

ANALYSIS OF FIRS' CIRCULAR ON IMPLEMENTATION OF VAT PROVISIONS IN THE FINANCE ACT

BACKGROUND

On 14th January, 2020, President Muhammadu Buhari signed the Finance Act, 2019 (the "Finance Act") into law. The Finance Act made radical changes to several provisions of Nigerian tax laws, including the Value Added Tax Act, Cap V1, Laws of the Federation of Nigeria 2004 ("VAT Act"). However, the Finance Act raised a lot of legal questions and uncertainties with respect to the application of the amendments it made to the VAT Act. These issues are examined in our Tax Blog Article titled "[8 Unanswered Questions Under the Finance Act 2019](#)".

As rightly predicted in the Tax Blog Article, the Federal Inland Revenue Service ("FIRS"), on the 29th of April, 2020 issued an information circular, titled "Clarification on the Implementation of the Value Added Tax (VAT) Provisions in the Finance Act 2019" (the "Circular"). The Circular provides clarity on the implementation of the VAT provisions in the Finance Act. This article highlights the key provisions of the Circular and analyses the challenges that may be faced in implementing these provisions.

HIGHLIGHTS OF THE CIRCULAR

1. Definition of Goods & Services

The Circular has clarified the nature of "goods" for which VAT is chargeable. These includes items with tangible and intangible properties such as articles of trade, rights in goods or property (e.g. rights in mineral resources, copyrights, trademarks), assets, motor vehicles, oil wells, rigs, aircrafts, ships, buildings, roads, jetties, or any other type of property.

Furthermore, the nature of "services" that will attract VAT include:



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- (a) services performed in Nigeria to persons in Nigeria irrespective of the residential status of the service provider;
- (b) services provided to persons in Nigeria, regardless of the medium of delivery of the service; and
- (c) services rendered remotely, online or by other virtual means to Nigerian residents or persons in Nigeria.

It is important to note that services rendered to and consumed by a Nigerian resident while physically outside Nigeria, are not liable to VAT in Nigeria.

2. The Rate of VAT and Transitional Issues

The Circular has clarified that:

- (a) the new VAT rate of 7.5% took effect on the 1st of February, 2020, and not on the 14th of January, 2020, which is the commencement date of the Finance Act;
- (b) taxable supplies made prior to the 1st of February, 2020 would attract VAT at the rate of 5% while contracts of taxable supplies signed prior to 1st of February, 2020, but for which the supplies or performance occurred on or after the 1st of February, 2020, will attract VAT at the rate of 7.5%;

- (c) continuing contracts for which supply or performance is based on achievement of milestones, the VAT rate for the milestones achieved on or after the 1st of February, 2020, is 7.5%; and
- (d) the VAT rate for all taxable supplies made from 1st of February, 2020 is 7.5%.

3. VAT Registration and Deregistration

- (a) The Circular reiterates the requirement for all taxable persons to immediately register for VAT upon the commencement of business and to also notify the FIRS of their intention to deregister for VAT within 90 days of cessation of business in Nigeria.
- (b) The Circular further clarifies that taxable supplies made after cessation of business shall be deemed to have been made on the day immediately preceding the date of cessation of business.
- (c) The FIRS also stated that penalties for failure to file returns will also continue to apply where the taxpayer fails to give notice of its cessation of business.

4. Registration by Non-Residents

The Circular has clarified that non-resident companies with fixed base or permanent establishment in Nigeria must comply with the requirements for registration, filing, payment and other requirements like other Nigerian companies. Thus, such companies must register using the address of their places of business in Nigeria (fixed base), issue VAT invoice, file returns, remit the tax, submit themselves to tax examinations, etc. in accordance with the VAT Act.

5. Self-Accounting for VAT

The Circular provides clarity on persons that are required to self-account for VAT. Based on the Circular, the obligation to self-account and remit VAT arises where:

- (a) the supplier is a person exempted from charging VAT under the law (e.g. a Small Company within the meaning of the Finance Act or a person that deals on exempted goods or services);

- (b) the supplier is a foreign company without a fixed base or permanent establishment in Nigeria, whether or not that foreign supplier included VAT in the invoice; or
- (c) a taxable person receives taxable supplies for which VAT was not charged either from a person below the threshold of N25,000,000 or any other person.

Such persons are required to render VAT returns and remit VAT received to the FIRS.

6. Introduction of VAT Threshold

The Circular re-emphasises the fact that taxable persons with taxable supplies of N25,000,000 and above ("Threshold") are required to charge, collect, remit and file monthly VAT returns to the FIRS. The Circular makes the following clarification on how the Threshold is determined:

- (a) A taxable person with taxable supplies less than the Threshold, may at any time voluntarily register, charge, collect, remit and file monthly VAT returns. Such a person shall notify the FIRS prior to doing so and shall be subject to all the provisions of the VAT Act applicable to persons above the Threshold;
- (b) A taxable person who had attained the Threshold prior to the enactment of the Finance Act shall continue to charge, collect, remit and file monthly VAT returns even though its supplies are not up to the Threshold in the current year;
- (c) A taxable person who did not attain the Threshold before 1st of February, 2020, shall immediately begin to charge, collect, remit the tax and file monthly returns upon attaining the Threshold at any time within the year;
- (d) A taxable person who has not attained the Threshold but expects to attain same at a future date within the calendar year shall immediately, begin to charge, collect, remit and file monthly VAT returns;
- (e) A taxable person who has attained the Threshold within a calendar year is required to file monthly VAT returns irrespective of whether any of the supplies made are VAT exempt.

7. Business Sold or Transferred by Connected Persons

In relation to VAT exemption given to business transfers by related companies, the Circular has provided the following conditions for the application of the concession:

- (a) the company must prove, to the satisfaction of 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 recognized group of companies; and
- (b) the entities involved must have been related for a minimum consecutive period of 365 days before the reorganization.

As provided in the Finance Act, where assets transferred in the reorganization are further disposed within 365 days after the reorganization, the VAT exemption granted shall be withdrawn and the applicable VAT due on the reorganization shall be treated as due and unpaid from the date of the initial transfer. The Circular further provides that penalty and interest shall be charged on such VAT to be paid.

8. Meaning of Exported Service

The Circular provides that “exported service” means “a service rendered within or outside Nigeria by a person resident in Nigeria, to a non-resident outside Nigeria. Provided that a service supplied to the fixed base or permanent establishment of a non-resident person shall not qualify as exported services.”

Per the Circular, for a service to qualify as an exported service, the following must exist:

- (a) the service must be provided by a Nigerian resident to a non-resident;
- (b) the non-resident person to whom the service is provided must be outside Nigeria when consuming the service;
- (c) where the non-resident is in Nigeria or consumes the service in Nigeria, such service will be liable to VAT;
- (d) where a non-resident contracts a third party to provide a service to its permanent establishment or fixed base (branch or any other physical presence) within Nigeria, such service will be liable to VAT;



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- (e) where a non-resident company provides a service through its fixed base in Nigeria, such will not be an exported service;
- (f) where a non-resident company provides a service to a person in Nigeria, such service shall not be considered an exported service; and
- (g) a person is understood to have consumed a service, where the service is “provided to” such person who is the actual consumer of the service in Nigeria. Accordingly, where a service is provided to a consumer in Nigeria “for” or on behalf of a non-resident, such service will not qualify as an exported service.

Analysis of the Circular

The FIRS in this Circular provided the much-needed clarifications on some of the teething issues in the Finance Act. However, we note that the FIRS, in an attempt to provide clarifications through the Circular, has expanded the scope of the VAT Act beyond the contemplation of the Finance Act. Some of the such contentious provisions are considered below:

1. **VAT on Buildings:** The Circular defines “VATable” goods to include buildings even though Section 46 of the Finance Act, being the principal law, defines goods to exclude immovable property (i.e. land/building) and any interest in land. The Circular is, therefore, in direct conflict with the Finance Act in this regard. On this issue, it is instructive to note that in the case of *Global Marine International Drilling Corporation v. FIRS*(2013) 12 TLRN 1, the Tax Appeal Tribunal held that an FIRS



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Information Circular is “in the nature of an Explanatory Note and cannot by any stretch of statutory interpretation override or supersede the clear and unambiguous meaning of any statutory provisions.”

2. **Conflicting Commencement Date:** The FIRS has declared that the commencement date for the application of the 7.5% VAT rate is the 1st of February, 2020. This is in direct conflict with the Finance Act, which sets the commencement date as the 14th of January, 2020. While the Circular provides clarity and certainty to stakeholders who were confused as to the date the new VAT rate would take effect, an FIRS Circular cannot legally prescribe a commencement date contrary to the Finance Act. Such amendment can only be made by amending the Finance Act via a law.
3. **Expansion of the Scope of N25,000,000 Threshold:** The Circular provides that taxable persons who had attained the Threshold in the prior year are required to continue to charge, collect and remit VAT even if they have not attained the Threshold in the current year. It is instructive to note that the Finance Act does not contain any express provision on this and neither can this interpretation be inferred from any of the provisions of the Finance Act. It is, therefore, outside the contemplation of the Finance Act. In addition, this referenced provision of the

Circular may be seen as being retroactive as it seeks to impose a new duty in respect to transactions or considerations that occurred in a period before the commencement of the Finance Act.

Generally, Nigerian courts are averse to giving a statute retrospective effect and usually regard them as applying to facts or matters which came into existence after the statutes were passed unless it is clearly shown that a retrospective effect was intended by the legislature – *Alewa v. Sokoto I.E.C.* (2008) ALL FWLR (Pt. 402) 1043 at 1061, paras. B - E (CA). As a result, to the extent that the Finance Act is clear that the obligation to levy and remit VAT shall be based on the taxable supplies in a calendar year (i.e. annually) beginning from the commencement date in 2020, the courts are unlikely to enforce the retroactive provision of the Circular in this regard.

4. **Creation of Penalties not Envisaged in the Finance Act:** As highlighted in the review above, we note that some of the provisions included in the Circular create penalties not envisaged under the Finance Act. An example is the provision in the Circular on business reorganization by connected persons that requires a connected person/taxpayer to pay interest and penalty where the concession for business reorganization is lost. While the Finance Act provides that when the concession is lost, VAT due on the initial transfer shall be deemed due and unpaid from the date of the initial transfer, there is nothing in the Finance Act which provides for additional liability to the taxable person in the form of payment of interest and penalties. For reasons adduced earlier in 2 and 3 above, it is very unlikely that Nigerian courts will enforce such penalties not provided for under the principal Act.

Conclusion and Recommendation

There is no gainsaying the fact that some of these clarifications provided by the FIRS under this Circular are indeed commendable because of the certainty they bring to the Nigerian tax framework. However, as highlighted in our analysis of the provisions of the Circular in this article, there are contentious provisions in the Circular stemming from irregularities in the legal process with which these provisions have been introduced. While these provisions might be well-intended, the FIRS may need to revisit the legal process for introducing some of these provisions, perhaps by waiting for the next amendments, which we expect will be made using subsequent Finance Bills that will accompany the Appropriation Bills for each year. It is advised that this approach should be adopted to prevent a lot of

actions in Nigerian courts questioning the FIRS' power to make provisions via circulars that conflict with principal tax legislations.

On the other hand, it is imperative that taxpayers/business owners take note of the changes in their obligations within the VAT regime to avoid violation of the law. More specifically, taxpayers should note the instances when they are mandated to self-account for VAT on the goods and services received from their suppliers and service providers even when these persons, for any reason, do not charge VAT on their invoices. This is because there are now increased penalties for failure to comply with the VAT Act as amended.

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