TAXATION OF M&A TRANSACTIONS - WHAT HAS CHANGED? (SERIES II)

In our previous newsletter (Series I) on the Taxation of M&A transactions in Nigeria (**read here**), we highlighted some of the significant changes to the taxation framework , including tax considerations for corporate restructuring transactions in Nigeria, as introduced in the recently enacted Finance Act 2020 (“Act”).

Further to the Act, various guidelines and orders have been issued by the Minister of Finance, Budget and National Planning (“**Minister**”) and the Federal Inland Revenue Service (“**FIRS**”), to supplement and provide clarifications necessary for the implementation and enforcement of the provisions of the Act. Of importance to this discourse are the (i) Companies Income Tax (Significant Economic Presence) Order (“**SEP Order**”) issued by the Minister”) which defines the threshold for determining the significant economic presence of non-resident companies in Nigeria; (ii) the FIRS Information Circular no 2020/06 which provides clarification on business commencement and cessation rules and business reorganisations (“**M&A Circular**”); (iii) the FIRS Information Circular no 2020/02 which provides clarification on the implementation of the value added tax provisions in the Act (“**VAT Circular**”); and (iv) the FIRS Information Circular no 2020/05 which provides clarification on the provisions of the Stamp Duties Act (“**Stamp Duty Circular**”).

We have briefly discussed below some salient provisions of these circulars/order which impact on the taxation of corporate restructuring transactions in Nigeria.

RELATED PARTY TRANSACTIONS

The M&A Circular further clarifies that where a trade or business carried on by a company is sold or transferred to a Nigerian company for the purposes of better organisation of that

trade or business or the transfer of its management to Nigeria, and any asset employed in such trade or business is sold or transferred to the Nigerian company, the entities involved will qualify for the following concessions:

1. Commencement and cessation rules shall not apply. In other words, the surviving entity shall be deemed to have continued carrying on the business of the old entity.
2. Assets would be deemed to have been transferred at Tax Written Down Value i.e. balancing adjustments would not be made.
3. Capital Gains Tax and Value Added Tax will not apply to the asset transferred or sold.

However, the above concessions would only be available where the parties obtained the written consent of the FIRS, the affected companies have satisfied the FIRS that one company has control over the other or that the companies are controlled by some other person or are members of a recognised group of companies, and such control/related party relationship must have been in existence for not less than a consecutive period of 365 days before the transaction. Further, the assets acquired in relation to which the above tax concessions have been granted shall not be disposed within 365 days of the reorganisation, as such disposal will trigger a withdrawal of all concessions granted and the parties will be required to pay the applicable taxes, including the payment of penalties and interest as though the concessions were not granted *ab initio.*

VALUE ADDED ACT ("VAT")

The VAT Circular further reinforces the provisions of the Act, including the requirement for any taxable person who permanently ceases to carry on trade or business in Nigeria to notify the FIRS within 90days for the purposes of deregistration and failure to notify the tax authority would render the taxable person liable to penalty as though it has failed to file its returns. It is therefore important for parties to corporate restructuring transaction to take note of this provision.

The VAT Circular also provides that a non-resident person who makes taxable supplies to Nigeria shall register with the FIRS using the address of the recipient of the supply in Nigeria for the purpose of correspondence relating to the tax. Unless the non-resident company has a permanent establishment in Nigeria, it will not be required to remit the VAT chargeable to the FIRS, rather the recipient of the supplies in Nigeria has the obligation to self-account for VAT.

COMPANIES INCOME TAX ("CIT")

Save where the reorganisation is between related parties and the concessions available with respect to related person transactions as discussed above have been granted by the FIRS to the parties, the commencement rule as explained in the Series I Newsletter will apply. In order words, the resulting entity will be deemed to have commenced business and the rules on timing for payment of CIT will apply. Also, as provided in the Companies Income Tax Act (as amended) as well as the M&A Circular, if any company ceases to carry on business following a corporate restructuring transaction, the Company is required to file CIT tax returns within 6months of ceasing business, and its assessable profits therefrom shall be the amount of the profits from the beginning of the accounting period to the date of cessation of business.

WITHHOLDING TAX DEDUCTION

Based on the definition of "*significant economic presence*" provided in the SEP Order, a non-resident company providing technical, professional, management or consultancy services to persons in Nigeria will be deemed to have significant economic presence in Nigeria where it earns any income or receives any payment from a person resident in Nigeria or from its fixed base or an agent of a non-resident company in Nigeria and consequently will be liable to companies income tax in Nigeria. Significant economic presence would however not arise if the payment is made by the foreign fixed base of a Nigerian company to the non-resident service provider. Due to the above provision, Nigerian transaction parties who engage the services of foreign corporates as advisers may likely have an obligation to

deduct withholding tax at the rate of 10% on the professional fees payable to the advisers. The withholding tax payable in such circumstance shall be the final tax.

STAMP DUTY

As we explained in the Series I Newsletter, the definition of "instrument" under the Stamp Duty Act was amended by the Act to include "electronic documents". However, the Act does not provide for a definition of "electronic document" and also does not address when an electronic document executed outside Nigeria will be deemed to have been received in Nigeria. With respect to documents executed outside Nigeria, clarity as to when they are received in Nigeria is critical, as the obligation to pay stamp duty on such instrument is postponed until such a time when the instrument is **received in** Nigeria. Unlike physical instrument where it can easily be determined as to when the document has been brought into Nigeria, because of the nature of "electronic documents", this remains a grey area.

The FIRS has however issued the Stamp Duty Circular where it stipulates that an electronic instrument will be deemed to have been received in Nigeria for the purpose of stamp duty obligations if:

1. it is retrieved or accessed in or from Nigeria;
2. it (or an electronic copy of it) is stored on a device (including a computer, magnetic storage, etc.) and brought into Nigeria; or
3. it (or an electronic copy of it) is stored on a device or computer in Nigeria.

The foregoing interpretation provided by the FIRS is quite broad and would likely give rise to enforcement challenges. However, pending a judicial decision clarifying the intended scope as to when an electronic document will be deemed to have been received in Nigeria, the interpretations provided by the FIRS indicates its pulse towards the enforcement of stamp duty in relation to electronic documents.

CONCLUSION

The evolving landscape of the Nigerian tax regime calls for parties to corporate restructuring transactions to ensure that tax analysis of their deals is properly undertaken by seasoned tax law professionals. This would ensure that parties adopt the most tax efficient structures for their transactions.

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