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TAXATION OF OFFSHORE ASSETS: HIGHLIGHTS OF THE PRESIDENTIAL EXECUTIVE ORDER NO. 8 OF 2018



Apparently, the Executive Order No. 8 of 2018 was on Monday, October 8, 2018, signed by President Muhammadu Buhari in furtherance of the current administration's resolve to increase tax revenues and stem the tide of tax evasion and money laundering by Nigerian citizens in and outside the

country. The Executive Order essentially creates a window for owners of taxable offshore assets, who have defaulted in their tax payment in the past, to regularize their positions.

Tagged **Presidential Executive Order on the Voluntary Offshore Assets Regularization Scheme** ("**VOARS**" or "**EO8**" or "**the Order**"), the Order directed the Office of the Attorney General of the Federation and Minister of Justice ("**OAGF**") to set up in Switzerland a *Voluntary Offshore Assets Regularization Scheme* ("the Scheme"). The purpose of the Scheme is to encourage and provide opportunity for all categories of eligible taxpayers who hold offshore assets and incomes to, within a period of twelve (12) months beginning from October 8, 2018, voluntarily declare those assets; pay taxes on them; and obtain compliance certificate under the Order shielding them from the legal consequences of tax evasion in respect of the declared offshore assets.

According to the EO8, offshore assets include liquid assets (bank balances), stocks and bonds held in portfolios, insurance policies, shares in listed or unlisted offshore companies, property assets and all manners of assets held directly or indirectly through corporate entities, trust structures and non-Nigerian resident companies and intermediaries.





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This piece reviews the provisions of the EO8 and the implications of the Order on affected owners of offshore assets.

WHAT THE ORDER IS SET TO ACHIEVE

For the duration of the Scheme, eligible taxpayers will be encouraged and given opportunity to:

- voluntarily elect to access the *Voluntary Offshore Assets Regularization Facility in Switzerland* (“**the Facility**”) and obtain an Eligibility Certificate to declare offshore assets through the Scheme. However, payment of a two percent (2%) facility access fee and submission to compliance procedures required by Swiss authorities are preconditions to doing this. It should be noted that the Facility is the qualified intermediary of the Federal Government of Nigeria (“**FGN**”) rendering sovereign advisory services for the Scheme;
- regularize their offshore assets held anywhere in the world by paying the taxes due on them, or voluntarily elect to regularize their tax status for all the relevant years by paying a one-time levy of thirty-five percent (35%) of the value of their offshore assets to the FGN in lieu of all outstanding taxes, penalties and interest;
- ensure full tax compliance on their residual offshore assets after accessing the Scheme by paying taxes on income earned thereon to the FGN, and
- avoid and stop tax evasion.

However, in order to use the Scheme, eligible taxpayers are required to establish a Swiss nexus for their offshore assets held anywhere in the world or arrange for their management either in Switzerland or through the Swiss financial system and institutions.



VALID DECLARATION UNDER THE SCHEME

For an offshore assets declaration to be valid under the Scheme, the disclosure made by the concerned eligible taxpayers must:

- be made voluntarily, full, honest, complete and verifiable in all material respects;
- be made through the Facility (the qualified intermediary);
- be made in accordance with compliance procedures required by Swiss authorities through the processes established by the Facility or in any other form or manner as may be prescribed by the Regulations governing the Scheme;
- consent to payment to the FGN of the 35% one-time levy on the offshore assets declared under the Scheme; and
- consent to assessment of future taxes payable on income earned on residual offshore assets by the relevant Tax Authority.



ELIGIBLE TAXPAYERS

According to the Order, all persons, entities and their intermediaries holding offshore assets and are in default of their tax liabilities in any way whatsoever are eligible to participate in the Scheme. Particularly owners of offshore assets who:

- are yet to declare them to the relevant authorities or have not been making full declaration of their taxable income/assets;
- have been underpaying or under-remitting the taxes due;
- though registered with relevant tax authorities, have additional disclosures to make or need to amend prior disclosures or have not been filing returns as appropriate;



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- are under a process of tax audit or investigation with the relevant Tax Authority but are prepared to settle the tax dispute out of court;
- have applied for and received FGN Special Clearance to access the Scheme;
- are not already under investigation by law enforcement agencies in Nigeria or any other country and have not been charged with any crimes including theft of public funds or obtaining offshore assets through corrupt practices; and
- have been determined to be innocent after investigations or legal proceedings.

CONSEQUENCES OF NON-COMPLIANCE

As stated in the Order, any defaulting eligible taxpayer who fails to take advantage of the Scheme shall, after the expiry of the 12-month grace period, face the legal consequences of tax evasion, including:

- investigation, charges and enforcement procedures concerning offshore assets held by them anywhere in the world, as well as prosecution for tax offences under relevant extant laws;
- loss of right to plea bargain;
- liability to pay in full the principal sum due together with one-hundred-percent (100%) of all interest and penalties arising therefrom;
- liability to undergo comprehensive tax audit;
- withdrawal of any reliefs previously granted to the defaulting taxpayer; and
- the possible appropriation of any sum paid in relation to the Scheme as part-payment of any further outstanding tax in respect of undisclosed information.



WHAT DO PARTICIPANTS STAND TO GAIN UNDER THE SCHEME?

The VOARS offers various reliefs to eligible taxpayers who take advantage of the Scheme while it subsists. As provided in the Order, the benefits to be derived by eligible persons and entities who truthfully and voluntarily make appropriate declarations, pay the required taxes/one-time levy and comply with all the regulations governing the Scheme, include the following:



- permanent waiver of criminal prosecution for tax offences in relation to offshore assets,
- waiver of penalties and interest on the declared and regularized offshore assets;
- immunity from tax audit of the declared and regularized offshore assets;
- receipt of Offshore Assets Regularization Compliance Certificate from the FGN on the declared and regularized offshore assets; and
- freedom to use or invest their duly regularized residual offshore assets in any manner in Nigeria or overseas, and thereafter be subject only to payment to the FGN of annual tax on income earned on the residual offshore assets.

However, it should be noted that the stated reliefs/benefits are not guaranteed in all situations. Specifically, eligible taxpayers who participate under the Scheme are only qualified to receive the waivers and benefits, where such will not prejudicially affect or invalidate any court order or judgement already obtained, in respect of any default in payment of tax for which interest and/or penalty have already accrued.

REMARKS

The key objectives of the EO8 remain largely the same with that of the EO4 which was effected between July 2017 and March 2018 on the Voluntary Assets and Income Declaration Scheme (“VAIDS”). As was the case with VAIDS, the FGN, in addition to curbing corruption and illicit financial flows, intends to boost its revenues by expanding the country’s tax base and encouraging compliance among taxpayers through VOARS. Notably, every taxable person/entity in Nigeria is under statutory obligation to voluntarily declare income earned and assets acquired from all sources, including offshore assets, file appropriate tax returns annually and pay the tax due to the relevant Tax Authority.

The FGN has indicated its resolve to make use of the information it has obtained on all Nigeria-related offshore incomes and assets through automatic exchange of information (“AEI”) with other countries to prosecute tax offenders who fail to regularize their tax status in respect of offshore assets under the Scheme. It would be recalled that Nigeria is a signatory to the Treaty on AEI (an initiative of The Global Forum on Transparency and Exchange of Information for Tax Purposes) which, as at December 2017, had been signed by over 95 countries for the purpose of global exchange of information on illicit financial flows and tax evasion.





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Similar instruments to VOARS have been used by many countries of the world. Since the 2016 revelations from the Panama Papers, many countries have shown renewed interest in, and beamed searchlight on, the activities of their citizens which have the effect of tax evasion through investments hidden in offshore tax havens. They are increasingly relying on global platforms/initiatives, such as the AEI, to curb the incidence and seek recovery and repatriation of evaded taxes. As reported by the Organisation for Economic Cooperation and Development (OECD), Australia recovered about 326 million EUR in 2013 due to exchange of information. Sweden recovered 130 million EUR due to AEI requests and 200 million EUR due to voluntary disclosures between 2010 and 2014. France recovered about 1.85 billion EUR as at September 2014 under its voluntary disclosure program while the total amount received by countries in unplanned additional revenue as a result of voluntary disclosure programmes and other similar initiatives (in the lead-up to the first exchanges done pursuant to the AEI Treaty) stood at circa 80 billion EUR as at March 2017.

We note that the EO8 is silent on the status of offshore incomes and assets whose owners have participated and obtained amnesty previously under the VAIDS. It is however presumed that amnesty granted in respect of offshore incomes and assets already declared and regularized under VAIDS, should have equal effect as a compliance certificate granted under VOARS for the same set of offshore assets. It is suggested that the Regulations should clearly exempt owners of such assets from the ambit of VOARS or expressly state that clearance certificate issued under VAIDS suffices for the purposes of VOARS to avoid cases where persons cleared under VAIDS become subjects of tax audits and prosecution for failing to comply with VOARS. At any rate, owners of offshore assets are advised to seek professional advice on their tax compliance status and in appropriate cases, take necessary steps to comply with the Scheme.

The Grey Matter Concept is an initiative of the law firm, Banwo & Ighodalo

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