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Taxation of Income Derived From Nigeria By International Shipping Companies: A Brand-New Tax Obligation?

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In what appears to have taken international shipping companies by surprise, the Federal Inland Revenue Service ("**FIRS**") recently issued tax assessment notices to international petroleum tankers and transport vessels operators, regarding the recovery of income tax allegedly owed over the period from 2010 to 2019 (the "**Tax Assessments**"). These Tax Assessments indicate a computation of 6% tax, 10% penalty, and 19% interest rate in respect of profits derived from Nigeria during the relevant period, remittance of which is due and outstanding.

The resultant effect has led to the withdrawal of a large pool of foreign oil vessels from operations in Nigeria by their owners in a bid to prevent an arrest or detention of the vessels by the FIRS. This development has directly resulted in higher freight costs due to the fall in supply of service. As a stop-gap measure, the Federal Government of Nigeria, through the Special Adviser to the President on Revenue, at a recent shipping stakeholders' meeting, guaranteed that no vessel will be detained or arrested due to the Tax Assessments. Further, the Special Adviser noted that a technical committee comprising of the oil and gas industry regulators[1], FIRS, and relevant offices of the Presidency, will be set up to consider concerns arising from the Tax Assessments.

However, these Tax Assessments are not in respect of a *'brand new tax obligation'* as the FIRS previously issued notices and circulars encouraging tax compliance by international shipping companies deriving income from Nigeria. In particular, by a public notice dated December 17, 2021 (the "**Notice**"), the FIRS specifically referred to the provisions of Sections 9, 13(2), 14 and 55A of the Companies Income Tax Act ("**CITA**") Cap. C21 LFN 2007 (as amended)[2], which relate to the taxation of income derived by international shipping lines in Nigeria and directed all such operators and agents "to regularize their tax compliance status". Notably, a cut-off date of February 28, 2022, was indicated in the Notice for the regularization of tax compliance. In addition, by information circulars, particularly the circular dated May 11, 2022 (the "**Circular**"), the FIRS provided extensive guidance on relevant

1. Nigerian Upstream Petroleum Regulatory Commission, Nigerian Midstream and Downstream Petroleum Regulatory Authority and the Nigerian National Petroleum Corporation Limited.
2. The extant CITA amendment came into effect on May 1, 2023, upon the enactment of the Finance Act 2023.

provisions of the CITA which relate to the taxation of income of foreign companies engaged in shipping and air transport in Nigeria. Undoubtedly, these tax obligations have been in existence and embedded in various versions of the CITA, which effectively commenced since April 1, 1977.

it is noteworthy that section 14 of the CITA has always provided that the profits of foreign shipping companies or airlines derived from Nigeria are taxable in the country. Such profits are categorized into freight income[3] or non-freight income[4], albeit only freight income is taxable. In addition, where the carriage into Nigeria is for the purpose of trans-shipment, profits arising from such carriage shall not be liable to tax in Nigeria. It is equally noteworthy that the material provisions of section 14 of the CITA have remained unaltered, save for the cosmetic amendments introduced thereto by the Finance Acts 2020 and 2023, which do not affect the liability of non-resident shipping and air transport companies operating in Nigeria to file tax returns and pay taxes due on their income derived from the country.

Further, where there is a Double Taxation Agreement ("**DTA**") between Nigeria and the offshore base of a foreign company, the FIRS will consider, amongst other things, the terms of the relevant DTA in determining whether the foreign company will be exempt from payment of income tax or benefit from the application of a reduced tax percentage. For instance, Article 8 of the DTA between Nigeria and the UK, grants UK resident companies' unconditional exemption from the payment of income tax in respect of profits derived from the operation of ships or aircraft in international traffic. However, certain DTAs with other countries specify a pre-condition for reciprocity, such that the relevant foreign company will only be exempted from tax payments or benefit from a reduced tax percentage, where there are Nigerian owned vessels that operate in international

waters and operate in the relevant foreign country. Therefore, the question of whether a conditional or unconditional exemption will apply is determined on a case-by-case basis and needs to be assessed by each affected foreign company.

There are concerns regarding the propriety of the FIRS' action in seeking tax back charges spanning from 2010 to 2019. While there is a six (6) years tax limitation period for the FIRS to conduct a tax audit and raise additional assessments on a company in respect of a relevant tax year, such limitation will not apply where the FIRS establishes that there has been fraud, negligence or willful neglect by the relevant company. Thus, it appears that the FIRS has taken the position that the foreign companies who have received Tax Assessments were either fraudulent, negligent, or willfully neglected their income tax obligations in Nigeria. Notwithstanding the foregoing, the Tax Assessments may be challenged on the grounds that the period to which some of the years therein relate fall outside the statutory limitation period, with evidence shown that there was no element of fraud, negligence or willful neglect which led to the failure to remit income tax.

Further, it appears that certain foreign shipping companies received pre-tax assessment notices, which indicate that information is still being garnered by the FIRS, which will form part of the assessments

3. This is income earned from the carriage of passengers, mails, goods, or livestock shipped or loaded into an aircraft in Nigeria.
4. Income earned from other business activities including but not limited to commission, demurrage, container clearing fees, and stevedoring are excluded and are categorized as non-freight income.

in the letter of demand that the relevant company can expect to receive in the coming weeks. There is a thirty (30) days' timeline to appeal a disputed assessment received from the FIRS, failing which the FIRS may commence enforcement of the tax liabilities. As such, there is a need for relevant foreign companies to assess whether the notice which was received from the FIRS amounts to an assessment or a pre-assessment notice.

The recent actions of the FIRS may be inspired by the provisions of the recently enacted Finance Act 2023, which amends the CITA and indicates the synergy between the Nigerian shipping regulatory agencies and the tax authorities, as evidence of tax filings and Tax Clearance Certificates ("**TCCs**") are now required for foreign companies to engage in business in Nigeria and procure relevant approvals, licenses and permits, for their operations. Therefore, standard operations of foreign shipping companies in Nigeria will only be allowed where evidence of tax filings and TCCs are furnished.

Evidently, it is a season of strict enforcement of tax laws in Nigeria and operators which fall within the scope of Section 14 of the CITA will need to determine whether they will be liable to pay tax and/ or benefit from any DTA, which Nigeria may have with their resident company. It will be prudent for such companies to seek legal advice regarding their tax obligations.

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