Key contacts

Dipo Komolafe
Partner and Head,
Tax
isaac.komolafe@templars-law.com

Igonikon Adekunle
Partner,
Dispute Resolution and Tax
igonikon.adekunle@templars-law.com

Sesan Sulaiman
Partner,
Dispute Resolution and Tax
sesan.sulaiman@templars-law.com

Dr. Jude Odinkonigbo
Counsel,
Tax,
Investigation, White Collar and Compliance
jude.odinkonigbo@templars-law.com

TEMPLARS Transcripts: Tax Digest

Policy and Tax Administration

- ### Federal Inland Revenue Service (FIRS) publishes Guideline on the Withholding of Value Added Tax (VAT)

  On 3 March 2023, the FIRS issued a circular on the operation of the VAT withholding (reverse charge) and self-account regime in line with the provisions of the Value Added Tax Act ("the Circular"). The Circular sets out the legal framework for withholding VAT on taxable supplies, VAT collection obligations as well as VAT withholding obligations on transaction with non-resident suppliers.

  The FIRS reiterated in the Circular that, by Sections 10(3) and 14(3-4) of the Value Added Tax Act, an obligation to withhold VAT or reverse charge VAT and remit same to the FIRS exists for a resident taxpayer where that person receives taxable supplies for which VAT is not included in the invoice, and in the case of taxable supplies by non-resident persons, where a collection agent has not been appointed by the FIRS for that non-resident entity. In fulfilling the obligation to withhold VAT, taxpayers are implored to remit same to the FIRS in addition to their existing obligation to collect and remit VAT on their taxable supplies.

The Circular also provides as follows:

- ❖ When preparing VAT returns, the taxpayer is required to prepare separate tax returns in respect of their collected VAT and the withheld VAT.
- ❖ Taxpayers with the obligation to withhold VAT shall maintain a separate entry in their books known as "VAT Withheld Account" and make the account available for audit as may be required by the FIRS.
- ❖ Taxpayers shall ensure that the schedules of suppliers from whom taxes are withheld are uploaded on the FIRS' electronic portal, TaxPro Max.

- **Federal Inland Revenue Service (FIRS) signs Memorandum of Understanding (MoU) with HMRC**

  On 16 March 2023, the FIRS signed an MoU with the United Kingdom's tax authority, His Majesty's Revenue and Customs (HMRC) with the aim of fostering improved collaboration and capacity building between the two tax authorities. The HMRC, in its statement, emphasized that the MoU would allow for capacity building in areas such as Transfer Pricing, Country-by-Country Reporting Standards, Exchange of Information and Audit in the Oil and Gas industry. The MoU will also allow both agencies to exchange information and gather data for the purpose of tax administration. The FIRS noted that the MoU is in line with two planks of the current administration's goals for the service, i.e., building a data-focused tax authority and improving the Service's collaborative stance on stakeholder relations. With this collaboration, officers of the Service will be better equipped to improve tax revenue collection and in turn raise domestic tax revenue for the Nigerian government.

- **The Minister of Finance and National Planning recommends increase of Value Added Tax (VAT) from 7.5% to 10%**

  On 17 March 2023, the Minister of Finance and National Planning recommended an increase of Value Added Tax (VAT) from 7.5% to 10% by the incoming government. The Minister noted that VAT is one of the avenues for increasing a country's revenue and Gross Domestic Product (GDP) and that at present, the average VAT rate in Sub-Saharan Africa is 18 per cent. The Minister further noted that at 7.5 per cent, Nigeria has the lowest VAT rate in the world and an increase from 7.5 percent to 10 per cent would stimulate the country's economic growth. This recommendation, if implemented, will amount to a 33.3 per cent increase of the current VAT rate in Nigeria, and a 50% increase on the rate of VAT since 2020 when the rate was first increased from 5% to 7.5%.

Judicial Decisions

- **Tax Appeal Tribunal (Tribunal) rules that VAT is applicable to casino and gaming activities and constitutes a supply of services within the context of the VAT Act**

  In **Tourist Company of Nigeria Plc (TCN Plc.) v. FIRS**, the Tribunal held that gaming and casino activities are taxable supplies within the meaning of the VAT Act and therefore liable to VAT. TCN Plc is in the business of hospitality and entertainment and also operates a gaming and casino facility within its premises.

  The FIRS issued an additional VAT assessment on TCN Plc in response to which the Appellant stated that its casino activities did not constitute an exchange of goods or services within the context of the VAT Act. TCN Plc argued that for VAT liability to exist, it must be determined whether the transaction was for the supply of goods and services, and whether the supply was for a consideration in the form of money or for money's worth. TCN Plc further submitted that the nature of its business does not qualify as either a good or a service especially because the gaming chips used by patrons of the casino were provided free of charge by the company. On its part, the FIRS argued that TCN Plc provides gaming services to its customers by making available a physical location for its customers' gaming purposes and charges payment for that service. Thus, TCN Plc is providing a service and the revenues derived from the services should be taxed under the VAT Act.

In deciding the matter, the Tribunal stated that three elements must be present, before it could be said that there was a taxable service. The service must be (i) tangible or intangible, (ii) useful for a person, and (iii) provided for a fee. According to the Tribunal, although the gaming cards were provided by TCN Plc to its patrons free of charge, the company derives revenues from the customers' gaming and casino activities. Also, the Tribunal concluded that since TCN Plc admits that it earned an income from those activities (and pays income tax on same), it stands to reason that lack of consideration cannot be a basis for the activities not being taxable. Thus, having provided taxable services, the attendant revenue should be liable to VAT.

- **Tax Appeal Tribunal (Tribunal) rules that shrinkages and product losses are deductible under the Companies Income Tax Act (CITA)**

In **Ardova Plc (Formerly Forte Oil Plc) v. FIRS**, the Tribunal held that the shrinkages and product losses incurred by the Company were incurred in accordance with the WREN principle i.e., wholly, exclusively, necessarily, and reasonably incurred for the purpose of producing its profits, and therefore constitute deductible expenses**.**

At the Tribunal, the FIRS had argued with respect to shrinkages and product losses that, it rightly disallowed the excess in shrinkages and product losses claimed by the Company, as it exceeded the industry average being 20%. The Company had charged between 22.7-35.5% of its total purchases as shrinkage and product losses, which the FIRS adjusted to 20%. The Company argued that the decision of the FIRS to apply a benchmark based on industry average defeats the purpose of the CITA which allows expenses to be deducted based on the WREN principle and is not justifiable.

Agreeing with the Company, the Tribunal held that once an expense passes the WREN test, it should be deducted. The Tribunal further stated that the CITA does not provide a benchmark or an industry average neither does it give a discretion to the FIRS as to the quantum of expense to allow. The burden is on the Company to establish that the expense it seeks to deduct, passes the WREN test and once it has discharged this burden, the FIRS is obliged under the law, to allow the deduction. Based on this, the Tribunal held that the FIRS unlawfully disallowed part of the Company's deductions for shrinkages and product losses, for the relevant financial years.

Legislative Advancements

- **The Minister of Finance issued the Electronic Money Transfer Levy Regulation 2022:**

The Stamp Duties Act introduced the Electronic Money Transfer Levy (EMTL) and gave the Minister of Finance powers to issue regulations for its implementation. In June 2022, the Minister of Finance issued the Electronic Money Transfer Levy Regulation (the "Regulation") with the objective of providing a regulatory framework for the effective administration of the Levy and other related matters.

The Regulation provides that:

- A one-off charge levy of N50.00 is imposed on all electronic receipts or electronic transfer of deposit above N 10,000 with a bank in any type of account except otherwise exempted by the Act.

- The levy is imposed on the account receiving the transfer of money and is further charged on the transfer of money in other currencies at the exchange rate determined by the Central Bank of Nigeria (the "CBN").[1]

- The FIRS is empowered to administer the levy[2] which shall be collected and remitted by the receiving bank on the next working day following the day of the transaction or such other time as the FIRS may determine from time to time.[3]

- A bank that fails to collect the levy is liable to a penalty equal to 150% of the Levy not collected and if collected but failed to remit, liable to 100% of the levy collected but not remitted, penalty equal to 50% of the levy not remitted and interest computed at the prevailing Monetary Policy Rate on the Levy not remitted.

- Where a bank collects and remits the levy but fails to file returns of Levy collected or renders an incomplete or inaccurate returns, it shall be liable to a penalty equal to 10% of the amount.[4]

[1] Regulation 3 of the Regulation.
[2] Regulation 4 of the Regulation.
[3] Regulation 5 (4) of the Regulation.
[4] Regulation 10 of the Regulation.