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) directs international shipping companies to regularize their tax affairs no later than 31 December 2023**

The FIRS recently issued a public notice (the Notice) requesting all international shipping companies (ISCs) operating in Nigerian territorial waters in whatever capacity to regularize their tax affairs no later than 31 December 2023.

The Notice was issued further to FIRS' circular No.2021/14 dated 3 June 2021 and a public notice dated 17 December 2021. The FIRS by the circular and public notice had previously requested ISCs to regularize their tax affairs within three months from the date of the circular. The FIRS however stated that it recorded low compliance from ISCs since publishing the circular and the public notice.

Consequently, the FIRS issued this Notice requesting affected ISCs to conclude the regularization of their outstanding tax returns at the Non-Resident Persons Tax Office no later than 31 December 2023. The Notice further stated that the FIRS will collaborate with relevant government regulatory and security agencies in the maritime sector to commence enforcement action on all defaulting shipping companies after the expansion of the grace period of 31 December 2023.

The Notice is sequel to tax demand notices issued by FIRS to International Petroleum tankers and transport vessels operators regarding the recovery of income tax allegedly owed between the periods 2010 – 2019.

- **Federal Government plans to streamline number of taxes from 52 to 10 and rename tax agencies**

  The Special Adviser on Revenue to the President of the Federal Republic of Nigeria stated that the Federal Government plans to streamline the current tax regime from 52 taxes to 10 taxes in order to reduce the burden on businesses in Nigeria, as well as consolidate revenue collection into one agency to be called the Nigeria Revenue Service, to avoid duplications and ensure that all taxes due to the Federal Government are collected by one agency.

  The above measures are targeted at ensuring the fulfilment of the administration's stance to address multiple taxation and anti-investment inhibitions.

- **Federal Inland Revenue Service (FIRS) issues public notice on the application of the Finance Act 2023 effective 1st September 2023**

  The FIRS issued a public notice (the Notice) on 25 August 2023 notifying taxpayers, tax practitioners and the public of the application of the tax amendments under the Finance Act 2023 effective 1st September 2023.

  The Notice was issued further to the Finance Act (Effective Date Variation Order) 2023, which extended the effective date of application of the amendments under the Finance Act 2023 from 1st May 2023 to 1st September 2023.

  By the Notice, FIRS reiterated the various tax amendments and set out the period for compliance some of which include:

  - By the amendment to section 14(3) of the Value Added Tax (VAT) Act, persons appointed to withhold or collect VAT shall remit the VAT withheld or collected on or before the 14th day of the month following the month the VAT was collected. Hence all VAT withheld or collected in August 2023 shall be remitted to the FIRS **on or before the 14th day of September 2023**.

  - By the amendment to section 46 of the VAT Act, the definition of building excludes fixtures or structures that can be easily removed from the land. As such, **all items removed from the definition of land will become chargeable to VAT at the prevailing rate from 1st September 2023.**

  - By the amendment to section 1(2) of the Tertiary Education Tax (TET) Act, the **new rate of TET is 3% of assessable profit and shall take effect for TET becoming due in respect of accounting period ending on or after 1st September 2023.**

  - Provisions of section 32, 34 and 37 of the Companies Income Tax Act (CITA) granting allowance in respect of capital expenditure incurred in certain circumstances and tax exemption on income earned in convertible currencies from tourist by hotel have been repealed. Consequently, **the said allowances and tax exemption are no longer available for tax returns becoming due in respect of the accounting period ended on or after 1stSeptember 2023.**

Judicial Decisions

- **Tax Appeal Tribunal (the "Tribunal") rules that the Country-by-Country Regulations 2018 is *ultra vires* the FIRS Act and the Constitution.**

  The Tribunal sitting in Lagos in the case of Check Point Software Technologies B. V. Nig Ltd v. FIRS[1] held that the Country-by-Country (CBC) Regulations 2018 is inconsistent with the FIRS Act and the Constitution of the Federal Republic of Nigeria.

  The FIRS issued Check Point Software Technologies B. V. Nig Ltd with Notices of Administrative penalties for the late filing of the 2019 and 2020 Country-by-Country Notifications under the CBC Regulations 2018. In response, the Appellant objected to same on the basis that the Regulations are illegal, *ultra-vires*, null and void.

  The Appellant argued that section 61 of the FIRS Act specifically confers powers on the FIRS Board to make subsidiary regulations under the FIRS Act and that the FIRS Board was dissolved and inoperative from 2012 to 2020 – the period within which the CbC Regulation 2018 was made. Thus, the Regulation was not validly made by the Board as prescribed under section 61 of the FIRS. Relying on the position of law that the power to make the law can be validly exercised only by the person or body named as the donee of the delegated legislative powers, the Appellant submitted that the CBC Regulation not made by the FIRS Board (the donee of the power) is invalid.

  Additionally, the Appellant argued that the OECD Country by Country Multilateral Competent Authority Agreement (CBC MCAAC) pursuant to which the FIRS CbC Regulation 2018 was made is an international Treaty/Instrument/Agreement not yet domesticated by the National Assembly as required by section 12 of the 1999 Constitution, hence unenforceable within the Territory of Nigeria, likewise the CbC Regulation 2018. In view of these, the Appellant submitted that the CBC Regulation 2018 is illegal, unconstitutional, and void and so is any penalty arising from same.

  The FIRS, on its part, argued that the Income Tax (Country by Country Reporting) Regulation 2018 was made pursuant to the FIRS Establishment Act (FIRSEA) 2007 and that Regulation 1 of the Regulations lists out laws and the Agreements which the Regulations gives effect to which includes the Country-by-Country Multilateral Competent Authority Agreement (**CBC MCAA**) signed by Nigeria and ratified by the Federal Executive Council, thereby making the CBC regulation 2018 made pursuant to it, enforceable in Nigeria.

  Disagreeing with the FIRS, the Tribunal held that in Nigeria international agreements, treaties, or convention do not automatically have the force of law after ratification as there is a constitutional requirement for every international instrument to be domesticated before it can have the force of law by section 12 of the Constitution and since the CbC MCAA is yet to be domesticated any Regulation made pursuant to it is invalid. Additionally, by necessary implication it is only the Board of FIRS, legally constituted and properly composed that can exercise the powers donated by the

[1] TAT/LZ/CIT/121/2022

National Assembly under section 61 of the FIRS Act in Nigeria to make the CbC Regulation and since the purported Regulation on CbC of 2018 was not made by the Board of the FIRS (legally constituted and properly composed), it is invalid. In view of these, the CbC Regulation 2018 was held to be illegal, unconstitutional, void and inconsistent with the FIRS ACT and the Constitution.

- **Tax Appeal Tribunal (the "Tribunal") rules that taxpayers can only claim tax deductions on expenses that pass the WREN Test where they provide credible, supporting and convincing evidence in support of such expenses.**

  The Tribunal sitting in Lagos in the case of Chi Limited v. FIRS[2] held that taxpayers can only claim tax deductions on expenses that pass the WREN Test when they provide credible, supporting and convincing oral and documentary evidence in support of such expense.

  Following FIRS' tax audit of Chi Limited for the 2017 and 2018 year of assessment, FIRS raised additional tax assessment on Chi Limited for WHT, TET and VAT. The Appellant contended that the Respondent cannot issue tax assessments on its sales promotion expenses, bad and damaged goods expenses, repairs, and maintenance expenses and statutory fees paid to the Abia State government Advertising Agency which were validly incurred by the Appellant and satisfy the WREN test under section 24 of the CITA (i.e., the expenses were wholly, reasonably, exclusively, and necessarily incurred for the production of profits).

  FIRS however argued that they were not availed with any documentation to substantiate these expenses to assist in verifying the extent of the losses suffered by the Appellant. According to the FIRS, the provision of section 24 of the CITA clearly shows that the onus is on the taxpayer to prove to the satisfaction of the Respondent that all deductibles, were wholly, exclusively, reasonably, or necessarily incurred in the course of production of profit must be explained to the satisfaction of the Board. The FIRS emphasized that the Appellant did not adduce proof of bad and damaged products and all the other heads of expenditures and has failed to show the reasonability of the said expenses thus has failed to discharge this burden of proof.

  The Tribunal upheld the argument of Respondent and held that it is the responsibility of the Appellant to adduce credible, supporting and convincing oral and documentary evidence to establish the various heads of expense that were deductible under section 24 of CITA by virtue of the WREN test and the fact that there are entries in the ledger of a taxpayer does not substantiate the expenses.

[2] TAT/LZ/CIT/001/2022