

Some Significant Tax Law Developments in Nigeria

Civil Procedure

- 1 New Federal High Court Practice Directions in Tax cases:** On May 31, 2021, the Chief Judge of the Federal High Court (“FHC”), acting pursuant to the powers conferred on him by Order 57 Rule 3 of the FHC (Civil Procedure) Rules, 2019, issued the FHC (Federal Inland Revenue Service (“FIRS”)) Practice Directions, 2021 (“FIRS Practice Directions”). Among others, the FIRS Practice Directions aims to regulate proceedings at the Court on the application by the FIRS for the (A) forfeiture of assets, (B) freezing of bank accounts, (C) access to bank records, (D) access to and/or sealing of the business premises, of taxpayers. It also mandates taxpayers to deposit into the court half of the sum assessed to be payable by the taxpayer as a condition for defending the government’s tax recovery suit¹.
- 2 New Tax Appeal Tribunal (“TAT”) Rules:** The TAT (Procedures) Rules, 2021 (“TAT Rules 2021”) was issued pursuant to paragraph 21 of the fifth schedule to the FIRS (Establishment) Act 2007. The TAT Rules 2021 replaces the 2010 Rules and now regulates the proceedings of the TAT. Significant provisions of the TAT Rules 2021 include: virtual hearing, electronic filing, mandatory payment of 50% of assessed tax, documents only procedure, summary appeal procedure, pre-trial conference, among others. (See our publication on the [TAT Rules 2021](#)²).

Tax Returns Filings

- 3 A wider range of taxpayers are now obligated to file tax returns.**
 - a. Non-resident companies (“NRCs”) taxable in Nigeria are obligated to register and file income tax returns annually for purposes of companies income tax (with the exception of NRCs whose income derived in Nigeria is subject to withholding tax as final tax).
 - b. Enterprises in Free Trade Zones, Export Processing Zones and Oil and Gas Free Zones, despite being exempt from paying taxes, are now required to file income tax returns with the FIRS.
- 4 A New Online Tax Administration System: TaxPro-Max.** The FIRS on June 5, 2021, introduced a new online Tax Administration Solution known as “TaxPro-Max” to ease tax compliance and streamline tax administration within the country. The TaxPro-Max platform is aimed to enable seamless registration, filing, payment of taxes, automatic credit of withholding tax and other credits to taxpayer’s accounts, amongst other related features.

International Anti-Avoidance Treaties

- 5 Suspension of Filing of CbCR:** In May 2021, the FIRS issued Public Notice on Local Filing Provision in Regulation 4 of the Income Tax (Country by Country Reporting (“CbCR”)) Regulations, 2018 notifying branches and subsidiaries of Multinational Enterprises

¹ Article -- The Federal High Court (Federal Inland Revenue Service) Practice Directions, 2021: An Appraisal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3907267>

² Article - Notable Changes in the Tax Appeal Tribunal- <https://bit.ly/3DIqkFI>

operating in Nigeria of the suspension of the implementation of local filing requirements of CbCR³.

- 6 **OECD Two-Pillar Solution**. As of November 4, 2021, 137 countries out of 140 members of the Organisation for Economic Cooperation and Development ("OECD") Inclusive Framework on Base Erosion and Profit Shifting have signed up to the OECD two-pillar solution to address the tax challenges arising from the digitalisation of the economy. Nigeria has not signed the two-pillar solution agreement because of some perceived unfavourable effects of the two-pillar solution for developing countries.

Value Added Tax Administration ("VAT")

- 7 **The States Assume Greater Powers to Impose VAT**. Following the judgment of the Federal High Court in *A.G. Rivers State v. FIRS et. al.* (FHC/PH/CS/149/2020), the Houses of Assembly of Rivers State and Lagos State approved VAT Laws in 2021 for their respective States.

- 8 ***A.G. Rivers State v. Federal Inland Revenue Service et. al. (FHC/PH/CS/149/2020)***

Federal Government ("FGN") has no power to Legislate on VAT: The Federal High Court ("FHC") delivered the momentous VAT Decision reversing the long-standing legal view that the FIRS is the body with the power to administer and manage VAT assessment and collection. The FHC held that the FGN lacks the power to impose and collect VAT, withholding tax, technology tax, and education tax. Furthermore, the Constitution does not grant the National Assembly the power to make legislation imposing any type of sales tax, including VAT, or any other tax not related to capital gains, stamp duties, or the income or profits of individuals other than companies. FIRS' appeal against this decision is pending.

Oil Sector

- 9 **Changes in tax rates for upstream petroleum operations**: The Petroleum Profit Tax Act, which regulated the taxation of corporations engaged in upstream petroleum operations, was repealed by the Petroleum Industry Act, 2021 ("**PIA**"). With the PIA, upstream petroleum businesses will now be charged and assessed a Hydrocarbon Tax ranging from 15% to 30% on earnings from crude oil production, in addition to the 30% Company Income Tax and the 2.5% Education Tax⁴.

- 10 ***Sahara Energy Exploration & Production Limited V. Federal Inland Revenue Service (TAT/LZ/005/2013)***

Transfer of interest in an OPL is an asset for CGT purposes: The Tax Appeal Tribunal ("**Tribunal**") held that a transfer of an interest in an Oil Prospecting Licence ("**OPL**") is an asset for the purpose of the Capital Gains Tax. Consequently, the Tribunal held that the Appellant's transfer of 45% of its interest in OPL 284 is a disposal of asset in the context of the Capital Gains Tax Act. The Appellant was therefore held liable to account for the capital gains tax on the disposal, in addition to the penalty and interest that has accrued on the tax from the date the tax ought to have been remitted.

³ In January 2022, the FIRS issued another Public Notice on the lifting of the suspension of CbCR filing

⁴ The Education Tax rate has been increased from 2% to 2.5% by the Finance Act of 2021.

Administrative Discretion

11 *Barrister Michael O. Odo V. Ebony State Internal Revenue Board (TAT/SEZ/003/19)*

BOJ income tax assessment: The Tax Appeal Tribunal (“**Tribunal**”) held that assessments based on Best of Judgment (“**BOJ**”) must be reasonable and with proper basis. The Tribunal further held that a BOJ assessment that is punitive in nature will be liable to be set aside. Consequently, the Tribunal set aside the BOJ assessment issued to the Appellant for being punitive in nature.

12 *BJ Pumping Services Panama V. Federal Inland Revenue Service (TAT/LZ/CIT/029/2018)*

FIRS has power to charge tax on a percentage of turnover: The Tax Appeal Tribunal (“**Tribunal**”) held that the FIRS has powers to charge tax on a percentage of the turnover of a company where any of the conditions set out in s. 30 of CITA is present, notwithstanding any of the powers of the FIRS and/or the procedures set out in s. 55 of the CITA. The Tribunal also held that the failure of the Appellant to file its TP returns along with its income tax returns cannot be regarded as complete compliance with section 55. Consequently, the Tribunal held that FIRS was right in applying tax at the rate of 30% on 20% of the Appellant’s turnover.

13 *Max Aluminium & Allied Products V. Federal Inland Revenue Service (TAT/SEZ/003/2020)*

Audited financial statements for a single year cannot be basis for determining profit for subsequent years: The Tax Appeal Tribunal (“**Tribunal**”) held that the FIRS cannot rely on the audited financial statements of a single year to determine a company’s assessable profit for subsequent years. In this appeal, the FIRS relied on the 2017 audited financial statements filed by the Appellant to determine the “trend” of the company’s profit in 2018 and 2019 financial years. The Tribunal held that to take an isolated audited statement of a year, for use as estimated profit of the company in subsequent years, cannot be a logical and reasonable conclusion in the circumstance.

14 *Citibank Nigeria Limited V. Lagos State Internal Revenue Service*

Imposition of penalty and interest is not discretionary: The Tax Appeal Tribunal (“**Tribunal**”) held that the FIRS has no discretion whether or not to impose penalty and interest. The Tribunal held that s. 32 of the FIRS Act, dealing with imposition of interest and penalty, uses the word ‘shall’, which connotes that the relevant tax authority has no discretion in imposing penalty and interest. Thus, the Tribunal held that once it is established that tax was not paid/remitted within the time prescribed by law, the tax authority must impose penalty and interest on the taxpayer.

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