



FREE ZONE ENTERPRISES TO FILE INCOME TAX RETURNS? I THOUGHT THEY ARE “TAX FREE”?

Introduction

On 15 April 2021, the Federal Inland Revenue Service (“FIRS”) issued a Public Notice (the “Public Notice”) directing all approved enterprises (“FZEs”) registered and operating in export processing zones and oil and gas free zones (the “Zones”) to file income tax returns as required under law.

The Nigerian Government has taken an aggressive stance to revenue generation so it is important to understand and analyze the Public Notice and the impact it may have on FZEs.

The Position Before the Finance Act 2020

FZEs enjoy various fiscal incentives – most of which are tax exemptions for operations within the Zones. In particular, tax exemptions are granted under federal legislation (the NEPZA Act) and other zone-specific laws and regulations, such as the OGEFZ Act and the Oil and Gas Export Free Zone Regulations 2019 (the “OGEFZA Regulations”).⁴

Before the enactment of the Finance Act 2020, both the NEPZA and the OGEFZ Acts⁵ exempted the Zones from the application of all legislative provisions pertaining to taxes, levies, duties, and foreign exchange. This means that FZEs were, among other things, exempted from not only the obligation to pay tax, but also the requirement to file tax returns with the tax authorities.

Historically, the FIRS relied on NEPZA or OGEFZA (as the case may be) to ensure that FZEs include their annual tax returns in the statutory returns required to be submitted to either of the authorities.⁶

Finance Act 2020 Amendment

The Finance Act 2020 amended the general tax exemption granted the FZEs by imposing the obligation to file tax returns with the FIRS on FZEs. In the event of non-compliance, the Finance Act provided that penalties prescribed in Companies Income Tax Act (“CITA”) and the FIRS (Establishment) Act shall apply.

¹Tax returns are required to be filed in the manner specified in Section 55(1) of the Companies Income Tax Act and other provisions of the Public Notice, pursuant to Section 18(1) of both the Nigeria Export Processing Zone Authority Act (“NEPZA Act”) and the Oil and Gas Export Free Zone Act (“OGEFZ Act”) (as amended by the Finance Act 2020).

²Section 8 of the NEPZA Act. :³Section 8 of the OGEFZ Act. :⁴Paragraph 5(1) of the OGEFZA Regulations. :⁵Section 18(1)(a) of both the NEPZA and OGEFZ Acts.

⁶Section 19 of both the NEPZA and OGEFZ Acts. :⁷Sections 58 and 59 of the Finance Act, 2020. :⁸Indeed, the amendments made by sections 58 and 59 of the Finance Act to section 18(1)(a) of both the NEPZA and the OGEFZ Acts simply reinforced the provisions of section 55(1) of CITA, which provides that: “Every company, including a company granted exemption from incorporation shall, whether or not a company is liable to pay tax under this Act for a year of assessment, with or without notice from the Service, file a self-assessment return with the Service in the prescribed form ...” (Emphasis Ours).

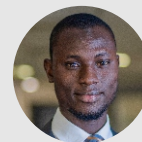
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The FIRS Public Notice and its Impact on FZEs

In the discharge of its statutory duty to implement the above amendments, the FIRS issued the Public Notice directing FZEs to: (i) file income tax returns for 2021 and subsequent years of assessment in the manner and time specified by CITA; and (ii) compute income tax and pay the tax due, if any.

Despite the tax-exempt status that the FZEs enjoy, they are not precluded from filing tax returns. Generally, tax returns are used for other fiscal and regulatory purposes, such as governmental statistical analyses, assessing regulatory compliance, maintaining corporate transparency in the financial sector, and much more. In particular, for companies operating within the Zones, the filing of returns will assist the Nigerian government ensure that the FZEs operate within the applicable rules and guidelines. For instance, it will be easy for the FIRS to discover activities of the FZEs that are outside the tax-exempt status granted them.

An interesting example of this was a case that took the FIRS five years to discover that an approved enterprise/FZE was engaged in taxable business activities outside the Zones⁹, therefore these new filing requirements will make it easier for the FIRS to discover any taxable activity of FZEs.

Importantly, the requirement for filing tax returns under the present regime does not impose the obligation to pay taxes on the FZEs¹⁰.

When to File?

The income tax returns to be filed by FZEs shall be filed not more than 6 months from the end of the accounting year for FZEs that have been in business for a period exceeding 18 Months and for newly registered FZEs, they must file their returns within 18 months of registration or not later than 6 months after the end of their accounting periods, whichever is earlier.

What to File?

FZEs are to file self-assessment returns with the FIRS containing:

- a. Audited accounts, tax, and capital allowances computation for the year of assessment and a true and correct statement in writing containing the amount of profit from each and every source computed;
- b. A duly completed self-assessment form prescribed by the FIRS attested to by a director or secretary of the FZE; and
- c. Evidence of payment of the whole or part of the tax due (if any) into a bank designated for tax collection.

Conclusion

As much as the Public Notice and the Finance Act 2020 will improve transparency and grant the FIRS and other relevant authorities the necessary information of the affairs of FZEs, it also creates an extra compliance obligation and administrative burden for FZEs.

Although FZEs are non-tax paying entities, they need to be aware of their obligations to file tax returns – especially in the present circumstance that the Public Notice prescribes sanctions for defaulters.

⁹In the case of Nigerdock Nigeria Plc FZE vs FIRS, Nigerdock was an approved enterprise within one of the Zones – i.e., the Snake Island Free Zone. Nigerdock provided engineering, logistics and associated support services to companies operating in the upstream sector of the Nigerian economy. For the period of 2007 to 2012, the Company provided services to two oil majors operating outside the Zone. Upon discovery of this, the FIRS issued an additional assessment to the Company for the services rendered to the oil majors, which the Company disputed on account of its tax-exempt status and the matter ended up in court. The Tax Appeal Tribunal agreed with the FIRS and held that tax-exempt status granted to an approved enterprise (such as the Company) does not cover operations of such enterprise carried outside the Zones. ¹⁰As earlier indicated, there are certain transactional arrangements which could result in an FZE having the obligation to pay tax, such as where the FZE has business transactions that take place entirely outside of the free zone area and occur in the customs territory. In such an instance, the FZE's tax exempt status would not apply, and it would be subject to taxes just like any other regular company incorporated in Nigeria.