived by educational institutions and other similar organizations from educational activities will no longer qualify for income tax exemption unless such profits are exempted by another provision of CIT Act.

In this regard, Section 5.0 of the FIRS Circular has clarified that companies that engage in educational activities that are deemed to be "charitable in nature" may benefit from the income tax exemption applicable to "charitable activities" under Section 23(1)(c) of CIT Act where such companies are able to demonstrate that their activities are charitable in nature. Based on the Circular, all the following conditions must be met for an educational activity to qualify as being "charitable in nature":

i. The company solves educational needs on grounds of kindness and benevolence,

ii. The company does not charge fees for its services, and

iii. Any surplus/profit derived by the company is ploughed back into its educational activities.

Consequently, educational institutions that are profit-oriented (i.e., that are capable of distributing profits to their shareholders) will no longer benefit from the tax exemption provided under Section 23(1)(c) of CIT Act. Please refer to Chapter Six of this publication for further comments on this amendment in relation to the FIRS' Guidelines on the Tax Treatment of Non-Governmental Organisations.

2.2. Profits on goods exported

Section 23(1)(q) of CIT Act exempts the profits of a Nigerian company in respect of goods exported from Nigeria from income tax, provided that the proceeds of such exports are used for the purchase of raw materials, plant, equipment and spare parts.

Due to the broad nature of this exemption, it was available to companies engaged in Midstream and Downstream petroleum operations, which are liable to CIT. Moreover, following the enactment of the Petroleum Industry Act, 2021, companies engaged in Upstream petroleum operations are now also generally liable to CIT on their petroleum operations and could be eligible for tax exemption on their crude oil exports.

Consequently, Section 7(a) of Finance Act, 2021 has streamlined the eligibility criteria in the above section by amending it to exclude companies engaged in Upstream, Midstream or Downstream petroleum operations from the scope of the CIT exemption conferred by the section.

Section 6.0 of the Circular highlights the above restriction and has clarified that the exemption in Section 23(1)(q) of CIT Act will continue to apply to companies involved in non-petroleum operations that use the output of companies engaged in petroleum operations as raw materials to produce goods that are subsequently exported from Nigeria. CIT will accrue proportionately on any portion of export proceeds that is not utilized in the manner prescribed in the section. Therefore, to ascertain the portion of export proceeds that is exempted from CIT, the Circular requires qualifying companies to maintain a schedule and evidence of utilisation of their export proceeds.

It is noteworthy that the expenses incurred in deriving tax-exempt export profits would not be tax-deductible for income tax purpose.

2.3. Restriction of the claim of capital allowance on qualifying capital expenditure partially utilized in generating taxable profits

Prior to the enactment of Finance Act, 2021, companies were at liberty to claim capital allowances on all qualifying capital expenditure (QCE) utilised for the generation of their taxable and non-taxable business income, as there was no specific provision to the contrary in CIT Act.

However, based on the amendments to Section 31 of CIT Act, any QCE used to generate both taxable and non-taxable income will no longer be fully deductible (by way of capital allowances) from the assessable profits of the company, where the percentage of non-taxable income to total income exceeds 20%. In such an instance, the amount of QCE that can be allowed as a deduction (in the form of capital allowances) will be restricted to the proportion of QCE that is used to generate the taxable income of the company.

One area of controversy that has been noted by taxpayers and tax practitioners regarding the above amendment, is whether the restriction on the claim of capital allowances would apply to a company's entire QCE, or to only the QCE pertaining to assets acquired with effect from 1 January 2022 (i.e., the effective date of Finance Act, 2021).

Based on Section 10.0 of the Circular, the FIRS' view on this issue is that the restriction of capital allowances will apply to an affected company's entire QCE, and that such a company would be entitled to carry forward the unutilised portion of its capital allowances to future tax years.

2.4. Clarification on minimum tax relief

In a bid to mitigate the impact of COVID 19 on the Nigerian economy, a reduced minimum tax rate of 0.25% of gross turnover less franked investment income was introduced by Finance Act, 2020. This reduced rate was declared to be applicable to tax returns prepared and filed for any year of assessment (YOA) falling due between 1 January 2020 and 31 December 2021.

To provide further clarity on the application of the reduced minimum tax rate, Finance Act, 2021 further amended the minimum tax provision in Section 33 of CIT Act to the effect that:

i. the reduced minimum tax rate of 0.25% shall be applicable to tax returns prepared and filed with respect to FYs ending on any date between 1 January 2019 and 31 December 2021, both days inclusive (Section 33(2)(b) of CIT Act as amended by Section 10 of Finance Act, 2021).

ii. taxpayers have a right of election to decide what periods to claim the reduced minimum tax rate of 0.25% out of the two available periods from 1 January 2019 to 31 December 2020 or 1 January 2020 to 31 December 2021.

Furthermore, in line with Section 55(8) of CIT Act (as amended by Section 12 of Finance Act, 2021), any company that claims the minimum tax relief but fails to file the tax returns as and when due will be liable to pay as penalty for late filing, an amount that is equal to the value of the minimum tax relief sought.

One of the concessions granted by the FIRS to taxpayers to limit the impact of the Covid-19 pandemic on taxpayers, was the extension of the due date for the submission of the income tax returns for 2020 YOA. Section 12.1 of the Circular clarifies that taxpayers that submitted their 2020 YOA CIT returns within the timelines covered by any of the following three tax filing extensions, would not be liable to the above late filing penalty:

i. First extension which ended on 31 July 2020

ii. Second extension which ended on 31 August 2020

iii. Third extension which ended on 31 December 2020.

According to the Circular, any returns not covered by the above extensions shall attract appropriate penalties as stated above.

It is, however, worthy of note that the FIRS also granted CIT filing extensions in 2021. The deadline for the submission of 2021 YOA income tax returns (by companies with a 31 December year-end) was extended to 31 July 2021 by *FIRS Public Notice dated 1 July 2021*, on account of the numerous teething issues associated with the filing of returns on the FIRS' TaxPro-Max electronic tax filing platform. The FIRS also issued a *Public Notice dated 8 October 2021* by which it granted a waiver of late returns penalty and interest charges to taxpayers that file their 2021 YOA income tax returns by 30 November 2021. Consequently, it is our view that taxpayers that took advantage of the extended filing deadline should not be liable to any late returns penalty.

Unfortunately, no reference was made in the Circular to taxpayers' ability to enjoy tax exemption from the late filing penalty regime specified in Section 55(8) of CIT Act, where the affected 2021 YOA CIT returns were submitted by the FIRS' extended filing deadline in November 2021. Consequently, affected taxpayers may need to engage with the FIRS on this issue.

Commentary

Most of the clarifications issued by the FIRS in its Circular are in line with the provisions of CIT Act relating to the taxation of companies. However, we hope that the FIRS will address the contentious areas highlighted above to avoid any potential tax disputes.

Please click **here** to read and download the updated Circular

Chapter Three

Clarification on the exemption of small companies from income tax

The FIRS Information Circular No.: 2022/03 on the Exemption of Small Companies from Income Tax ("the Circular") provides clarification on the implication of the exemption status of small companies and their obligations under the CIT Act.

We have summarized below, our comments on the key issues addressed in the Circular:

3.1. Tax exemption status

Finance Act, 2019 amended Section 23 of the CIT Act to exempt the profits of small companies, being companies with an annual gross turnover of less than ₦25million, from CIT. Finance Act, 2020 further introduced the exemption of small companies from Tertiary Education Tax under the Tertiary Education Trust Fund (Establishment, etc.) Act.

Notwithstanding the tax exemption, small companies are required to fulfil the following obligations to be eligible for the exemption and avoid resultant penalties and "best of judgment" assessments by the FIRS:

i. register for tax and obtain the tax identification number (TIN);

ii. file tax returns on or before the statutory due date;

iii. comply with all other obligations stipulated under CIT Act; and

iv. pay any penalties imposed for breach of statutory duties.

Additionally, the FIRS plans to sanction business reorganizations carried out after the enactment of Finance Act, 2019 with the intention to benefit from the tax exemptions available to small companies. Therefore, the incorporation of two or more companies to execute a contract that is ordinarily within the capacity of one company in order to mine the tax exemption incentive will result in the aggregation of the value of the contract by the FIRS for tax purposes. Finally, a company that conceals its turnover for the purposes of obtaining tax benefit available to small companies will be prosecuted along with its directors and relevant principal officers in accordance with Section 42 of the FIRS (Establishment) Act.

The FIRS correctly stated that small companies are required to register for taxes and file returns promptly, failure of which will expose such defaulting companies to penalties. However, it is important to note that Finance Acts, 2019 and 2021 do not stipulate the requirements as prerequisites for companies to claim the tax exemption.

Specifically, Section 23(1)(n) of the CIT Act explicitly provides that the conditions are *"without prejudice to this exemption".* In other words, there should be no prejudice to the right of a small company to tax exemption simply because it has not registered or filed tax returns. Rather, such taxpayer will be subject to the applicable penalties for such default.

3.2. Application of withholding tax

According to the Circular, the tax exemption does not preclude companies from deducting withholding tax (WHT) from payments due to small companies. However, affected small companies may apply to the FIRS for tax refunds subject to the fulfilment of the conditions for exemption. Similarly, small companies are required to deduct taxes from payments made to other entities.

The Circular further clarified that small companies in the manufacturing sector are not required to deduct WHT on dividend paid out during the first 5 years of operation. Similarly, such dividends are exempted from tax in the hands of the recipients (i.e., the investors).

The FIRS' position requiring companies to deduct tax from payments due to small companies is understandable given the difficulty of ascertaining whether a party in a business arrangement is a small company as of the time of the transaction. However, the FIRS must ensure a seamless process of tax refund to such small companies by ensuring that the refund is made within 90 days of application in line with Section 23(4) of the FIRS (Establishment) Act, 2007, irrespective of whether an audit has been concluded or not. This will provide small business owners with the necessary cashflow to grow their businesses. The tax refund audit may be conducted at a later period, and any additional payment that may arise from the failure to deduct and remit relevant taxes withheld can be assessed and collected at that time.

3.3. Treatment of capital allowance

The Circular clarifies the provisions of Finance Act, 2021 on the treatment of capital allowance for small companies under Section 31(1)(c) of the CIT Act. Accordingly, the Circular provides that:

i. capital allowances (including investment allowances) computed for new and existing small companies will be taken to have been granted to, and utilized by the company in the year it was computed regardless of the amount of the company's assessable profit.

ii. small companies that were previously medium or large companies will be assumed to have utilized the capital allowance computed together with any prior period unabsorbed capital allowances brought forward in the year it was computed regardless of the amount of the company's assessable profit.

iii. small companies that incurred qualifying capital expenditure prior to crossing the threshold to medium or large, will be taken to have utilized all allowances (initial and annual) for the period while it was a small company. Only annual allowance pertaining to the assessment years it operated as a medium or large company may be claimed against the profits of the relevant years.

Finally, the Circular provides illustrations to demonstrate the treatment of capital allowances computed by small companies on qualifying capital expenditure (QCE).

Commentary

We commend the FIRS on its detailed Circular on the interpretation of the amendments to the CIT Act regarding the taxation of small companies. However, it is hoped that the FIRS will expedite the tax refund process for eligible small companies to ensure that the purpose of the incentive granted them under the law is not defeated due to a prolonged tax refund process.

Click **here** to read and download the FIRS' Circular

Chapter Four

Clarification on the provisions of Capital Gains Tax Act

The FIRS addresses the changes to the administration of capital gains tax (CGT) in its Public Notice on the charge of CGT on proceeds from the disposal of shares pursuant to the amendment of Section 30 of CGT Act.

Consequently, the FIRS has issued an updated Information Circular No.: 2022/04 on the provisions of the CGT Act. The updated Circular, which replaces the previous Circular No. 2021/09 of 3 June 2021 on the same subject, retains the clarifications on the provisions of the CGT Act and provides guidance on the interpretation of the amendments to Section 30 of the CGT Act. For our comments on Circular 2021/09, please refer to our ***Tax Alert, Issue No. 9.1 of 2 September 2021*** *to access and download our e-book on* ***Matters Arising from the Implementation of Finance Act 2020.***

The key issue in the updated Circular is the amendment of Section 30 of the CGT Act, which provides for the imposition of CGT on gains from disposal of shares amounting to an aggregate of ₦100million in one or more Nigerian companies within a 12-month period. The CGT Act, however, provided two exceptions as follows:

i. where the whole or part of the disposal proceeds are reinvested within the same year of assessment (YOA) in acquiring shares in the same or other Nigerian companies; and

ii. where the transfer of shares is between an approved borrower and lender in a regulated securities lending transaction.

Consequently, the FIRS requires taxpayers to render CGT returns on disposal of shares by 31 December following the date of disposal.

The Circular also states that gains accruing to a person resident in Nigeria from the disposal of shares in a foreign company are not exempt under the CGT Act and as such will be liable to CGT in line with Section 4 of the Act. However, there is no provision in the CGT Act that taxes capital gains from disposal of shares in a foreign company. Section 4 of the CGT Act specifies that CGT is applicable only when such gains are *"received or brought into Nigeria".* Therefore, capital gains on disposal of a foreign company's shares that are not received or brought into Nigeria are not taxable in Nigeria.

Commentary

We commend the FIRS for providing clarification on the charge of CGT on disposal of shares as provided in the CGT Act. However, it is hoped that the FIRS will update its position on the application of CGT on disposal of shares in a foreign company to align it with the extant provisions of the CGT Act.

Click **here** to read and download the FIRS' updated CGT Circular

Chapter Five

Tax implications of the operation of Regulated Securities Lending Transaction in Nigeria

Securities lending transaction ("SEC Lending") continues to be a key area subject to legislative amendments via the annual Finance Acts. Following the regulatory amendments introduced by Finance Act, 2021, the FIRS has issued a revised Information Circular No: 2022/05 ("the Circular") dated 11 April 2022, withdrawing and replacing the previous Circular No: 2020/03 of 29 April 2020 on the tax implications of the operation of Regulated Securities Lending Transactions (RSLTs) in Nigeria.

We have highlighted below, the key issues discussed in the FIRS' Circular:`

5.1. Clarity on the nature of SEC Lending

The Circular leverages the Securities and Exchange Commission (SEC) Rules on securities lending transactions to define an RSLT. As with the previous Circular, the revised Circular emphasizes the requirement for a Borrower and Lender in a securities lending transaction, to conclude transactions through an Agent and without any direct contact with each other. This clarification is consistent with the current SEC Rules on securities lending arrangements.

The Circular further defines "collateral" based on its definition in the SEC Rules. This is a useful inclusion considering that the FIRS' clarifications remain relevant to the extent that they are consistent with the applicable SEC Rules.

5.2. Taxation of income on SEC Lending

The Circular clarifies the income streams and cashflows applicable in a typical securities lending transaction and provides guidance on the CIT and withholding tax (WHT) treatment of the relevant cashflows. Additionally, income streams (excluding compensating payments), such as actual dividends, interest, rights, bonus, fees, and any other benefit, accruing to a Borrower or Lender under an RSLT, will be liable to tax in accordance with the relevant provisions of CIT Act.

The Circular also clarifies:

i. the non-taxable/ non-deductible nature of compensating dividend payments made by a Borrower to an Agent or Lender.

ii. the tax-deductible nature of compensating interest payments made by a Lender to an Agent or Borrower. This position is a welcome revision of the previous *Circular 2020/03* wherein the FIRS had stated that such compensating interest payments would not qualify as a deductible expense contrary to the provision of Section 24(1)(l) of the CIT Act.

iii. the deferral of taxes (excluding WHT) on compensating interest payments until received by the Borrower.

iv. the role of an Agent as a pass-through entity in a regulated securities lending transaction, with the responsibility of deducting WHT on interest payments made to the Borrower.

v. the exemption of RSLTs from stamp duties.

5.3. Exemption of SEC Lending from Capital Gains Tax Act

Finance Act, 2021 has expunged the outright tax exemption on gains arising from the disposal of shares under Section 30 of the CGT Act. However, to preserve the commercial substance of SEC lending transactions, the Act provides a tax exemption for shares transferred between an approved Borrower and Lender in an RSLT.

Accordingly, the FIRS clarifies that gains accruing to an approved Lender, Borrower or Agent from the transfer of shares in an RSLT is not subject to CGT.

The Circular further states that CGT is applicable on the subsequent disposal of shares by a Lender, Borrower or Agent to a third party, provided that the conditions for subjecting shares to CGT have been met.

Commentary

The SEC Lending Circular adequately highlights the key issues around SEC Lending and constitutes a useful frame of reference for providing taxpayers with insights on securities lending and the tax implications thereof.

Additionally, we commend the FIRS for revisiting its position on the deductibility of compensating interest payments made by a Lender to an Intermediary Agent or a Borrower. The clarification in the revised Circular accords with the objective of the CIT Act regarding the elimination of the risk of multiple taxation on the same income stream in a single securities lending transaction.

Please click **here** to read and download the SEC Lending Circular.

Chapter Six

Guidelines on the tax treatment of Non-Governmental Organisations

The NGO Circular provides guidance on the taxation of incomes of Non-Governmental Organisations (NGOs) pursuant to the provisions of the CIT Act, PIT Act, CGT Act and the VAT Act, as well as other statutory obligations on the operations and activities of NGOs.

The updated Circular, which replaces the FIRS Information Circular No.: 2021/01, retains the clarifications provided in the replaced erstwhile Circular and introduces additional information on the interpretation of key terms, conditions for the claim of tax exemption, and taxation of educational institutions. Please refer to our ***Tax Alert Issue No 4.8 of 26 April 2021*** *for our comments on the erstwhile NGO Circular.*

We have summarized below, the key provisions introduced in the updated Circular:

6.1. Interpretation of key terms

Section 23(1)(c) of the CIT Act exempts the profits of companies engaged in *"ecclesiastical or charitable activities of a public character in so far as such profits are not derived from a trade or business carried on by such company."* However, the absence of a definition of ecclesiastical or charitable activities in the CIT Act has resulted in varying interpretations subject to taxpayers' intentions. The FIRS Circular sought to address the issue by defining ecclesiastical and charitable organisations as follows:

"Charitable Organisation is set up with the objective of not making profits and do not have provisions for distributing dividends. The funds are derived mainly from public and private donations which are held in trust for the objects and purposes expressed in the charter."

"Ecclesiastical Organisation is one pertaining to anything belonging to or set apart for the use of Religious Institution and is distinguished from civil or secular use."

While we commend the clarification provided by the FIRS, it is important to note that the focus of Section 23(1)(c) is on the public character nature of the activities of the charitable or ecclesiastical organisations, and not the charitable or ecclesiastical organisations themselves.

6.2. Conditions for the claim of tax exemption under Section 23(1)(c)

The FIRS provides three conditions under which companies carrying out charitable or ecclesiastical activities may claim tax exemption under Section 23(1)(c) of the CIT Act. According to the Circular, eligible companies must demonstrate that their activities

satisfy the following conditions before claiming the exemption:

i. solves needs on grounds of kindness, benevolence or ecclesiastical;

ii. without charging fees; and

iii. any surplus/profit is ploughed back into the charitable/ecclesiastical activity.

While charitable and ecclesiastical organisations are expected to conform to a certain range of activities, there is no provision in the CIT Act that requires such organisations to fulfil the conditions stipulated in the Circular before claiming tax exemption pursuant to the provision of Section 23(1)(c). The fact that an activity is charitable does not mean it must be performed free of charge. Thus, the mere fact that an NGO charges a fee for its services should not result in the services being automatically recharacterized as a trade or business. This will also be the case with not-for-profit educational institutions. The fact that they charge fees should not make them liable to income tax as long as they satisfy the statutory requirements for exemption of charities from tax in Section 23(1)(c) of CIT Act. In any case why would the CIT Act exempt the profits of such institutions from income tax if it is not intended that they charge a fee for their services and make profits?

Relatedly, Finance Act, 2020 amended the CIT Act to define a public character as an *"organization or institution that is registered in accordance with the relevant law in Nigeria; and does not distribute or share its profit in any manner to members or promoters".* Therefore, the existing condition for tax exemption in the Act is that companies engaged in charitable or ecclesiastical activities are duly registered as such and they do not distribute profits. The introduction of additional conditions for the claim of tax exemption under Section 23(1)(c) by the FIRS is tantamount to amending the law, which it does not have the legislative competence to do.

6.3. Taxation of education institutions

The FIRS Circular provides that educational institutions registered under the Companies and Allied Matters Act (CAMA), 2020 as Companies will no longer enjoy explicit tax-exempt status on their educational activities, based on the amendment of Section 23(1)(c) by Finance Act, 2021. The FIRS' position is that profits derived from "educational activities" now qualify as profits derived from a trade or business that are taxable under the CIT Act, irrespective of the incorporation status of the entity performing the activities or whether such profits are distributed to its shareholders. This is a sweeping statement that is not supported by law. If educational institutions that are organized as charities, such as by being incorporated as companies limited by guarantee or incorporated trustees, then all organisations registered as companies limited by guarantee should be similarly taxed. However, this will amount to upending the law on not-for-profits organisations. Hence, the FIRS should revisit its position for the following reasons:

i. the fact that an activity is educational in nature does not mean it cannot be ecclesiastical or charitable. In essence, an NGO may engage in charitable educational activities of a public character.

ii. there is no provision in Section 23(1)(c) of CIT Act that specifically disqualifies the profits of educational institutions organized as a charity income tax exemption. The revised wording of the subsection merely excludes specific reference to "educational activities". Notwithstanding the exclusion of educational activities from Section 23(1)(c), educational activities organized using not-for profit vehicles will be at par with similarly organized benevolent, literary, scientific, social, cultural or sporting activities. The lack of specific reference to these activi-

ties does not mean that they automatically qualify as taxable trades or businesses and ineligible for tax-exempt status.

In fact, the Black's Law Dictionary defines a "charitable organisation" as *"a tax-exempt organization that (1) is organized and operated exclusively for religious, scientific, literary, educational, athletic, public-safety, or community-service purposes (2) does not distribute earnings for the benefit of private individuals, and (3) does not participate in any way in political candidate campaigns, or engage in substantial lobbying"* (Emphasis ours).

While we deduced from our reading of Sections 2 the FIRS' Circular that the FIRS holds the view that an NGO can perform "benevolent, literary, scientific, social, cultural or sporting activities" without being liable to tax, it seems to discriminate against educational activities without any clear basis for this in the CIT Act. The difference in the FIRS' position between the above two categories of activities indicates an inconsistency in the FIRS' position on the tax-exempt status of educational activities of a public character performed by NGOs.

Furthermore, while it is true that the registration status of an organisation under the CAMA is not sufficient to confer it with tax exemption under Section 23(1)(c) of CIT Act, we are of the view that an organisation's registration status as a charity will qualify it for income tax exemption as long as its income is exclusively from its registered charitable activities. Similarly, any other income made by the company outside its registered charitable activities will be taxed in the normal way as if it were a commercial entity.

Following from the above, it is our considered view that a not-for-profit educational institution will qualify for income tax exemption under the surviving provision of Section 23(1)(c) of CIT Act. Such entity will not be liable to tax simply because it is an educational institution and just because educational institution has been deleted from the list of exempted organizations under the provision.

Commentary

We commend the FIRS on its detailed Circular on the interpretation of the amendments to the CIT Act regarding the taxation of NGOs. However, the FIRS should revisit its position with respect to not-for-profit educational institutions and not-for-profits organisations charging fees for their services in line with our comments above.

Click **here** to read and download the FIRS' updated NGOs Circular

Chapter Seven

Clarification on Section 16 of Companies Income Tax Act in relation to taxation of Insurance Companies

The Federal Inland Revenue Service (FIRS) Information Circular No. 2022/01 ("the Circular" or "the FIRS Circular") provides guidelines on relevant provisions of the Companies Income Tax (CIT) Act relating to taxation of companies and payment of additional liabilities arising from an assessment.

The Circular updates and replaces the FIRS Information Circular 2021/16 of 3 June 2021 and provides clarification on the taxation of insurance companies in Nigeria pursuant to the provision of Section 16 of the CIT Act as amended.

The updated Circular re-emphasizes the amendments introduced by Finance Acts 2019 and 2020 on the deduction of reserve for unexpired risks on a time apportionment basis, and deductibility of claims and outgoings for non-life insurance businesses. Additionally, the updated Circular addresses the amendments introduced by Finance Act, 2021 to the provision of Section 16 of CIT Act which include:

i. alignment of the taxation of resident and non-resident insurance businesses to the provision of Section 13 of the CIT Act;

ii. alignment of the basis for computing minimum tax for insurance businesses with the provision of Section 33 of the CIT Act;

iii. clarification of the definition of taxable and non-taxable investment income for life insurance business;

iv. determination of deductible expenses incurred and capital allowances utilised in generating non-taxable investment income.

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

7.1. Taxation of resident and non-resident Insurance Businesses

The Circular clarifies that the profit of a Nigerian insurance business is liable to tax in Nigeria whether such profit is brought into or received in Nigeria or not. Therefore, profits earned abroad by a Nigerian insurance business will be taxed in Nigeria, even if such profits are not disclosed or repatriated to Nigeria.

The Circular further explains that the profits of non-resident insurance businesses derived from Nigeria through a fixed base or the operation of an agent or any of the other activities prescribed in Section 13(2) of CIT Act will be liable to tax in Nigeria. This clarification aligns the taxation of non-resident insurance businesses with other businesses, the profits from whose fixed base have always been taxed in Nigeria.

7.2. Definition of gross turnover for minimum tax purposes

7.2.1 Non-life insurance business

Finance Act, 2019 introduced a minimum tax of 0.5% of gross premium payable by non-life insur-ance businesses in any year of assessment. Sub-sequently, Finance Act 2020 defined gross premium as "total premiums written, received and receivable, excluding unearned premium and premium returned to the insured". This clarification eliminates 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.

Notwithstanding the above, there were concerns that the application of minimum tax provisions to non-life insurance companies was not the same as with other companies under the CIT Act. While other companies are subject to minimum tax on their gross turnover and all other income, excluding franked in-vestment income, non-life insurance companies were taxed on 'gross premium' only. This resulted in an uneven playing field for non-life insurance companies when compared to other businesses taxable under CIT Act. To resolve this issue, Finance Act, 2021 introduced a clause that allows the minimum tax provisions applicable to other companies to equally apply to insurance businesses. Consequently, the Act redefined 'gross turnover' for non-life insurance business as *"gross premium and other income"*. The Act further defined "other income" *as "all the income of the non-life insurance business other than gross premium (excluding franked investment income)"*. However, in providing clarification on the nature of income exempt from minimum tax, the FIRS intro-duced a requirement for evidence of WHT deducted on dividend income to be provided as a condition for treating dividend income as franked investment income and exempting it from the minimum tax computation. This is similar to the requirement for life insurance businesses in the previous June 2021 Circular.

With the introduction of TaxPro-Max system, which automatically credits WHT deducted from a taxpayer's income to its account, it is expected that the insurance companies will be able to easily present evidence of WHT deducted from their dividend income to the FIRS. However, it is important for insurance companies to proactively confirm that WHT deducted from their dividend income has been duly remitted to the FIRS to ensure that such dividend income is eligible for minimum tax exemption.

It must be stated that while the aforementioned changes are welcomed, the issue of premium paid outwards to reinsurers for underwriting risks that cannot be covered by the insurance company remains to be addressed. 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 purpos-es. It is hoped that this issue will be considered and addressed in subsequent Finance Act.

7.2.2 Life insurance business

Like the point above, Finance Act, 2021 aligns the basis for computing minimum tax for life insurance businesses with the minimum tax provisions applica-ble to other companies taxable under CIT Act.

While the FIRS adopted the definition of 'gross in-come' in the Finance Act, the FIRS introduced an ad-ditional clause on items deductible against the gross income in its Circular. The FIRS clarified that deduc-tions other than franked investment income, premi-ums received and claims by re-insurers will not be allowed as deductions against gross income for the purposes of computing minimum tax and assessable profits of a life insurance business. The pro-forma tax computation provided in the Circular aligns with this clause as other tax-deductible normal business outgoings were not considered before arriving at the assessable profit.

However, Finance Act, 2021 amended Section 16(11) of CIT Act to allow life insurance businesses a de-duction of *"all normal allowable business outgoings"* from their investment and other incomes. Therefore, the restriction of deductible expenses as stated in the FIRS's Circular clearly contradicts the provi-sions of Section 16 of the CIT Act. It is hoped that the FIRS will update its Circular to reflect the true position of the law regarding the computation of the assessable profits for life insurance businesses.

7.3. Treatment of expenses incurred, and capital allowances utilised in generating non-taxable investment income

Finance Act, 2021 defines investment income for the purpose of taxation of a life insurance business as *"income derived from investment of shareholders' funds".* This definition is a welcome development as it ensures that life insurance businesses are only taxed on income accruing to the company and not policyholders' funds. To this end, the FIRS in its clarification Circular requires life insurance companies to maintain separate schedules and evidence of its investment of shareholders' funds and policyholders' funds with their associated income. While this requirement may present an additional administrative burden to life insurance companies, it will enable them to have adequate documentation and justification in place for the taxable and non-taxable investment incomes in the event of a tax audit.

The FIRS further clarified that expenses incurred in the generation of non-taxable investment income (including investment income attributable to policy holders' fund) will not be tax deductible. This is in line with Section 27(h) of the CIT Act on tax deductibility of expenses introduced by Finance Act, 2019. Additionally, the FIRS prescribed the pro-rata approach introduced in its previous *Circular No: 2021/11* for the apportionment of joint costs incurred in generating taxable and non-taxable investment income as the basis for apportioning the amount of capital allowance to be allocated to the taxable investment income. The FIRS's position is based on the amendment to Section 31 of the CIT Act by Finance Act, 2021, which requires that allowable capital allowance computed on qualifying assets partially used in generating taxable income shall be pro-rated where the proportion of non-taxable income is greater than 20% of the total income. Therefore, a life insurance business must evaluate whether the proportion of its non-taxable income to the total income exceeds the set limit in order to determine the portion of its allowable capital allowances in a relevant tax year.

7.4. 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. However, the income was only relevant under the erstwhile accounting standard [i.e., Statement of Accounting Standard (SAS)] which separated policy holders from shareholders' funds and required the 'distribution' of surpluses from the former to the latter fund.

Now, with the adoption of International Financial Reporting Standards (IFRS), the distribution from actuarial revaluation no longer applies. Therefore, this provision of the tax law would only apply to prior period tax returns prepared based on SAS financial statements and not IFRS based financial statements. It is hoped that the FIRS will update its format to reflect this new reality in subsequent Circulars.

Commentary

We commend the FIRS for providing clarification on the provisions of the CIT Act applicable to insurance companies. However, as noted above, some of the clarifications provided in the revised Circular are inconsistent with the provisions of Section 16 of the CIT Act as amended. It is hoped that the FIRS will update its position to ensure consistency with the law and avoid unnecessary disputes with taxpayers.

Click **here** to read and download the FIRS' updated Insurance Taxation Circular

Chapter Eight

Implementation of the Value Added Tax Act

The FIRS Information Circular No 2022/08 ("the Circular") updates and replaces FIRS Information Circular 2021/08 of 3 June 2021, and provides clarification on the implementation of the Value Added Tax (VAT) Act as amended by Finance Act, 2021. For our comments on Circular 2021/08, please refer to our ***Tax Alert, Issue No. 9.1 of 2 September 2021*** *for our e-book on* ***Matters Arising from the Implementation of Finance Act 2020***

We have summarized below the key updates provided in the Circular and practical issues associated with its implementation:

8.1 Collection and remittance of VAT on transactions with Non-resident suppliers

Finance Act, 2020 amended the VAT Act to create the VAT mechanism for cross-border transactions (i.e.,, transactions between Nigerian customers and non-resident suppliers). In such transactions, a Nigerian customer is required to account for the VAT on invoices issued by the non-resident supplier (under a reverse charge mechanism) and remit the same to the FIRS. However, there was a risk of significant revenue loss to the government where the Nigerian customer is an individual who is not an approved agent required to deduct and remit VAT to the FIRS under the VAT Act.

Finance Act, 2021 has amended Section 10(3) and (4) of the VAT Act to plug this loophole. Specifically, Section 10(3) of the VAT Act was amended to empower the FIRS to appoint non-resident suppliers (NRS) as agents for the purpose of accounting for VAT on cross-border transactions. Similarly, Section 10(4) was also amended to reflect the changes in sub-section (3) by stipulating that the customer is only required to withhold VAT where the appointed non-resident supplier fails to fulfill its duty.

In view of the above amendments, the Circular clarifies that where:

- the FIRS has appointed a person as a VAT agent, the agent shall withhold/ collect and remit the VAT due on the transaction. The FIRS further clarified that any person appointed under this rule will have the same obligation as a taxable person under the Act and shall file accurate returns and remit taxes collected in accordance with the law.

- an appointed NRS does not collect the tax, the resident person to whom the supply was made is required to withhold and remit the VAT due to the FIRS in the currency of the transaction.

The above FIRS' position complements with the provision of Section 14(4) of the VAT Act, as amended by Finance Act, 2019 which requires the Nigerian customer to self-account for VAT where the NRS fails to include VAT on the invoice. Principally, a Nigerian customer is required to deduct VAT on transactions with an NRS and remit same to the FIRS. Therefore, the appointment of an NRS as a VAT collection agent by the FIRS will transfer that obligation to the NRS. The FIRS' position also presupposes that the Nigerian customer is a company or incorporated entities who are empowered to collect VAT from vendors. Therefore, the Circular did not consider the practical compliance issues where the Nigerian customer is an individual and the NRS fails to deduct and remit VAT on the relevant transaction.

8.2 Self-accounting for VAT

Paragraph 7.2 of the Circular clarifies that the self-accounting provision of Section 14(4) of the VAT Act, which imposes a duty to charge, collect and remit VAT by a taxable person to whom a supply is made to in Nigeria, will crystallise where the supplier:

- is an individual;
- is a person exempt from charging VAT under the Act;
- has failed to charge VAT;
- is a foreign company that makes a taxable supply of goods and services outside the scope of the *Guidelines on Simplified Compliance Regime for Value Added Tax (VAT) for Non-Resident Suppliers,* without a fixed base or permanent establishment in Nigeria, *"whether or not VAT is included in the invoice."*

The FIRS' position on the obligation of a Nigerian beneficiary to self-account for VAT on transactions, where no VAT is charged on the invoice by a NRS with no fixed base or permanent establishment in Nigeria, is in line with Section 14(4) of the VAT Act. However, its requirement for the beneficiary of taxable supplies to self-account for VAT *"whether or not VAT is included in the invoice"* may conflict with the provision of Section 10(4) of the VAT Act. Section 10(4) specifically precludes the Nigerian customer from withholding VAT on a taxable transaction where the FIRS has appointed the NRS as an agent for VAT

collection, except where the NRS fails to collect the tax.

While we understand that the FIRS' position is to improve the ease of administration of VAT compliance for NRS' without permanent establishment or fixed based in Nigeria, such position must be in line with the provisions of the law. Otherwise, the FIRS will be imposing an additional obligation on taxpayers where no such obligation exits in the tax law.

8.3 Treatment of companies with below ₦25 million taxable supplies

Section 15(2) of the VAT Act exempts companies that make taxable supplies below the ₦25 million threshold from VAT obligations, such as registering for VAT, issuing VAT invoices, collecting, remitting, and filing VAT returns. Therefore, suppliers that meet or expect to meet the ₦25 million threshold will no longer be exempted from VAT obligations.

However, the FIRS omitted the exemption from the provision of Section 8(2) of the Act granted to small companies (i.e., exemption from penalty for non-compliance with VAT registration upon commencement of business) under Section 15(2) of the Act in the list of exemptions provided in Paragraph 9.1 of the Circular. Therefore, the FIRS should consider including as item V – *"registration with the Service for VAT purposes upon commencement of business"* to ensure that the list is consistent with the provision of Section 15(2) of the VAT Act.

Also, the Circular alleges that a supplier that previously exceeded the threshold will no longer be exempted from VAT obligations even in subsequent years where such supplier fails to meet the ₦25 million threshold. However, Section 15(2) of the VAT Act does not impose any restriction in respect of the threshold. Specifically, Section 15 of the VAT Act provides that *"any person that does not fall within the threshold in subsection (1) is exempted from the provisions of section 8(2), 13A, 29, 34 and 35 of this Act".* Therefore, the restriction in the Circular by the FIRS is tantamount to amending the law, which it lacks the constitutional power to do.. The FIRS should accordingly update the Circular to align it with the provisions of the law accordingly.

Finally, the Circular clarifies that companies engaged in upstream petroleum operations are ineligible for the exemption in Section 15 of the VAT Act, based on the amendments introduced by Finance Act, 2021. Consequently, companies engaged in upstream petroleum operators are obligated to withhold VAT on qualifying transactions and remit same to the FIRS, even where they have not commenced production or have no turnover, or such turnover is below the ₦25 million threshold.

8.4 Other exempted items

The FIRS listed the goods and services exempted from VAT in the First Schedule to the VAT Act (as amended) by Finance Acts 2019 and 2020. However, the list excluded the items added to the First Schedule by the VAT (Modification) Order, 2021, which was issued by the Honourable Minister of Finance, Budget, and National Planning on 30 July 2021 in exercise of the powers conferred on her by Section 38 of the VAT Act.

It is hoped that the FIRS will update the Circular to reflect the revised extended list of goods and services exempted from VAT in line with the provisions of the VAT Act.

Commentary

We commend the FIRS for issuing the Circular to clarify the key amendments introduced by Finance Act, 2021. It is expected that the regular issuance of Circulars will improve taxpayer education and tax compliance as taxpayers are apprised of the changes in the law and availed of clarifications where required. However, the importance of consistency between the clarifications provided by the FIRS in the Circulars and the provisions of the Act cannot be over-emphasised. The FIRS should accordingly review and revisethe areas of the Circular that are inconsistent with the law to avoid unnecessary disputes with taxpayers.

Click **here** to read and download the FIRS' updated VAT Circular

Chapter Nine

Administration of the National Agency for Science and Engineering Infrastructure Levy

The FIRS Information Circular No.: 2022/15 ("the Circular") provides guidance on the administration of the National Agency for Science and Engineering Infrastructure ("NASENI" or "the Agency") Levy, pursuant to the amendment introduced by Finance Act, 2021 to the NASENI Establishment Act, Cap N3 LFN, 2004 ("the Act").

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

9.1. Persons liable to pay NASENI Levy

The Circular re-states the applicable persons liable to pay the NASENI levy as provided in Finance Act, 2021. Specifically, it provides that the levy is applicable on profit before tax (PBT) of *"commercial companies and firms with turn-over of ₦100,000,000 and above, covering the banking, mobile telecommunication, ICT, aviation, maritime and oil and gas sectors"* calculated at the rate of 0.25%.

However, the FIRS in the Circular sought to expand the application of the levy to non-resident companies (NRCs) that are subject to tax in Nigeria, which is not in the NASENI Act (as amended).

9.2. Relevant authority for the administration of the Levy

The Circular confirms the FIRS as the relevant authority charged with the responsibility of collecting the NASENI Levy from the affected companies on behalf of the Agency.

9.3. Effective date, filing, assessment, payment and penalties

The FIRS has directed in the Circular that the NASENI Levy returns should be filed with the income tax returns in accordance with the provisions of CIT Act relating to *"time of filing"*, i.e., within 6 months from a company's year-end or within 18 months from date of its incorporation (whichever is earlier). The provisions of the extant laws regarding the timelines for payment (either as lump sum or instalments) as well as penalties for noncompliance will also apply to the Levy.

Further, taxpayers are to file the returns in a form prescribed by the FIRS. As a result, the FIRS has adopted the TaxPro-Max platform for filing and remittance of the Levy.

9.4. Tax deductibility of the Levy

Paragraph 7 of the Circular states that *"The NASENI levy is not tax deductible in determining the assessable profits under the Companies Incomes tax, Petroleum Profit tax or Hydrocarbon tax."* However, this assertion contradicts the clear provisions of Section 22 of the NASENI Act which provides that:
"All income derived by the Agency from the sources specified in section 20 (2) of this Act shall be exempt from income tax and all contributions to the fund of the Agency shall be tax deductible."

Therefore, the FIRS' assertion is inconsistent with the provision of the NASENI Act, and the sample calculation of the Levy in the Circular is incorrect as it does not consider the impact of the tax deductibility of the Levy.

Commentary

For matters arising that led to the amendment of NASENI Act in Finance Act, 2021, please refer to our newsletter **Issue No. 8.1 of 16 August 2021.**

The Circular has timely provided clarity on the amendments to the Act. However, it is hoped that the FIRS will revisit its assertion that the Levy is not tax deductible as the principal legislation imposing the levy has expressly provided otherwise. Any attempt to disallow the Levy on the basis that it is a "tax" item (since it is based on PBT), would be against the spirit and letter of the law as the Act has appropriately described the payment as a "levy" and qualified it as a tax deductible contribution. PBT has only been used as the basis for calculating the Levy under the Act. In any case, there is nothing that stops the National Assembly from qualifying an earmarked tax as tax deductible, if it considers it necessary to do so. .

Furthermore, it is questionable whether NRCs should be chargeable to the NASENI Levy, given that NASENI Act does not expressly include them in the category of entities liable to pay the Levy.

Click **here** to read and download the NASENI Circular

Chapter Ten

Administration of Nigeria Police Trust Fund Levy

The FIRS' Circular No.: 2022/10 ("the Circular") provides guidance on the administration of Nigeria Police Trust Fund (NPTF) Levy ("the Levy") and the interpretation of amendments made by the Finance Act 2021 to the NPTF (Establishment) Act, 2019 (NPTF Act).

The key issues from the Circular are discussed below:

10.1. Legal basis for implementation

Section 4(1)(b) of the NPTF Act provides for a charge of *"0.005% of the net profit of companies operating business in Nigeria".* According to the Circular, eligible taxpayers comprise all companies carrying on commercial activities in Nigeria, including small companies, non-resident companies and non-for-profit organisations that carry on trade or business in Nigeria.

10.2. Administration of the Levy

Finance Act, 2021 introduced Section 4(3) of the NPTF Act to empower the FIRS to *"assess, collect, account, and enforce the payment of the levy".* In line with this mandate, the FIRS has provided an effective date of 1 **January 2022** for enforcement of the Levy. This may imply that payment of the NPTF levy commences from 2022 year of assessment.

The amendment further stipulates that the administration, assessment, collection, accounting, returns and enforcement of the levy shall be in line with the provisions of the CIT Act Cap. C21, Laws of the Federation of Nigeria, 2004 and the FIRS Service (Establishment) Act No. 13, 2007.

10.3. Assessment and filing

According to the Circular, the Levy shall be filed based on the provisions of the CIT Act in relation to timeline for submission of returns. Therefore, the Levy returns should be filed, in a form prescribed by the FIRS, alongside the CIT returns for the relevant year of assessment.

Interestingly, the Circular states that the Levy *"shall not be tax deductible in determining the assessable profits under CIT, Petroleum Profit Tax or Hydrocarbon Tax".* However, there is no provision in the NPTF Act that precludes its treatment as a deductible expense. Considering that the Levy is neither a tax nor a penalty but a mandatory contribution to the NPTF, it satisfies the "wholly, reasonably, exclusively and necessarily" test for tax deductibility of expenses in the CIT Act. This also aligns with the Supreme Court (SC) decision in the case between *Shell Petroleum*

Development Company of Nigeria Limited and Federal Board of Inland Revenue (LER [1996] SC.87/1994)[1] wherein the SC held that where there is a statutory duty to incur an expenditure, such expenditure should qualify as a deductible expense for tax purposes. Therefore, the Levy, which is similar to the National Information Technology Development Act (NITDA) Levy, should be a tax deductible expense.

Finally, failure to comply with the provisions of Section 4(1)(b) & (3) of the NPTF Act amounts to an offence with resultant penalties in line with the relevant provisions of the extant laws. The Circular provides that a non-contested additional assessment issued by the FIRS shall be deemed final and conclusive and payable within 30 days of its service of by the FIRS.

Commentary

We commend the FIRS for issuing guidelines on the administration of the NPTF Levy, following the amendments introduced by Finance Act, 2021, and updating TaxPro-Max to incorporate the computation of the Levy.

However, it must be noted that the Circular focused on the implementation of Section 4(1)(b) of the NPTF Act, without considering the implications of the Federal High Court (FHC) judgement in the case between the *Attorney General for Rivers State (the Plaintiff) and Attorney General of the Federation (AGF) & ANOR,* where the FHC nullified Section 4(1)(a) and (b) of the NPTF Act for contradicting the provision of the Constitution of the Government of the Federal Republic of Nigeria 1999 (as amended) ("the 1999 Constitution"). Further to the judgement, the Federal Government is obliged to pay all the revenue it collects (except certain incomes specifically exempted) into the Federation Account and Section 4(1)(b) of the NPTF Act is no longer operational to oblige companies to remit the Levy into the NPTF. Please refer to our ***Newsletter, Issue No.: 2.5 of February 2022*** for details of the judgement.

It is unclear yet whether the AGF has appealed the FHC judgement or obtained a stay of its execution. Pending an overriding decision by the Court of Appeal, it is expected that the NPTF Levy remittance will be made into the Federation Account rather than the earmarked NPTF.

Click **here** to read and download the FIRS' NPTF Circular.

[1] [1996] 8 NWLR (Pt. 466) 256 SC

Chapter Eleven

The administration of the Tertiary Education Tax Levy

The FIRS' Information Circular No.: 2022/11 ("the Circular") provides guidance on the administration of the Tertiary Education Tax Levy ("TET Levy"), pursuant to the amendment introduced by the Finance Act (FA), 2021 to Sections 1(2) and 2(2) of the Tertiary Education Trust Fund (Establishment Etc.) Act (TETFEA) 2011.

Below is a summary of the key aspects of the Circular:

11.1 Administration of tertiary education tax (TET)

The Circular confirms that the new TET rate of 2.5% will apply on assessable profits of companies registered in Nigeria other than small companies as defined in the CIT Act. This confirmation is consistent with the provisions of the extant law regarding companies that are liable to pay TET in Nigeria.

11.2 Effective date of implementation, filing and payment

The FIRS has prescribed **1 January 2022** as the effective date for enforcement of the revised 2.5% rate. Therefore, tax returns due after this date are to be based on the new rate. Such returns are to be filed in the form prescribed by the FIRS in accordance with the provisions of CIT Act, the Petroleum Profits Tax (PPT) Act and the Petroleum Industry Act (PIA) relating to the time of filing.

11.3 Assessment and payment of TET

The Circular provides for two possible types of assessment models, namely, self-assessment and additional assessments. For self-assessment, taxpayers are required to pay the tax due on or before the due date of filing of the relevant income tax (e.g., 30 June annually for companies with a 31 December year-end). However, while the FIRS' position is largely hinged on the provision of the "principal" legislation (i.e., CIT Act as referenced in section 2(1) of the TETFEA itself), its position is contrary to the express provision of Section 2(2) of the same law, which states that:

"the tax imposed by this Act shall be due and payable within 30 days after the Service has served notice of the assessment on a company".

Thus, TET liability established on self-assessment should only be payable according to the TETFEA within 30 days after the FIRS issues the taxpayer a notice of assessment.

With regard to additional TET assessment, revised assessment, or any other instance where the FIRS serves a notice of assessment on a company, the payment of the TET due must be made within 30 days of service of the notice. However, where the taxpayer opts to settle the undisputed TET liabilities in instalments, the final instalment must be paid on or before 30 days of receiving the notice of assessment. Where the taxpayer disputes an assessment, the objection letter must be submitted within 30 days of receipt of the notice. Furthermore, where a taxpayer wishes to request extension of time to make a TET payment, such application is to be submitted before the due date of payment, stating the payment plan and evidence of payment of the first instalment. However, the application for instalment payments would not preclude the FIRS from imposing interest charges on the balance from the initial due date.

11.4 Penalty for non-compliance

The Circular provides that the provisions of CIT Act, PIA, PPT Act and FIRSEA as they relate to offenses and penalties shall apply to assessment, collection, enforcement, and other aspects of the administration of the tax.

Finally, the Circular provided sample computations of TET under PPT Act, PIA and CIT Act in accordance with the provisions of the relevant tax laws.

Commentary

The TET Circular is quite instructive, especially with regards to its application to companies under the PIA regime. Apart from the change in the TET rate, the Circular reconfirmed most of the administrative provisions of the TETFEA, except the misalignment noted in Section 11.3 above regarding the timing for payment.

However, while it is already standard practice for companies to remit TET alongside their CIT liability, given the convergence in the timing for filing the respective tax returns, the FIRS should revisit its changes to the timing of payment of the tax in the Circular as it conflicts with the express provision of Section 2(2) of the TETFEA.

Please click **here** to read and download the TET Circular.

Chapter Twelve

Taxation of non-residents in Nigeria

The FIRS Information Circular No. 2022/12 provides guidance on the taxation of non-resident individuals and companies pursuant to the provisions of the extant tax laws.

The updated Circular, which replaces the FIRS Information Circular No.: 2021/07, retains the clarifi-cations provided in the erstwhile Circular and intro-duces additional information on the turnover basis of assessment for non-resident companies (NRCs) to tax in Nigeria in line with the provisions of CIT Act and the Significant Economic Presence (SEP) Order, 2020. Please refer to our ***Tax Alert, Issue No. 9.1 of 2 September 2021*** for our commentary on Circular 2021/07, and download our e-book by clicking on ***Matters Arising from the Implementation of Finance Act 2020***

Section 4.3 of the updated Circular addresses the taxation of NRCs on turnover basis following the amendment of Section 30 of CIT Act by Finance Act, 2021. Section 30 of CIT Act empowers the FIRS to assess the turnover of any company to income tax if it appears to it that for any year of assessment, *"the trade or business produces either no assessable profits or assessable profits which in the opinion of the Board are less than might be expected to arise from that trade or business or, as the case may be, the true amount of the assessable profits of the company cannot be ascertained".* Finance Act, 2021 subsequently amended Section 30 to include non-resident digital service providers that are liable to tax based on their SEP in Nigeria. Therefore, the FIRS is empowered to assess to tax, the income derived from Nigeria by digital service companies at a *"fair and reasonable percentage",* where the income is below the expectation of the FIRS.

The Circular further outlines the methods through which the FIRS may arrive at a fair and reasonable percentage for its tax assessment, including profit margins determined by information in the NRC's individual and group financial statements, a percent-age adopted in line with Government policy, and any other basis that the FIRS may consider fair and reasonable.

Commentary

The FIRS Circular provides detailed clarification on the relevant tax laws governing the administration of taxes applicable to resident and non-resident indi-viduals and companies in Nigeria. It is hoped that the FIRS will adopt appropriate audit procedures and verify available data to determine the fair and reason-able percentage to adopt in taxing NRCs income in Nigeria.

Please click **here** to read and download the FIRS' Circular

Chapter Thirteen

Provisions of Finance Act, 2021 relating to Personal Income tax

The FIRS Circular No 2022/14 updates and replaces FIRS Information Circular 2021/18 of 3 June 2021 and provides clarification on the amendments made to certain sections of Personal Income Tax (PIT) Act by Finance Acts, 2019 to 2021.

The key issues from the Circular are discussed below:

13.1. Taxation of non-resident Individuals (NRIs)

Based on the provision of Section 6(A) of PIT Act as introduced by Finance Act, 2020, NRIs will be subject to tax on income derived from a trade or business that comprises the furnishing of technical, management, consultancy, or professional services to a person in Nigeria. This is to the extent that the NRIs have significant economic presence (SEP) in Nigeria under the SEP Order to be issued by the Minister of Finance, Budget, and National Planning. An NRI will be deemed to have SEP in Nigeria where it receives any income or payment from a Nigerian resident in connection with the specified activities. However, the related tax will be the final tax from such transactions for NRIs. Consequently, persons making payments to NRIs for such services are required to deduct the tax at the appropriate rate and remit same to the relevant tax authority before the statutory deadline.

The amendment, which aligns with a similar provision in the CIT Act, is not unique to Nigeria. There are other jurisdictions, such as India, that require their resident taxpayers to withhold taxes at specified rates when payments are due to non-residents in respect of similar services. The key objective is to ensure that taxes are paid in the source countries where the related income is generated from.

13.2. Allowable deductions

13.2.1. Pension, Provident or Retirement Fund

The Circular clarifies that contributions to a pension, provident, or other retirement benefits scheme rec-ognized under the Pension Reform Act will qualify as allowable deductions for PIT computation purposes. For this purpose, the National Pension Commission (PenCom)'s approval is required for employers' retire-ment benefit schemes other than the contributory pension scheme. Otherwise, the related contribu-tions will not qualify as allowable deductions.

13.2.2. Insurance premium

The amendment to Section 33(3) of PIT Act by Fi-nance Act, 2021 excludes the phrase *"or of a con-tract for a deferred annuity on his own life or the life of his spouse"* from the subsection. On this basis, the Circular notes that premium paid on contract for immediate or deferred annuity on the life of an individual or that of his or her spouse will not be tax deductible. In addition, pursuant to Section 17 of PIT Act, where the relevant tax authority is of the opinion that a life policy arrangement or disposition is viewed to be artificial or fictitious, the premiums paid in relation to such contract may be disallowed by the relevant tax authority for PIT purposes.

While the Circular aligns with the provisions of Finance Act, 2021, it is silent on the tax treatment of the income that will be received in future. Does it mean that the future income will be tax exempt? Otherwise, the taxpayer would have to deduct the premiums made before the related income is taxed. This will require the tracking and monitoring such premiums.

Given that deferred annuities are usually used to supplement retirement income, the expectation is that the related payment should be tax deductible while the income receivable is taxed at the time of receipt, or when withdrawals are made. This will help to address the issues that may arise if the premiums cannot be expensed in the year of payment.

13.3. Exemption of minimum wage from tax

In alignment with the provisions of the Finance Act 2020, the Circular clarifies that any person, who earns the national minimum wage, which is currently ₦30,000 per month, will be exempted from tax. Such persons will also not be subject to minimum tax.

However, the Circular appears to state that the computation of 'gross income' must be determined first before such income can qualify as less than the national minimum wage. The definition of gross income in Section 33 of the PIT Act specifically states that it is for the purpose of that section alone. In other words, it should only be applied when calculating the consolidated relief allowance and not for any other purpose. Given that the amendment to Section 37 is specific that anyone whose income is less than the minimum wage be exempted from tax, the reference to gross income in paragraph 33 of the Third Schedule to the PIT Act can only mean total income. In any event, the courts have ruled that any provision in a Schedule to an Act that appears inconsistent with the body of the Act is null and void to the extent of that inconsistency.

Commentary

We commend the FIRS on its detailed Circular on the interpretation of the amendments to PITA. However, it is hoped that the FIRS will provide more clarification on the areas noted above and update its position in areas that are inconsistent with the extant laws to avoid unnecessary disputes with taxpayers.

Click **here** to read and download the FIRS' updated PITA Circular

Chapter Fourteen

Claim of Tax Treaty Benefits and Commonwealth Tax Relief in Nigeria

The Tax Treaties Circular was issued based on the provisions of the Double Taxation Agreements between Nigeria and other countries, and the extant tax laws. The 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. 2021/05 issued on 3 June 2021*, retains the clarifications on available tax treaty benefits provided in the erstwhile Circular, and introduces additional information on the new applicable WHT rates, requirements for permanent establishment (PE) in Nigeria and guidelines for the claim of Commonwealth Tax Relief (CTR) under Section 44 of the CIT Act.

Please refer to our ***Tax Alert Issue No 5.4 of 19 May 2022*** for our comments on the Tax Treaties Circular.

Click **here** to read and download the FIRS' updated Tax Treaties Circular

Chapter Fifteen

Deployment of Automated Tax Administration Solution

The FIRS issued a Public Notice ("the Notice") in February 2022 as a follow on to the March 2021 Public Notice on deployment of Automated Tax Administration Solution (ATAS). The Notice emphasizes the FIRS' authority to utilize proprietary or third-party technologies for tax administration and information gathering in Nigeria, pursuant to the provisions of Section 25 of the FIRS (Establishment) Act (FIRSEA), 2007 (as amended).

The March 2021 Public Notice had announced the deployment of ATAS to access relevant data, information, records, etc., held in systems, electronic devices, or cloud computing facilities, including point of sales or invoicing platforms maintained, operated, owned, or controlled by taxpayers or their agents. Please refer to our ***Tax Alert Issue No. 4.1 of April 2021*** for details.

The February 2022 Public Notice reiterates the FIRS' commitment to tax administration through the deployment of ATAS and assures taxpayers of confidentiality of their information in line with Section 50(1) of the FIRSEA.

Finally, the Public Notice clarifies that taxpayers are required to grant unrestricted access to the FIRS within 30 days of receipt of the FIRS' notice based on Section 25 of the FIRSEA. In this regard, an administrative penalty of ₦25,000 would apply for each day a taxpayer fails to grant FIRS access to its system within the prescribed timeline (i.e., after 30 days of receipt of the FIRS' notice).

Commentary

ATAS was introduced by Finance Act 2020 and its deployment highlights FIRS' commitment to the adoption of technology in tax administration. The use of technology is expected to further drive taxpayer compliance, especially for micro, small and medium-sized entities through effective data collection that will aid compliance enforcement.

However, since its introduction in 2020, the FIRS has not gained much traction on it. Hence, Finance Act, 2021 has introduced an administrative penalty to compel taxpayers to grant it access to their systems.

But while the penalty now makes it inevitable for taxpayers to oblige the FIRS, there are concerns that deploying an Application Programming Interface (API) directly to their systems could be disruptive and may grant the FIRS access to their non-tax related proprietary information. In this regard, some taxpayers are concerned that while Finance Act has introduced measures to ensure their compliance, there are no corresponding measures to protect them against data privacy breach by the FIRS. Further, taxpayers have also expressed concerns that the FIRS deployed the ATAS without adequate consultation with key stakeholders in various industries whose systems are to be integrated with ATAS.

It appears the FIRS has positively addressed some of the concerns (which were expressed during a stakeholder seminar organized by the FIRS in February 2022) as the e-payment gateway companies engaged by the FIRS to facilitate the deployment of ATAS have adopted a middleware or dumping room where taxpayers can dump their VAT and WHT information monthly for automatic transmission to the FIRS subsequently. This approach appears to be acceptable to some taxpayers as they can review the information that is being collated by the e-payment companies before they are transmitted to the FIRS.

It is noteworthy that, subject to consideration by the FIRS, taxpayers can under Section 25(4) of the FIRSEA request it to withdraw or extend its notice. However, it may be that only requests from taxpayers with a historical track record of compliance with their tax obligations will be entertained by the FIRS. We hope the FIRS will review and grant such requests on their merits to encourage more voluntary tax compliance by taxpayers.

Finally, while the deployment of ATAS is an efficient use of technology to drive tax administration and compliance, the FIRS should also begin to explore how the technology could enable them to expand the tax net to include the informal sector. The FIRS should leverage the big data which will be at its disposal from the deployment of ATAS as a stepping stone to improve enforcement of tax compliance and collections from taxpayers in both the formal and informal sectors of the economy.

Click **here** to read and download the FIRS' Public Notice

Chapter Sixteen

Mandate of the FIRS as the primary agency of the Federal Government for tax administration

The FIRS' Public Notice of 3 February 2022 clarifies that the FIRS is the primary body that is statutorily empowered to administer taxes and levies due to the Federation, the Federal Government (FG) or any of its agencies, pursuant to the amendment of Section 68 of the FIRS (Establishment) Act, by Finance Act, 2021. The Public Notice correctly posits that only the FIRS should conduct tax audits, tax investigations, tax compliance or other tax functions, and outlines sanctions applicable to persons or government agencies that contravene the provisions of the FIRS (Establishment) Act.

Commentary

The clarity provided by the Public Notice is a panacea to taxpayers who have borne the brunt of the FG's recent aggressive tax drive. Over the past few years, different FG agencies, institutions, and functionaries have sought to bridge existing revenue/funding gaps by auditing companies' tax and accounting records to confirm compliance and subsequently recover alleged shortfalls from defaulting taxpayers. Some of the bodies and functionaries include the Revenue Mobilisation Allocation and Financial Committee (RMAFC), the Economic and Financial Crimes Commission (EFCC), the National Assembly and the Attorney General of the Federation & Minister of Justice. While such bodies have some powers to monitor the revenue of the Federation and ensure that the FG suffers no loss, neither the 1999 Constitution of the Federal Republic of Nigeria nor their enabling laws empower them to act as tax collection agencies or to engage tax consultants to conduct tax audits or collect tax revenues at their instance for the Federation.

Therefore, the provision of Section 22 of Finance Act, 2021 confirming the exclusive power of the FIRS as the tax administrator of federally collectible taxes and levies rehashed in the Public Notice, is a welcome development. Not only will this save taxpayers of multiple tax audits and the associated costs, it will eliminate the confusion and uncertainty which erstwhile characterized our tax system due to the activities of the affected bodies and functionaries.

As responsible bodies and functionaries of the FG, it is expected that they will follow due process and abide with the new law and operate within the confined of the Constitution and their enabling laws in respect of the revenue of the Federation.

Click **here** to read and download the FIRS' Public Notice.

Conclusion

We commend the FIRS for updating its Circulars for the third consecutive year for the purpose of administration of the various tax laws amended by Finance Acts reviewed in this book. However, it must be noted that circulars, guidelines, and regulations of government agencies, such as the FIRS, are merely rules or expressions of opinions on the interpretation of the related statutes. Hence, they are not legally binding and enforceable, especially when they are inconsistent with the related statutes. The tax laws remain the enforceable legal basis for taxation in Nigeria.

Consequently, it is hoped that the FIRS will revise the conflicting clarifications provided in some of its Circulars to align them with the provisions of the applicable tax laws as highlighted in this publication.

Please click the links below to access other related publications:

- ***Finance Act, 2020: Impact Analysis e-book***
- ***Matters arising from implementation of Finance Act, 2020***
- ***Finance Act, 2021: Impact Analysis e-book***

Appendix

- Clarification on Filing and Payment of CIT
- Sundry provisions of the Finance Act 2020 relating to CIT Act
- Clarification on the Exemption of Small Companies from Income Tax
- Clarifications on the Provisions of CGT Act
- Clarification on the Tax Implications of SEC Lending in Nigeria
- Guidelines on the Tax Treatment of NGOs
- Clarification on Section 16 of CIT Act in Relation to Taxation of Insurance Companies
- Clarification on the Implementation of the VAT Act
- Information Circular for the Administration of the NASENI Levy
- Information Circular for the Administration of NPTF Levy
- Information Circular for the Administration of TET
- Taxation of non-residents in Nigeria
- Provisions of Finance Act, 2021 relating to PIT Act
- Information Circular on the Claim of Tax Treaty Benefits and Commonwealth Tax Relief in Nigeria
- Public Notice on the Mandate of the FIRS as the primary agency of the Federal Government for Tax Administration
- Public Notice on Deployment of Automation of Tax Administration Solution
- Public Notice on Charge of CGT on Proceeds from the Disposal of Shares Pursuant to the Amendment of Section 30 of the CGT Act

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