TEMPLARS

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TEMPLARS Transcripts: Tax Digest

Policy and Tax Administration

- **Federal Government removes VAT on diesel for six months**

The Federal Government ("**FG**"), through the Chief of Staff to the President, has announced the removal of the Value Added Tax ("**VAT**") on diesel for 6 months. The removal came as part of the concessions made by the FG in the on-going negotiations between the FG, Nigeria Labour Congress and the Trade Union Congress.

The suspension of VAT on diesel was precipitated by the removal of subsidy on fuel, and the resultant hike in fuel price. The National Bureau of Statistics had earlier disclosed that the average retail price of diesel increased by 8.5%.

Applicability of VAT to diesel has been a controversial issue until the Minister of Finance, the Federal Inland Revenue Service (FIRS) and the Nigeria Customs Service (NCS) confirmed that VAT is applicable to diesel. The confirmation however resulted in complaints and pushback by stakeholders in the oil and gas sector, who reported that the 7.5% VAT on diesel, with the removal of subsidy had pushed diesel pump price to NGN950 across the country.

Given the suspension of VAT on diesel, it is expected that VAT on diesel will be waived from 01 October 2023 till 31 March 2024.

- **LIRS seeks Consumption Tax compliance from business owners**

The Lagos State Internal Revenue Service (LIRS) through a public notice issued recently, urged restaurant, hotel, and event centre owners to prioritize the monthly collection and remittance of a five percent consumption tax on all consumables and personal services. Consumption Tax in Lagos was established by the Hotel Occupancy and

Restaurant Consumption Law of Lagos State in 2009 and applies to goods and services consumed at such establishments. The LIRS clarified that the tax is not an additional tax on the affected businesses but is paid by consumers as it is already included in the price of goods and services.

Consumption tax serves as a significant revenue source for Lagos State, supporting public amenities and services like healthcare, education, transportation, and security. Restaurant, hotel, and event centre owners are required to register with LIRS as collecting agents and are responsible for collecting the tax from consumers and remitting it to the government. The deadline for remittance is the 20th day of the month following the month of collection.

Failure to remit the tax as and when due can result in penalties, including a 10 percent penalty on the amount not remitted and interest charges. Collecting agents may also face business closure and legal prosecution for non-compliance. Monthly filing of returns using the UCL 2 form is necessary, along with providing details of payments, tax collected, and any other required information.

The imposition of consumption tax in Lagos state has been a subject of controversy given that the VAT Act also imposes VAT on the same goods and services on which the consumption tax applies. In 2019, the Federal High Court held that the VAT Act did not cover the field of consumption tax and as such Lagos state's consumption tax was applicable to goods and services consumed in hotels, restaurants, and event centres. The Court of Appeal in Lagos state however set aside the 2019 judgment of the FHC and upheld the VAT Act and the powers of the FIRS to collect VAT on goods and services consumed in hotels, restaurants, and event centres in Nigeria. The Court of Appeal also held, among other things, that the VAT Act being an existing federal law, had covered the field of consumption tax. Hence, its provisions should prevail over similar States' laws, including the Hotel Occupancy and Restaurant Consumption Law of Lagos State, 2009 and Lagos State Hotel Occupancy and Restaurant Consumption (Fiscalisation) Regulations, 2017.

The decision of the Court of Appeal aligns with the decision of the Supreme Court (SC) *in AG Lagos State V. Eko Hotels and Federal Board of Inland Revenue* where the SC held that the VAT Act had covered the field of consumption tax, and any similar taxes would amount to double taxation and thus invalid.

Until the matter is brought before the Supreme Court, the decision of the Court of Appeal has established that hotels, restaurants, and event centres in Nigeria are not to pay consumption tax. The raging controversy may continue to impact negatively on affected businesses which will have to deal with the uncertainty of charging VAT or consumption tax on their goods and services and the attendant penalties and interest for failure to comply. It is hoped that the SC will lay the controversy to rest once and for all.

- **FIRS issues a public notice on a nationwide tax compliance exercise for Value Added Tax and Withholding Tax**

The FIRS recently issued a public notice (the Notice) informing taxable persons including Non-Governmental Organizations, Ministries, Departments and Agencies (MDAs) of the Federal Government, State and Local Governments that it would be embarking on a nationwide VAT and WHT compliance monitoring exercise with effect from Monday, 23 October 2023.

The Notice further stated that officers of the FIRS will be visiting selected taxpayers to review their VAT and WHT records for the 2019 to 2022 accounting years whose records have been audited by the FIRS up to the 2018 accounting year. However, for taxpayers whose accounts have not been audited up to the 2018 accounting year, the exercise will extend to prior years that are yet to be audited by the FIRS.

The Notice directed all taxable persons or tax agents who have made deductions of VAT or WHT on behalf of the FIRS to immediately remit all such deductions to the FIRS within two weeks of the publication of the Notice. Taxpayers who will be visited by the FIRS will be notified of the visit and documents required for the exercise.

Legislative Advancements

- **FIRS issues guidelines on desk examination, tax audit, tax investigation exercises and other task inquiry processes (the Guidelines)**

The FIRS recently issued the Guidelines which borders on various tax inquiry processes, including Desk Examination, Tax Audit, Tax Investigation exercises, and other verification functions. This Guideline which replaces the earlier guidelines published by the FIRS in October 2020 and April 2021, is intended to clarify the nature and scope of these inquiry processes.

The processes aim to ensure complete and accurate reporting of information by taxpayers in their tax returns, in line with Section 2 of the FIRSEA. The Guidelines categorize tax compliance inquiry functions into three levels based on their nature: (i) Desk Examination, (ii) Tax Audit and (iii) Tax Investigation.

Below is a summary of the Guidelines.

Desk Examination and Monitoring:

The first level of tax compliance inquiry involves Desk Examination and Monitoring exercises. Desk examinations primarily focuses on current year tax returns to ensure completeness, accuracy, and compliance with tax laws. Desk examinations cover issues such as reconciling balances brought forward, verifying tax computations, and addressing penalties for late filing. They do not require physical visits to the taxpayer's office but may request fundamental

documents when necessary. Desk Examination must be concluded before a tax audit or investigation can commence.

Tax Audit:

The second level of inquiry is Tax Audit. Tax Audit is carried out by designated officers in Tax Audit Offices. Tax Audit can be routine (risk-based) or special, such as for tax refunds or business combinations. These audits may cover up to six preceding years and must follow a detailed audit plan, specifying the nature, scope, and intensity of the exercise. The primary goal is to rectify discrepancies in tax returns, which may result in additional tax assessments, penalties, and interest. Tax audit does not preclude tax investigation actions if approved by management.

Tax Investigation and Special Tax Crimes Investigation:

The third level includes Tax Investigation and Special Tax Crimes Investigation. Tax Investigation is an in-depth examination of tax law violations, carried out by designated investigators in Tax Investigation offices. Tax Investigation may not be restricted to a specific number of years and can lead to criminal prosecution. Some of the triggers for Tax Investigation exercise provided in the Guideline include:

- Cases referred by tax audit department usually statute barred under routine audit (6 years) where fraud is detected.
- Investigation based on failed tax audit exercise
- Inconsistent financial statements
- Referrals of recalcitrant taxpayers by Tax Controllers and other departments and the other cases from within the Service.
- Failure to file tax returns
- Lifestyle discrepancies
- Unexplained losses
- Resistance to Tax Audit exercise
- Persistent low tax turnover ratio for 3 years, etc.

Special Tax Crimes Investigation targets serious tax-related criminal activities, such as tax evasion, fraud, money laundering, and other illicit actions aimed at evading taxes legally owed to the government. These investigations may involve specialized teams and methods, including forensic accounting and surveillance. Some of the triggers for Special Tax crimes Investigations are highlighted below:

- Cases that are under investigation, by other law enforcement agencies (EFCC, Police Investigation, ICPC Investigation, Interpol Investigation, National Assembly oversight functions investigation, spontaneous disclosures from NFIU and other anti-graft agencies)
- Referrals from anonymous tips or whistleblowers

- Fraud cases referred from top Management and other Departments of the Service (Audit, TID)
- Investigation of financial criminal/fraud cases being reported by national dailies, other electronic media, or international media.
- Petition written to the Service
- Offshore Transactions- unreported incomes or assets held in offshore accounts or tax havens.
- Illicit Financial Flows (IFFs) involving frequent or large cash transactions that may be indicative of unreported incomes.

Other Tax Inquiry Processes:

The Guidelines also highlights other tax inquiry processes such as Transfer Pricing Audit, Turnover Threshold Determination, and provides guidance on their handling. The Guidelines states that Transfer Pricing Audit is handled by the International Tax Department. In line with this, Tax Offices, Tax Audit or Tax investigation teams are precluded from carrying out Transfer Pricing Audit.

Taxpayers are to take note of the Guidelines.

Judicial Decisions

- **Tax Appeal Tribunal (the "Tribunal") Rules That Consent/Approval in Writing of the Federal Inland Revenue Service ("FIRS") is Required for any Merger, Take-over, Transfer or Restructuring of Trade or Business or the Application of Initial Allowance Under the Law**

The Tribunal sitting in Lagos in Dangote Agro Sacks Ltd. v. FIRS[1] held, amongst others, that Dangote Agro Sacks Ltd ("Dangote") was not entitled to enjoy certain tax incentives granted to companies in relation to their mergers and other business restructurings as Dangote did not fulfill the underlying conditions for the incentives provided under Section 29(9) of the Companies Income Tax Act (CITA).[2] Consequently, the Tribunal upheld the denial of exemption by the FIRS to Dangote, and FIRS' subsequent assessment of Dangote to tax in the sum of Two Billion Naira.

The Tribunal noted that section 29(9) of the CITA requires that where a company is sold or transferred to a Nigerian company for the purpose of better reorganizing its company or its management, the parties will qualify for certain incentives and concessions subject to the parties obtaining the consent of the FIRS in writing.

[1] Appeal No: TAT/1B/040/2019
[2] Page 15 of the judgment

Section 29(12) states that no merger, takeover, transfer or restructuring of trade or business shall take place without the consent and clearance of the FIRS. The Tribunal also considered that Dangote had acceded to this impression in their submissions before the Tribunal. According to the Tribunal, based on the provisions of the law, the FIRS was granted a statutory discretion to waive the cessation rules and deem the transferred assets at the Tax Written Down Value ("TWDV"). Since Dangote had not sought the FIRS' consent or made any information available to it prior to taking benefit of the incentives and concessions, the Tribunal held the FIRS' discretion cannot be exercised in a vacuum.

- **Tax Appeal Tribunal (the "Tribunal") rules that Certificate of Pioneer Status shields a company from Companies Income Tax Liability for the period of the pioneer status incentive – Tourist Company of Nigeria PLC v FIRS (CIT)**

Following a tax audit on TCN for the 2015 and 2016 years of assessment, the FIRS raised additional tax liability on the Appellant on the ground that TCN's casino income was non-pioneer income and therefore not exempt from income tax liability and that interest earned by TCN from bank balances in TCN's bank account did not qualify as pioneer income as it fell outside the TCN's pioneer business. TCN rejected the assessment on the basis that its casino income and interest from bank balances for the relevant period did not fall outside their pioneer activities.

TCN in its argument outlined 5 (five) applicable steps to tax exemption which include through pioneer status. The Appellant noted that a company may be granted pioneer status upon making the necessary application as provided under the Industrial Development (Income Tax Relief) Act **("IDITRA").** Upon approval of the pioneer status incentive, the commencement date was determinable by the Certificate of Production Day issued by the Industrial Inspectorate of the Federal Ministry of Industry. The certificate tendered by TCN served as evidence that the Appellant enjoyed pioneer status during the period of the 2016 year of assessment in respect of its business of tourism and hospitality.

TCN further argued that its casino and gaming business were covered by its pioneer status and the earlier decision of the Tribunal in Tourist Company of Nigeria Plc v. FIRS[3] was referred to. It also maintained that the interest income accrued on their bank balances from deposits in relation to the income generated from its tourism and hospitality activities during the 2016 accounting year which is exempted from income tax.

Relying on Section 16 of IDITRA, the Tribunal held that the effect of the provision is to shield a company that enjoys pioneer status from the tax net for the period of the pioneer status such that a tax authority is disallowed from demanding tax or raising tax assessment on the company during the period it enjoys the pioneer status. The Tribunal added that whether a company is covered under pioneer

[3] Appeal No. TAT/LZ/VAT/033/2018.

status is a question of fact to the extent that the pioneer certificate would state the nature of the business from which income is exempt from tax. Based on this, the Tribunal discharged the Notice of Additional Assessment imposed upon TCN by the FIRS.

On whether the interest income was exempt from tax or not, the Tribunal stated that TCN's income from the bank balances should qualify as investment income different from the Appellant's tourism and hospitality business which is exempted from income tax. The Tribunal, however, noted that the FIRS failed to deny TCN's argument in relation to the interest income. Further, neither TCN nor FIRS furnished the Tribunal with the Appellant's financial statement to assist the Tribunal in ruling on the issue of the interest income being exempt from tax. Given that the issue was not contested by FIRS in its pleading, the Tribunal deemed the issue as being admitted by the FIRS.

- **Court of Appeal holds that a company is liable for failure to collect VAT from customers - Kandelite Engineering Co. Ltd. V. FIRS.**

FIRS issued additional Value Added Tax (VAT) assessment including penalties and interest on KEC in the sum of N21,105,875.31, for KEC's failure to remit VAT for the years under review.

KEC challenged the assessment at the Tax Appeal Tribunal. KEC argued that it issued invoices for the period under review. However, its customers failed to pay the VAT charged on its fees. The Tribunal ruled in favour of the FIRS, ordering KEC to pay VAT assessment as well as the penalties for late filing of VAT returns. Dissatisfied with the Tribunal's decision, KEC appealed to the Federal High Court (FHC). The FHC however affirmed the decision of the Tribunal. KEC further appealed to the Court of Appeal.

At the Court of Appeal, KEC, relying on Sections 2 and 46 of the VAT Act, contended that, as an agent issuing invoices on behalf of the Respondent, it should not have been held liable for unpaid VAT. KEC further argued that it fulfilled its obligations by issuing invoices. They further argued that the VAT Act distinguishes between VAT calculation (at the invoice issuance stage) and VAT collection, with the latter dependent on the success of the former.

Conversely, the FIRS contended that KEC, as a taxable entity, was responsible for collecting and remitting VAT on behalf of the FIRS. FIRS argued that KEC had failed to remit VAT collected from 2005 to 2009, citing relevant sections of the VAT Act and legal precedents to substantiate their claim. FIRS asserted that KEC had intentionally separated VAT payments from customer payments, and as such, they should be held liable for penalties associated with this failure.

The Court of Appeal, based on Sections 14 and 15 of the VAT Act, held that KEC's argument that it was frustrated from collecting the VAT by the refusal of its clients to pay the VAT through the company is not convincing. The Court of Appeal found that KEC could have enforced the position of the law upon its

clients within a reasonable time. In the final analysis, the Court of Appeal held that KEC, a taxable person, is liable to pay VAT and penalties for late returns even though it issued invoices to its clients but failed to collect the VAT.