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TEMPLARS Transcripts: Tax Digest

Policy and Tax Administration

- **FIRS hosts Stakeholder Session to discuss taxation of Non-Resident Shipping Companies in Nigeria**

The Executive Chairman of the Federal Inland Revenue Service, Mr Zacch Adedeji, on 20 November 2023, held a stakeholder session in partnership with the Oil Producers Trade Section (OPTS) of the Lagos Chamber of Commerce to discuss the taxation of non-resident shipping companies and the FIRS' recent drive to enforce tax compliance on those companies. The session was attended by representatives from OPTS, the International Association of Independent Tankers Owners (INTERTANKO), International Chamber of Shipping (ICS), the Nigeria Maritime Administration and Safety Agency, Nigerian Chamber of Shipping (NCS), lawyers and tax practitioners.

At the session, the FIRS reiterated the legal basis for the taxation of freight income in Nigeria and confirmed the Service's alignment with the various available exceptions and limitations provided by the law. In turn, the stakeholders requested that FIRS provide further clarification on the tax implications of the prevalent contractual arrangements in the shipping industry, and a review of the compliance period communicated to taxpayers by the FIRS. FIRS, in response, requested shipping companies to provide documentation and information to enable FIRS provide guidance on a case-by-case basis, and announced that concessions are available to taxpayers who regularize their tax position in Nigeria before 31st March 2024.

- **The Nigerian Government announces plans to stop the collection of taxes in foreign currency**

The Chairman of the Presidential Committee on Fiscal Policy and Tax Reforms. Mr. Taiwo Oyedele has declared that the payment of taxes in foreign currencies will be discontinued for some companies by the end of 2023.

Mr. Oyedele emphasized that there is no justification for Nigerian entities conducting business in Naira to settle their taxes in dollars, as this practice contributes to a demand for foreign currency over the national currency.

Furthermore, he mentioned that discussions are ongoing with state governors to explore the possibility of suspending various state taxes that impede business operations for corporate taxpayers. Additionally, Oyedele revealed plans to present an Emergency Economic Intervention bill to the National Assembly by November.

- **The Lagos State Internal Revenue Service shuts down businesses for non-compliance with tax legislations.**

The Lagos State Internal Revenue Service (**"LIRS"**) has closed 34 companies and 23 hotels, restaurants, and event facilities in Nigeria's commercial hub for failure to remit Personal Income Taxes and Consumption Tax to the Lagos State Government. The Director of Legal Services of LIRS announced that the closure of the businesses was part of a comprehensive tax law enforcement operation conducted by the Service in the state. He also emphasized that the cumulative tax obligations of the affected companies and hotels exceeded N356.12 million.
The Director further cautioned that the enforcement initiative would persist, targeting all non-compliant companies, hotels, restaurants, and individuals within Lagos state unless they promptly rectify their tax positions or adhere to the prevailing regulations in Lagos State.

Judicial Decisions

- **Tax Appeal Tribunal (the "Tribunal") rules that the exemption from Value Added Tax granted to interests in land under the Finance Act 2019 also applies to buildings on any such land.**

The Tribunal, sitting in Lagos, has held that the VAT exemption granted in the Finance Act 2019 in respect of interests in land, extends to the buildings attached to any such land.

In the matter, NGX Real Estate Limited (the "**NGX**"), a company in the business of acquiring, leasing, hiring or part-exchanging real property, filed this appeal against the Federal Inland Revenue Service (the "**FIRS**") in opposition of certain assessments made by the FIRS against the Appellant. Sometime in February 2022, the FIRS had served a letter on the Appellant, alleging that the Appellant had not fully discharged its Value Added Tax (VAT) obligations for the 2020 accounting year, in the sum of N36,185,564.25 (Thirty-Six Million, One Hundred and Eighty-Five Thousand, Five Hundred and Sixty-Four Naira, Twenty-Five Kobo) only. The assessment was disputed by the Appellant, following which the Appellant instituted the appeal before the Tribunal.

Two issues which came up before the Tribunal was whether the FIRS erred in law when it imposed the VAT liability on the Appellant, and secondly whether the FIRS erred in law when it charged interests and penalties on the tax assessment or demand notice when same was neither final nor conclusive.

The Appellant relied on the definition of "Goods" and "Services" in the VAT Act as amended in the Finance Act 2019 ("**FA19**"). By the definition of the terms in the VAT Act as amended by the FA19, goods include tangible and intangible product, asset or property which can be transferred from one person to another excluding interest in land. Services, on the other hand, refers to anything other than goods, money or securities which is supplied, excluding services provided under a contract of employment.

NGX argued that since VAT is payable only in respect of supply of goods and services, an important pass-mark is that for VAT to be chargeable on a transaction, the transaction must qualify as a transaction for the supply of goods and services. The Appellant then submitted that lease transactions, which border on delivering up possessory rights to a tenant, cannot be said to mean taxable supplies as defined in the relevant laws.

On the second issue, the Appellant argued that the FIRS only had power to charge interests and penalties on a tax assessment when the same was final, that is, an objector failed to appeal against an assessment or demand notice within the period provided for. The Appellant's contention then was that having filed its notice of appeal within the legally stipulated window, the demand or assessment notices were not final and conclusive and hence penalties could not arise from them.

FIRS' contention, on the other hand, was that by the provisions of the Finance Act 2019, interests in land was exempt from VAT, while interests in buildings were not. The Finance Act 2020, the FIRS argued, does exempt both land and buildings from VAT, and by that specificity, the exemption of buildings cannot be imported into the Finance Act 2019. Thus, while interest in building was liable to VAT in the 2020 financial year (the commencement year of the passage of the 2019 Finance Act), it is not liable to VAT in the 2021 financial year. Thus, the Appellant was liable to pay the assessed VAT for the 2020 financial year.

On the second issue, the FIRS argued that penalty and interest are a statutory levy for failure to pay tax and in line with the tax laws must be from the date the duty to deduct arose and not from the date the assessment was raised.

In resolving the issue, the Tribunal reiterated the position of the law that the law applicable at the time a cause of action arose should be the law applied by a court of law in a case, as retrospective application of laws in not allowed, except in limited cases. The Tribunal thus held that the law applicable in the scenario was the Finance Act 2019. Going further, the Tribunal found that following the amendments to the VAT Act by the Finance Act 2019, it was undisputed that

interests in land was exempt from VAT. Buildings, the Tribunal held, being attached to land, formed part of the land and hence the exemption granted in the Finance Act 2019 in respect of land, should extend to the buildings affixed to land. In view of that, the Tribunal discharged the assessment by the FIRS.

On the second issue, the Tribunal considered it a mere academic exercise to delve into whether the FIRS erred in law in charging the interests and penalties on the assessment, seeing as the assessment itself had been discharged by the Tribunal.

- **Tax Appeal Tribunal (the "Tribunal") rules that the provision of Software licensing and upgrades qualify as VAT-able supply in Nigeria- MTN Communications Plc v FIRS**

The Tribunal sitting in Lagos in **MTN Nigeria Communications Plc (MTN) V Federal Inland Revenue Service ("FIRS)**[1] held, amongst others, that the provision of software licensing and upgrades by MTN qualifies as VAT-able supply in Nigeria.

MTN initiated this appeal following a report from the Office of the Attorney General of the Federation (**OAGF**) on its investigation into MTN's visible and invisible transactions through which it subsequently alleged that MTN had outstanding liabilities in respect of import duty, VAT, and WHT. FIRS, on that basis, conducted a review of MTN's tax and accounting records and upheld the OAGF's alleged tax liability. Consequent to the FIRS's refusal to revise the assessment, MTN filed the Appeal at the Tribunal.

The first issue before the Tribunal was whether the provision of software licensing and upgrades qualifies as a taxable supply of goods and services in view of the provisions of the Value Added Tax (VAT) Act prior to the amendment by the 2019, 2020, and 2021 Finance Acts.

MTN in its arguments submitted amongst others that the software contracts between it and several service providers for software licenses and upgrades do not qualify as either supply of "goods" or "services" for the purpose of VAT, prior to the amendments of the Finance Acts.

Despite MTN's arguments, the Tribunal, relying on the case of **Vodacom Business (Nig) Limited v FIRS**[2], held that the provision of software licensing and upgrades qualify as VATable supply in Nigeria as they were not included as exempted services in the VAT Act. The Tribunal emphasized that the evidence adduced before it showed that the software licensed by MTN was meant for value addition to the assets of MTN.

Other issues before the Tribunal bordered on the treatment of satellite services, the scope of the tax investigation by the FIRS, the susceptibility of offshore training to tax, and the calculation of interest and penalties during the pendency of an objection to a tax assessment.

[1] Appeal No: TAT/LZ/VAT/075/2022
[2] (2019) LPELR- 47865

The Tribunal held that the supply of bandwidth capacities by Intelsat Global Services and Marketing Limited through transponders located in the satellite qualified as VATable supply, as such should attract appropriate VAT liabilities. The Tribunal reasoned that MTN had enjoyed some services from Intelsat which made the relationship VATable under extant laws in force in Nigeria, irrespective of whether Intelsat maintains a physical presence in Nigeria or not.

Regarding whether the FIRS has the authority to conduct a tax investigation beyond the 5-year restriction in the absence of any false or untrue document or statement by MTN, the Tribunal, drawing on the precedent set in **Phoenix Motors Limited v National Provident Fund Management Board**[3], affirmed that ample evidence exists to grant the FIRS the right to conduct an investigation in this matter. The Tribunal further stated that any violation of the tax laws can lead to a tax investigation and such violation need not be fraudulent.

On the issue of whether training provided by offshore facilitators in Nigeria is subject to VAT, the Tribunal held that, as per the provisions of sections 2 and 46 of the VAT Act, training services, regardless of location, incur VAT if enjoyed in Nigeria. Consequently, such training would be deemed VATable under Nigerian law.

Addressing the question of whether the FIRS erred in calculating and imposing interest and penalties on MTN's alleged on MTN's alleged non-remittance of VAT liabilities, the said liabilities having not become final and conclusive, the Tribunal clarified that where an assessment is objected to or appealed against, it cannot be final and conclusive, until resolution.

- **Federal High Court voids controversial legislative provisions requiring tax debtors to deposit a portion of the disputed assessment prior to exercising their right of appeal.**

On Thursday, 9 November 2023, a Federal High Court in Abuja invalidated certain legislative provisions for infringing upon the right of appeal for tax debtors. Struck down were portions of the Tax Appeal Tribunal (Procedure) Rules (2021), the Federal High Court of Nigeria (Federal Inland Revenue Service) Practice Directions (2021), and the Federal High Court of Nigeria (Tax Appeals) Rules (2022).

The suit was instituted by Joseph Daudu, SAN, against the Minister of Finance, Budget, and National Planning as the first respondent and the Chief Judge of the Federal High Court and the Attorney General of the Federation (AGF) as the second and third respondents[4].

Justice James Omotosho, ruling on the matter, held that the provisions were unconstitutional, asserting that they curtailed the constitutionally provided right of appeal. The first provision voided was Order III Rule (6) (a) of the Tax Appeal

[3] (1993) 1 NWLR (Pt.272) 71
[4] The suit is marked: FHC/ABJ/CS/12/2022.

Tribunal (Procedure) Rules (2021), which required an aggrieved person, challenging the tax charged by the Federal Inland Revenue Service (**FIRS**) or any relevant tax authority, to pay 50% of the disputed amount before such an appeal could be heard.

The second provision, Order V Rule 3 of the Federal High Court of Nigeria (Federal Inland Revenue Service) Practice Directions (2021), mandated a payment of half of the assessed amount into an interest-yielding account pending the determination of the application and proceedings. The third provision, Order V Rule 1 of the Federal High Court of Nigeria (Tax Appeals) Rules (2022), required depositing the sum contained in the decision of the Tax Appeal Tribunal into an interest-yielding account maintained by the Chief Registrar of the Federal High Court.

The judgment affirmed the right to appeal as a constitutional entitlement and declared these provisions unconstitutional, null, and void. Justice Omotosho stressed that the provisions favoured the Federal Inland Revenue Service without adequately balancing the interests of tax debtors.

- **The Tax Appeal Tribunal (the "Tribunal") rules that bad debts are allowable for tax deductions and are not subject to the discretion of the FIRS.**

The Tribunal sitting in Lagos in *NPF Microfinance Bank Plc v. Federal Inland Revenue Service* has on 5 October 2023, ruled that bad debts are allowable tax deductions and are not subject to the discretion of the FIRS' Board. The Tribunal, however, disallowed an unsubstantiated public relations (PR) expense. The decision of the Tribunal involved an extensive consideration of the provision of section 24 of the Companies Income Tax Act ("**CITA**") Cap C21 LFN 2004 (as amended).

NPF Microfinance Bank Plc ("**NPF**") had classified bad debts, overdraft facilities and PR (advertisement) expenses as allowable expenses under the CITA, which the Federal Inland Revenue Service ("**FIRS**") disallowed and issued Notices of Additional Assessment and Demand Notes. NPF's objection was that FIRS's assessment was inconsistent with section 24 of the CITA, which allows expenses that are wholly, exclusively, necessarily, and reasonably ("**WREN**") incurred by the business to generate turnover. Despite ongoing reconciliation attempts, the FIRS issued a Notice of Refusal to Amend ("**NORA**"), pursuant to which NPF filed an appeal, arguing that its right to fair hearing had been infringed.

FIRS argued (a) that the debts did not qualify as bad debts as NPF had engaged recovery agents in some cases and did not provide death certificates of deceased debtors in other cases, (b) that NPF did not show how the "PR expenses" could satisfy the WREN test; and (c) that, relying on Oando Trading & Supply Trading Limited v. FIRS, there was no legal basis to argue that the NORA was issued prematurely, as the timing of the issuance of the NORA was inconsequential.

The Tribunal held that the absence of death certificates, bankruptcy orders, etc., cannot be the basis for disregarding the classification of debts as bad. Therefore,

the Tribunal ruled that the bad debts were allowable under the language of section 24 of the CITA.

On the question of PR expenses, the Tribunal held that while NPR's PR expenses were not specifically disallowed under section 27 of the CITA, they did not pass the WREN test under section 24, as NPR did not show that they were crucial to its continued existence. Also, NPF did not discharge its duty to provide evidence of the precise nature of expense, or the exact allowable amount. The Tribunal consequently held that the PR expenses were not tax deductible.

Finally, the Tribunal decided that the issuance of a tax audit report did not violate NPF's right to fair hearing. In reaching this conclusion, the Tribunal reasoned that the timeline in section 69 of the CITA does not apply to tax audit report, since tax audit report precedes a notice of objection to an assessment. Besides, according to the TAT, nothing under the law precluded FIRS from raising tax assessments anytime in the year, even during ongoing reconciliation.

The Tribunal then directed the FIRS to reevaluate NPF's tax liabilities in accordance with its judgment.