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Views and Vires:

FIRS' Public Notice on Deducting Withholding Tax (WHT)/Value Added Tax (VAT) at Source on Commission Paid to Distributors and Sales Agents

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FIRS
NIGERIA

Introduction

On 14th August 2019, the Federal Inland Revenue Service (FIRS) issued a Public Notice (***the FIRS Notice***) in Nigerian newspapers, titled ***"… Deduction at Source of Withholding Tax (WHT)/Value Added Tax (VAT) on Compensation Paid to Agents, Dealers, Distributors and Retailers by Principal Companies"***. The ***FIRS Notice*** stated: *"It has come to the notice of the Service that some companies do not deduct WHT/VAT from the compensation paid to their distributors contrary to the provisions of the Companies Income Tax (Rates, Etc. Deduction at Source (Withholding Tax) Regulations S.I 10 1997 and Paragraph 3.8 of [FIRS] Information Circular 2006/02 of February, 2006, which states that* ***'commission earned by distributors/dealers will be subjected to WHT and VAT.'"***[1]

The ***FIRS Notice*** further stated that: *"Following this discovery, the Service hereby puts all companies, particularly those in the Fast Moving Consumer Goods (FMCGs) Sector, on notice that compensation due to their distributors and customers in the form of Commission, Rebates, etc. and by whatever means of payment, whether by cash, credit note or even goods-in-trade must be subjected to WHT/VAT at the appropriate rates and remit same to the FIRS accordingly on or before the 21st of every month… "*[2]

Further to the ***FIRS Notice***, many FMCGs scrambled to communicate the FIRS' position to their relevant counterparties (Counterparties) in apparent preparation for commencing VAT deduction at source, on commission and other compensation payable to such Counterparties.[3] They also requested the Counterparties to provide evidence of their respective back VAT remittances for stated/relevant periods. Notably, the issue of WHT deduction is not in contention.[4]

Unexpectedly, many Counterparties contested the basis of FMCG's proposed actions on VAT source deductions, arguing that the FIRS' request is itself incongruous with the provision of the tax laws, particularly ***Value Added Tax Act***[5] (as amended, ***VATA***). The Counterparties argued that on current state of the law, the requirement for deduction of VAT at source is only applicable to transactions with: (a) companies in the oil and gas sector; (b) non-resident

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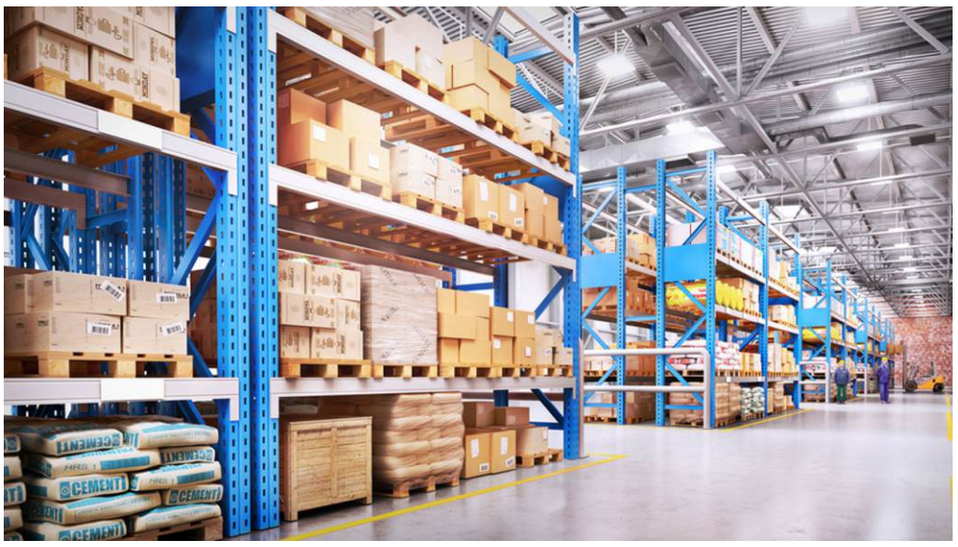
[1]Emphases supplied.
[2]Incidentally, the ***FIRS Notice*** misrepresented ***Para 3.8, FIRS 2006 Information Circular*** as basis for VAT deduction at source. ***Para 3.8*** reads as follows: ***"3.8. Where a manufacturer delivers its normal products to its distributors and dealers for Sale:*** *In this situation, the income accruing to the manufacturer will not be liable to withholding tax (WHT) as it is regarded as transaction in the ordinary course of business, but the Commission earned by the distributors/ Dealers will be subjected to WHT."* Emphasis supplied.
[3]It is unclear whether the FIRS has approached the FMCGs directly further to the Notice, or FMCGs are acting pursuant to the Notice, without any further contact from FIRS on the issue. ***This is a significant point because if the FIRS wrote FMCGs to demand compliance or issued an assessment in respect thereof, FMCGs would need to formally object within 30 days in line with Paragraph 13(2), 5th Schedule FIRS (Establishment) Act, Cap. F36, Laws of the Federation of Nigeria (LFN) 2004*** to be able to successfully challenge such assessment or FIRS decision.
[4]Although doubts have been expressed whether the FIRS can validly enforce a WHT obligation on other forms of compensation apart from commissions such as rebates, the Counterparties might as a matter of strategy, want to focus only on the VAT deduction, so applicability of WHT deduction on rebates is moot and therefore not covered in this article.
[5]***Cap. V1, (LFN) 2004.***



companies; and (c) government ministries, statutory bodies and other agencies of government (MDAs).[6] Counterparties also challenged any potential VAT deduction at source because of the risk *cum* possibility, of Counterparties suffering VAT deduction on unsold stock, even though VAT is meant to be borne by the ultimate consumer.

Given such feedback from the Counterparties, coupled with FMCGs' need to shield itself themselves from potential FIRS enforcement exposure for non-compliance, many FMCGs considered approaches on appropriate actions to resolve the issue. These were essentially satisfactory *cum* feasible, reputational risk-free resolution that is fully consistent with their rights whilst cognisant of critical relationships with their two 'conflicting' stakeholders: the FIRS and Counterparties.

This article delves into the various issues under the headings hereinafter appearing, within the context of the relevant regulatory framework.

The Nigerian VAT & VAT Source Deduction Regulatory Framework

The Nigerian VAT regulatory framework is primarily comprised in the ***VATA*** *and its subsidiary legislation* and the ***FIRS (Establishment) Act***[7] ***(FIRSEA)***. Essentially, VAT as a consumption tax applies to all goods and services at 7.5% of the consideration except those on the VAT exempt list in ***Schedule 1 VATA***.[8] Since the targeted FMCGs' transactions are clearly subject to VAT, and the focus of our discourse is VAT compliance bordering on entitlement to effect VAT source deduction, we will limit our discussions accordingly.[9]

What are the categories of VAT deduction at source transactions?

Whilst all "tax payers" are statutory VAT agents, incurring input VAT (on purchases), charging output VAT (on sales), mandated to file VAT returns and generally pay the excess of their output tax over input tax to the FIRS, there are three categories of VATable transactions which ***the law mandates VAT deduction at source*** for remittance to FIRS.

The first two (public sector contract payments and oil and gas transactions) are discoverable in ***section 13(1) and (2) VATA***, which provides that:

> *"(1) Every Ministry, statutory body or other agency of Government shall, at the time of the making payment to a contractor, remit the tax charged on the contract to the nearest local Value Added Tax office; (2) The Service may, by notice determine and direct the companies operating in the oil and gas sector which shall deduct VAT at source and remit same to the Service."*[10]

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[6]By the new ***section 10(3) VATA*** (introduced *vide* ***Finance Act 2020***), taxpayers are obliged to include VAT on invoices from vendors where such fail to include VAT, and self-account for the VAT to the FIRS. However, such scenario does not apply in the instant case as FMCGs/Counterparties' invoicing arrangement already includes VAT. The only issue at hand is whether FMCGs can deduct VAT on commission to Counterparties.

[7]***Cap. F36, LFN 2004.***

[8]For a detailed discussion of the VAT regulatory context and compliance obligations, see Afolabi Elebiju and Ayooluwatunwase Fadeyi, ***'Issues and Dimensions: Nigerian VAT and the Informal Sector'***, chapter contribution to forthcoming CITN publication, ***'VAT Collection, Remittance – Policy, Legal, Administrative Issues and Options for Reform in Nigeria'***. The authors stated *inter alia*: *"The introduction of Value Added Tax (VAT) in Nigeria vide the enactment of the …* ***VATA*** *in 1993 was a watershed in the history of Nigerian taxation. … The most recent VAT regulatory event is the enactment of* ***sections 33 – 47 Finance Act 2019*** *which significantly amended the* ***VATA****. …."*

[9]Whilst the general rule is that all goods and services (save on the VAT exempt list) are subject to VAT (at currently 7.5%, but before 1st February 2020, at 5%), ***the issue before us is whether the FIRS can expand the categories of taxpayers VAT compliance obligations, in the absence of clear legislative basis therefor***. Both FMCGs and the Counterparties respectively are *"taxable persons"* for VAT purposes, charge and pay VAT pursuant to ***VATA***, particularly ***section 12***. *Cf.* with ***Vodacom Business Nigeria Limited v. FIRS,*** where: the Tax Appeal Tribunal (TAT, ***(2016) 23 TLRN 80***); the Federal High Court (FHC, ***(2018) 35 TLRN 1***); and the Court of Appeal (CA, ***(2019) 44 TLRN 1***), all held that the supply of satellite network band-with capacities by a non-resident to a Nigerian company, was liable to VAT.

[10]The FIRS issued the requisite notice *vide* ***Information Circular No. 02/2007,*** titled ***'Notification of Guidelines on the Implementation of VAT Deduction (Reverse Charge) and New Payment Arrangement with Respect to Fees, Levies and other Charges Payable by Companies in Oil and Gas Industry'***, available at: https://taxaide.com.ng/files/Guidelines%20on%20Deduction%20of%20VAT%20at%20Source%20and%20New%20Method%20of%20Payment.pdf (accessed 09.05.2020).

The third category is *vide* ***section 38 FA 2020*** (introducing a new ***section 10 VATA)*** on Nigerian company counterparties in VATable transactions with non-resident companies. However, this duty predated the enactment of ***FA 2020*** which merely amended the erstwhile provision by including a new ***section 10(3) VATA.***[11]

The present issue arises from FIRS purport to apply a ***section 13(2) VATA*** situation to FMCGs. ***Section 13(2)*** empowers FIRS to issue a notice pursuant to which oil and gas transactions will suffer VAT deduction at source upon issuance of such notice. To the best of our knowledge, there is no equivalent of ***section 13(2) VATA*** applicable to FMCGs on the basis of which FIRS can demand VAT deduction at source by FMCGs.[12] Again, the two subsidiary legislation referenced in the ***FIRS Notice*** are totally inapplicable because they cannot be reasonably construed to directly or indirectly authorise FIRS to mandate VAT deductions by FMCGs in the manner contemplated by the FIRS.[13] We discuss the ramifications of these below.

Is the FIRS' Public Notice valid given extant Nigerian tax provisions laws?

The FIRS can make regulations and issue information circulars, pursuant to enabling provisions in that regard; however, such actions must be *intra vires* the enabling provisions. For example, ***section 44 VATA*** provides that *"The Board may, with the approval of the Minister,* ***make regulations for giving effect to the provisions of this Act.***[14] Indeed, the FIRS also recent issued a clarification Circular regarding ***FA 2020*** changes to the ***VATA.***[15] Thus the ***FIRS Notice*** is a regulation aimed at providing clarity on VAT administration in Nigeria, it must still be *intra vires* the ***VATA and FIRSEA;*** otherwise, it is null and void.

Given that FIRS had regularly issued information circulars, notices etc. on diverse tax issues, the Courts have sometimes been called upon to determine the status and import of such FIRS Circulars. Currently, settled case law is that FIRS Circulars: c***annot amend substantive provisions, they are not binding on, nor create estoppel against the FIRS (especially when not addressed to the party seeking to rely thereon), and are merely issued for the guidance of taxpayers. They have also been held to be the opinion of the writer of such Circular on the particular tax issue and are therefore only persuasive to the Courts, which insist on forming their own views based on its analysis of the relevant tax provision.***[16]

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[11] Per the new ***section 10 VATA:*** *"(a) A non-resident company shall include the tax on its invoice for the supply of taxable services; and (b) the person to whom the services are supplied in Nigeria shall withhold and remit the tax directly to the Service in the currency of payment. (c)* ***Where a person to whom taxable supplies is made in Nigeria is issued an invoice on which no tax is charged****, such a person shall self-account for the tax payable and remit the output tax to the Service within the timeline prescribed under Section 15 of this Act."*

[12] *Cf.* with ***WHT Regulations*** made pursuant to substantive provisions in the ***Companies Income Tax Act (CITA), Petroleum Profits Tax Act (PPTA)*** and ***Personal Income Tax Act (PITA),*** which provides a basis for WHT compliance requirements.

[13] See for example, ***Information Circular No. 2006/02*** of February 2006 *which is self-described as relating to only WHT*: ***'Further Explanatory Comments on Withholding Tax Principle and Operation' (2006 WHT Circular)***, available at: https://www.firs.gov.ng/sites/Authoring/contentLibrary/978a7f92-1743-4b1b-839d-2bdb9f685f01RE6.FURTHER-EXPLANA TORY-COMMENTS-ON-WITHHOLDING-TAX-200602.pdf (accessed 09.05.2020).

[14] See also ***section 61 FIRSEA:*** *"The Board may, with the approval of the Minister,* ***make rules and regulations as in its opinion are necessary or expedient for giving full effect to the provisions of this Act and for the due administration of its provisions*** *and may in particular, make regulations prescribing the – (a) forms for returns and other information required under this Act or any other enactment or law; and (b) procedure for obtaining any information required under this Act or any other enactment or law."* Emphasis supplied.

[15] See FIRS ***Information Circular No. 2020/02*** of 29th *April 2020* titled ***'Clarification on the Implementation of the Added Tax (VAT) Provisions in the Finance Act 2019'***, available at: https://www.firs.gov.ng/sites/Authoring/SiteAssets/Lists/Content/GetContent/2019%20FA%20Information%20Circular-VAT.pdf (accessed 09.05.2020);
FIRS, ***'Public Notice To Federal and State Ministries, Departments and Agencies, Local Government Councils, Corporate Organizations And Other Collecting Agents on Value Added Tax Monthly Remittance And Returns'***, available at:
https://www.firs.gov.ng/sites/Authoring/contentLibrary/cc497aba-7008-4015-fd84-f59629d9ac62PN7.PUBLIC-NOTICe-ON-VAT.pdf (accessed 09.05.2020).

[16] See for example, ***Halliburton v. FBIR 6 ALL NTC, 55 at 75-76, Halliburton WA Limited v FBIR, (2013) 11 TLRN 84, at 109-110,*** and ***Global Marine International Drilling Corporation v. FIRS (2013) 12 TLRN 1.*** The courts are unequivocal that FIRS Circulars have no force of law but represents FIRS opinion; thus, any regulatory views perceived to have been expressed inconsistently with the law would be disregarded by the courts.

As earlier mentioned, the ***FIRS Notice's*** reliance on the ***Companies Income Tax (Rates, Etc. Deduction at Source (Withholding Tax) Regulations S.1 10 1997*** *and* ***Paragraph 3.8 of [FIRS] Information Circular 2006/02 of February 2006,*** titled ***"Further Explanatory Comments on Withholding Tax Principle and Operation" (2006 WHT Circular***) to demand FMCGs to deduct and remit VAT (in addition to WHT) on dealers' commissions is flawed as the two instruments do not authorise or purport to authorise such. For example, ***Para 3.8, 2006 WHT Circular*** provides that:

> *"Where a manufacturer delivers its normal products to its distributors and dealers for Sale. In this situation, the income accruing to the manufacturer will not be liable to Withholding tax (WHT) as it is regarded as transaction in the ordinary course of business, but the Commission earned by the distributors/Dealers will be subjected to WHT."*

Apart from the principle that tax statutes must be strictly construed, it is also required that that gaps, and ambiguous provisions be resolved in favour of the taxpayer, and not the Revenue. The combined reading of ***sections 10 and 13 VATA*** allows only three categories of VAT source deduction transactions. Thus, the FIRS lacks capacity to amend the extant provisions of ***VATA*** cannot validly through the ***FIRS Notice***.

Assuming *arguendo* that ***VATA*** provisions are equivocal and requires further clarifications, the FHC in ***Citibank Nigeria Limited v. FIRS***[17] followed settled case law in holding that:

> *"A law which imposes pecuniary burden is … subject to the strict construction. All charges upon the subject must be imposed by clear and unambiguous language because in some degree they operate as penalties.* ***Thus, the subject is not to be taxed unless the language of the statute clearly impose the obligation. The language of statute must not be strained in order to tax a transaction which had the legislature thought of it would have been covered by appropriate words.*** *In a taxing legislation, therefore one has to look merely on what it clearly said. There is no room for any intendment. There is no equity about tax,* ***no presumption at all and nothing is to be implied…"*** (Emphases supplied)

Respectfully, the ***FIRS Notice*** *is a breach of the foregoing rules because it is seeking to impose a compliance obligation on FMCGs that* ***VATA*** *did not prescribe for, and it is also an unlawful attempt to change the VAT status of Counterparties.*

Whilst FIRS is entitled to conduct VAT audit on FMCGs and Counterparties, it cannot validly procure that the former request and forward to it, evidence of Counterparties' VAT remittances from August 2019, as a way of monitoring Counterparties' VAT compliance.

It is *ultra vires* FIRS powers to seek to expand the applicability of the referenced subsidiary legislation (***WHT Regulations and 2006 WHT Circular***) to the administration of VAT in Nigeria. Such expansive scope can only be effected through substantive legislative amendment of ***VATA***; by the same token, FIRS cannot try to achieve outcomes that is tantamount to amendment of ***sections 10 and 13 VATA***.[18]

FIRS may want to exercise its ***section 31 FIRSEA***[19] power of substitution to appoint FMCGs as a *"tax agent"* of the Counterparties in order to enforce the VAT source deduction because the provision relates to *recovery of* ***"any tax payable"*** which therefore includes VAT. However, the conditions precedent to the exercise of such power is not present in the instant case, hence ***section 31 FIRSEA*** is inapplicable.[20]

In the circumstance, the VAT on Counterparties commission is not "tax payable" because ***VATA*** *allows Counterparties to receive the VAT from FMCGs and make remittances directly whilst filing their VAT returns.*[21] Such "tax payable" must

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[17] ***(2017) 30 TLRN 40, at 54-55.***

[18] It is trite that a public body and donee of delegated legislation must act intra vires and not *ultra vires* its delegated powers. The Courts frown at statutory agencies exceeding their jurisdiction or any abuse of their power. In ***Oniga v. Govt. of Cross River State & Anor (2016) LPELR-40112 (CA), 6C*** the CA held that: *"The word 'Ultra vires' means beyond or above the power conferred. It is an act which is invalid since it has been done in excess of authority conferred by Law in excess of the powers."* See also ***Amasike v. Registrar-General of CAC, [2006] 3 NWLR (Pt. 968), 470.***

[19] ***CITA's*** predecessor provision to ***section 31 FIRSEA*** was the repealed ***section 38 CITA***.

[20] The Revenue's power of appointment of an agent under ***CITA*** has not been frequently invoked until recently. In ***Peniel Apartments Limited v. FIRS & Anor (2014) 15 TLRN 100,*** the FHC, in interpreting ***section 31 FIRSEA*** held that the circumstances warranted the FIRS' appointment of the Appellant's bankers as a tax agent. The Court held that *"The … FIRS' letter … appointing the bank as a tax collecting agent of its customer when it became* ***obvious that the applicant has neglected, failed and/or refused to pay the reconnected and agreed liabilities*** *for many years" was not ultra vires.*

[21] There would still be need for FIRS' strict compliance with the conditions precedents in order to successfully invoke same. See for example, ***Bestland & Sea Services Limited v. FBIR 4 All NTC 175*** (the appointed agent must have money due to the principal in its possession before the provision can be imposed); and ***BP Nigeria Ltd v. FBIR 2 All NTC 255*** (it must be established that the Principal owes tax to the Respondent).

also be not be tax in dispute as in the present case where payment modality (source deduction), is disputed. Underlying such "dispute", it is instructive that Counterparties have expressed their preference for continuation of the erstwhile arrangements prior to issuance of the ***FIRS Notice***.

An analogy may also be drawn with FIRS recent attempts to place liens on accounts of *alleged* tax defaulters, without the requisite judicial imprimatur as required by law. In many cases, the alleged tax amounts was in dispute, not having been become "tax due" and the Courts did not hesitate in striking down FIRS recovery actions in that regard as invalid.[22]

In conclusion, if the legislature wanted FIRS to exercise such powers as it purporting to have through the Notice, it would have used the opportunity of the enactment of the ***FA 2020*** to do so. This is moreso that the ***FA 2020*** amended many ***VATA*** provisions by introducing some new provisions, repealing some and also revising some. Significantly, ***FA 2020's*** amendment scope would have included tweaking ***sections 12 and 13 VATA*** to be enabling provision for FIRS intended action.

Is FMCGs obliged/liable to deduct the VAT from the commission paid to Counterparties?

The firm answer is in the negative, as the responsibility of collecting and remitting VAT on Counterparties' commission to the FIRS solely lies with them, being the suppliers of the subject services to FMCGs. This is consistent ***section 14(1) VATA*** provision that: *"A taxable person shall on supplying goods or services to his accredited distributor, agents, client or consumer, as the case may be, collect the tax on those goods or services at the rate specified in section 2 of the Act."* Such VAT constitute output tax for appropriate treatment by Counterparties for the purposes of computing their VAT liability.

Since there is no express statutory obligation on FMCGs to make VAT deduction at source, it would be impolitic to infer such, given the strict constructionist approach to the interpretation of tax legislation and the drastic impact of such deduction on the VAT reporting status of Counterparties.[23] Furthermore, as valued stakeholders in FMCGs' respective ecosystems and given their genuine concerns in the subject scenarios, FMCGs should advisedly show sensitivity for Counterparties' position especially as same appears to be backed by law.

> ***"Given the foregoing discussion, we are of the view that FMCGs is not obliged to, nor would be liable to the FIRS for, refusing to deduct VAT at source on commissions."***

Given the foregoing discussion, we are of the view that FMCGs is not obliged to, nor would be liable to the FIRS for, refusing to deduct VAT at source on commissions. Consequently, FMCGs is obliged to continue paying the Counterparties their VAT (at 7.5% effective 1st February, 2020), and also effecting appropriate WHT treatment on their invoices.[24]

Are there any possible exposures (to FIRS enforcement action) in the event that FMCGs refuses to comply?

This question is probably what brings the point home most poignantly about FIRS incapacity to mandate, and enforce VAT deduction at source. Clearly, none of the enforcement and penal provisions of the ***FIRSEA, and VATA*** (as amended by ***FA 2020***) will avail the FIRS, given the absence of a substantive obligation on FMCGs to effect the VAT source deduction. This can be illustrated as follows:

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[22] See for example, ***Etuwewe v. FIRS & Guaranty Trust Bank Suit No. FHC/WR/CS/27/2019*** where the Court held that the FIRS did not follow due process in purportedly exercising its powers, that the bank negligently breached its duties to the Plaintiff and accordingly awarded damages jointly and severally against the two Defendants. The FIRS action of freezing accounts was also preceded by a similar Public Notice. For some background details of FIRS actions in this regard see, ***'Lien Respite on Defaulting Taxpayers' Accounts Expires In 30 Days, Says Fowler'*** https://www.firs.gov.ng/PressRelease/PressReleaseUpdate (accessed 11.05.2020).

[23] *Of particular note is the understandable concern of Counterparties about the unintended effect of implementing the VAT source deduction: the prospect of bearing VAT on unsold stock. Such drastic impact reinforces the need for express substantive provision in order to give effect to FIRS' request. However, a counter-argument is that the VAT in issue is on their commission (and commission is considered earned when accrued, etc).* Note that in amending ***section 16 VATA, section 40 FA 2020*** provides that the taxpayer is only to remit excess of output tax (VAT collected on sales) over input tax (paid by taxpayer on purchases), to the FIRS. However, where the input VAT exceeds output tax, then the taxpayer can utilise the excess as a credit against subsequent VAT liability, or apply for ***VAT refund*** from the FIRS upon provision of requisite documentation that the FIRS may require from time to time.

[24] The FIRS would be in error to assess FMCGs, re: the Counterparties' VAT liabilities, in pursuance of the ***FIRS Notice***. In ***Saydoun Limited v. Edo SBIR (2019) 41TLRN 1 at 28,*** the High Court held that: *"the law places a duty on the relevant tax authority to act honestly and reasonably in making the assessment. The law will not allow the relevant tax authority to inflict any assessment on a taxpayer which tends to be of punitive nature."* See also ***FBIR v. Omotesho (2012) 8 TLRN 88***: the tax authority must not act dishonestly, or vindictively or capriciously.

- Firstly, failure to provide evidence of Counterparties' VAT remittances to the FIRS cannot ground liability if (as the Counterparties who are the subject taxpayers under VAT have indicated they would), refuse to provide same to FMCGs for onward transmission to FIRS. FMCGs cannot be reasonably expected to compel Counterparties to submit their VAT remittances without disrupting its sales operations.[25] Thus, impossibility/difficulty of performance would be an additional defense, apart from illegality of the FIRS' demand;

- If the FIRS uses a best of judgment assessment to demand the non-deducted VAT at source from FMCGs, such action would be subject to the tax dispute resolution provisions of the ***VATA*** and ***FIRSEA***. Such assessments are very likely to be discharged by the robust objection that FMCGs can provide in such circumstance and the ensuing tax appeal through the judicial system, if the FIRS does not relent;

- Penal provisions of the ***VATA*** and/or ***FIRSEA*** would be difficult to enforce against FMCGs. ***Offences and Penalties (Part V VATA)*** illustrate this point very well: furnishing of false documents, evasion of tax, failure to make attribution, failure to issue tax invoice, etc are all prohibited with sanctions.[26] It is trite that payment of tax is the civic responsibility of every eligible taxpayer;[27] and consequences of some ***VATA*** non-compliance includes imprisonment (***sections 36*** and ***37 VATA***).[28] One struggles to see how these criminal charges can be successfully sustained against FMCGs and its personnel for failure to 'cooperate' with FIRS pursuant to the Notice, as such failure does not constitute an offence; and

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[25] *However, from a reputational management cum responsible corporate citizen point of view, FMCGs may use moral suasion to get Counterparties to take their VAT compliance more seriously if there is any reason to believe some of them are not compliant. For example,* ***FMCGs can require them to make annual declarations that they comply with their tax obligations as part of the conditions for continuing business relationship. Although FMCGs will not have rights of audit, such declaration would "send a message" that FMCGs takes a serious view of their tax compliance even though it is unwilling to assume any responsibility for same beyond being a statutory agent for deducting and remitting WHT. FMCGs may also see if there are any provisions of the Dealership Agreements it can leverage in this regard; they already typically require prospective Counterparties to furnish their Tax Identification Numbers (TIN) which evidences their tax registration. It can also be assumed that the Counterparties' pushback can be taken as an indirect representation that they have optimal VAT compliance status.***

[26] See ***sections 25-29 VATA***. Furnishing of false documents is an offence which upon conviction attracts a fine of twice the amount under-declared (***section 25***); evasion is punishable with the higher of a fine of N30,000 or twice the amount of the VAT being evaded (***section 26***); failure to issue VAT invoice is sanctionable with a fine of 50% of the goods or services not invoiced (***section 29***), etc. Others include failure to keep proper records and accounts attracts N2,000 fine for every month that the failure continues; failure to collect VAT attracts as penalty, 150% of the VAT not collected plus 5% interest above CBN's rediscount rate (***section 34***). **Section 35 *VATA***) imposes a fine of N50,000 and N25,000 respectively in the month of default for every month in which the taxable person continues to default in submitting the returns. Also ***section 19(1) VATA*** provides that: *"If a taxable person does not remit the tax within the time specified in section 15 of this Act, a sum equal to 10% of the tax not remitted and interest at the prevailing [CBN] minimum re-discount rate, shall be added to the tax not remitted and the provisions of this Act relating to collection and recovery of unremitted tax, penalty and interest shall apply…"*

[27] See ***Independent Television/Radio v. ESBIR [2015] 12 NWLR (Pt. 1474), 442 at 493***. According to the oft quoted *obiter* of US Supreme Court Justice Oliver Wendell Holmes, Jr in a 1927 dissenting judgment: ***Compania General De Tabacos De Filipinas v. Collector of Internal, (275 U.S. 87, 88)***: *"Taxes are the price we pay for a civilized society."*

[28] ***Section 37 VATA*** provides that: *"Where an offence … is committed by a body corporate or firm or other association of individuals"* directors and officers of the body corporate, partners or officers of the firm, person involved with the management of the affairs of the association persons purporting to so act in any aforementioned capacity, *"would be severally guilty of that offence and liable to be proceeded against and punished for that offence in such manner as if he had himself committed that offence, unless he proves that such offence took place without his knowledge, consent, or connivance."*

- Provisions to punish non-deduction of WHT pursuant to ***CITA*** will not apply because WHT deduction is not in issue. ***Section 40 FIRSEA*** that sanctions failure to deduct and remit *"any tax"*, within prescribed timelines, including under ***VATA*** will also be inapplicable given the absence of legal *substratum* to the ***FIRS Notice*** – as ***VATA*** does not mandate the source deduction.[29] Another 'inapt' provision would be ***section 36 VATA***, which prescribes sanction for aiding and abetting an offence. Apparently, non-compliance with FIRS' *ultra vires* demand can never equate to an offence contemplated by ***section 36 VATA***.[30]

It is therefore clear that generally, enforcement and penal provisions that could have been regulatory 'sticks' that the FIRS can wield on defaulters, will only be applicable ***in the very unlikely event that FMCGs were to by refusing to comply with the Notice be held to be in default of their legal obligations***.[31]

Are there any possible exposures to Counterparties if FMCGs chooses to comply?

Although we are convinced there is no legal basis for it, the only compliance FMCGs may possibly undertake in line with the ***FIRS Notice*** would be VAT source deduction on the commission payable to Counterparties for direct remittance to FIRS. Whilst this would be the most risk averse approach from FIRS' point of view, such could expose FMCGs to its Counterparties.

The author believes that the Counterparties can successfully sue FMCGs (joining FIRS to such action) for declaration that such deduction is both unlawful and prejudicial to the Counterparties. Or better still, they can sue the FIRS and join FMCGs as Defendants. There could also be claim for interim and perpetual injunctive reliefs against the Defendants, stopping them from making deductions pending, and after final determination of the suit.

In fact, such course of action may be a good strategy to pre-empt FIRS' anticipatory enforcement action against FMCGs, thereby saving FMCGs the relationship capital of being the party that sued FIRS on the VAT source deduction issue. As discussed in further detail below, it is advisable that the FMCGs remain

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[29] ***Section 40 FIRSEA*** provides in part that a person in such default *"commits an offence and shall, upon conviction, be liable to pay the tax withheld or not remitted in addition to a penalty of 10 per cent of the tax withheld or not remitted per annum and interest at the prevailing Central Bank of Nigeria minimum re-discount rate and imprisonment for period of not more than three years."*

[30] ***Section 36 VATA*** provides that: *"… **any person who aids or abets the commission of an offence …** is liable on conviction to a fine of N50,000 or to imprisonment for a term of 5 years."* Also, ***section 26 FIRSEA***, empowers FIRS *vide* a notice to call for returns, books, documents and information that would aid its tax administration and enforcement especially in obtaining full information of the profits or income of a taxable person; any person who contravenes will be liable upon conviction to a fine equivalent to 100% of the amount of the tax liability.

[31] The FIRS cannot enforce against FMCGs without recourse to the courts. For example, in ***NOSDRA v. Mobil Production (Nig.) Unlimited [2018] 13 NWLR (Pt. 1636), 334 at 341A-B*** the CA defined 'fine' *"as a payment of money ordered by court from a person who has been found guilty of violating law… awarding a fine is a judicial act and it is the sole prerogative of a court of law under section 6 of the 1999 Constitution of the Federal Republic of Nigeria 1999 (as amended). No other organisations or bodies can usurp that power…"* Another 'inapt' illustration is ***section 26 FIRSEA***, which empowers the FIRS - *vide* a notice - to call for returns, books, documents and information that would aid its tax administration and enforcement especially in obtaining full information of the profits or income of a taxable person; any person who contravenes will be liable upon conviction to a fine equivalent to 100% of the tax liability.

in close contact with Counterparties and inform them of (possibly industry) efforts being made to amicably resolve the issue with FMCGs. FMCGs can also advise them to engage with the FIRS as a group; such would reinforce individual company efforts by FMCGs.

From the facts, it is not in dispute that the Counterparties charge VAT. Assuming they did not, then the provisions requiring FMCGs to charge the VAT and self-account for the VAT to FIRS would have been triggered. Since that is not the case, FMCGs have no basis to deduct their VAT at source.[32] This implies that if FMCGs settles invoice from Counterparties without charging VAT, the onus lies on FMCGs to self-account for such and remit same to FIRS. It is respectfully submitted that the Counterparties will be affected negatively if FMCGs decides to comply with the ***FIRS Notice***, given that they constitute taxable person under the ***VATA***.

What are the optimal risk management next steps/resolution options for FMCGs in managing both the FIRS and Counterparties?

In line with the foregoing discussions, the FMCGs may consider taking these options:

I. Resolution and Managing FMCGs's Relationship with the FIRS

It is possible that following the change of guards at the FIRS (the ***FIRS Notice*** was signed by the former Executive Chairman of FIRS), and on the strength of FMCGs' engagement with the FIRS to emphasise, based on current law, the impropriety and futility of FIRS' desired outcomes, that FIRS may change its mind and no longer insist on FMCGs compliance with same. In this regard, strong advocacy by the FMCG subsector of the Manufacturers Association of Nigeria (MAN) and also industry groupings may also be helpful.

Possibly, a consultant may be engaged by the Telcos to drive the engagement with the FIRS. If this is not possible, then FMCGs will have no choice but to write the FIRS giving reasons why it cannot comply with FIRS demands. However, we think an industry approach may be better, even if individual FMCG companies write the FIRS separately but around the same time.

If the engagement with the FIRS is unsuccessful, then FMCGs will have no choice but to pick up the gauntlet to challenge the FIRS on this matter. The specifics of FMCGs' strategy(ies) would be determined by whether FIRS has since written FMCGs pursuant to the ***FIRS Notice*** (in which case FMCGs needs to respond within time), or not (in which case FMCGs can write the FIRS to point out its and industry's concerns about the legal and business implications of the ***FIRS Notice***.

In fact, with the Counterparties' concurrence, FMCGs can attach their letter as supporting documentation to its letter to the FIRS. If there is no positive headway and FMCGs is of the view that FIRS is likely to enforce the ***FIRS Notice*** against it, FMCGs may either be 'quietly' preparing its potential defence or promptly proceed to file a tax appeal against the FIRS at the TAT. Which of the two approaches to take may depend on the context and outcomes of FMCGs/FIRS interactions on this issue after publication of the ***FIRS Notice***.

Essentially, FMCGs' narrative in engagement with the FIRS should be that they takes their duty as a corporate taxpayer seriously, having consistently made significant contributions to the national *fisc via* taxes, levies and charges. However, its governance architecture also impels it to operate strictly within the bounds of the law, hence its inability to comply with the demands of the ***FIRS Notice***, and then proceed to provide detailed basis for its position that the ***FIRS Notice*** lacked legal basis. FMCGs can conclude their respective narrative with reiteration of their willingness to remain socially responsible and cooperative corporate tax payers.

II. Managing the Relationship with Counterparties

FMCGs should continue to engage with the Counterparties, and thereby share views about the (invalidity of the) ***FIRS Notice***

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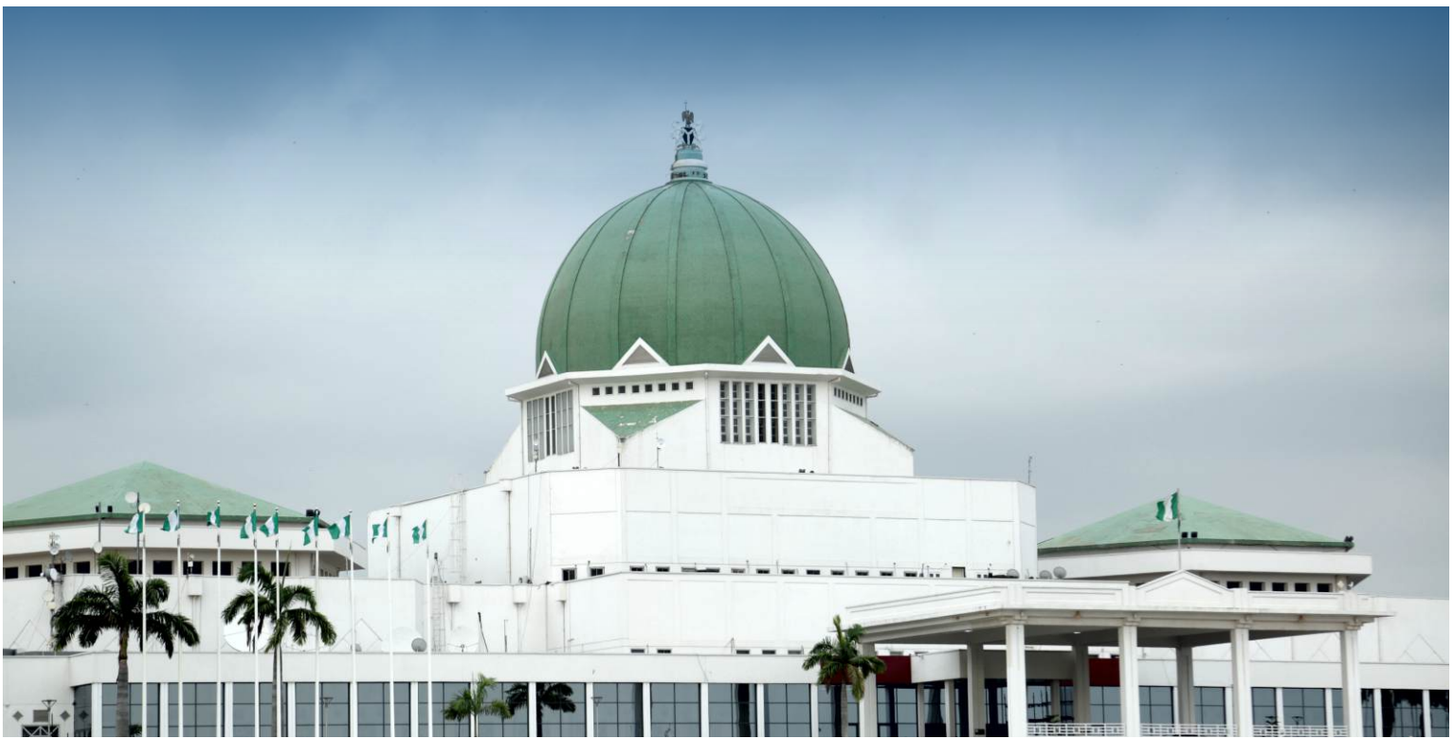
[32] ***Section 37(4) Fa1*** states that: *"When a person to whom taxable supplies is made in Nigeria is issued an invoice on which no tax is charged, such a person shall, self-account for the tax payable and remit the output to the service within the timeline prescribed under section 15 of this Act."*

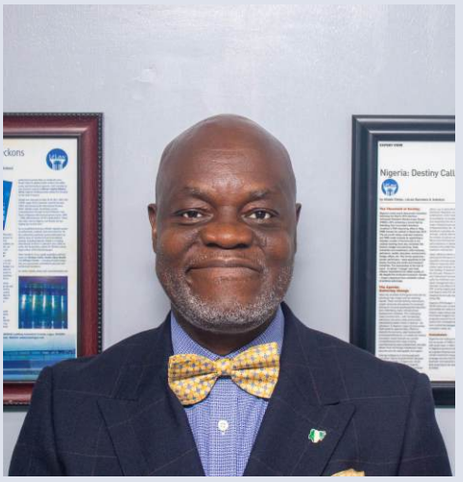


with them, whilst informing Counterparties of efforts to engage with the FIRS and also advising the Counterparties too to consider doing so, also as a group. The Counterparties may also reach out to their peers across the FMCGs landscape - to get a feel of the responsive strategies or potential strategies of those parties. In the process, they may mull the possibility of having an industry or common platform for responding to the ***FIRS Notice***, which could afford them a stronger voice in resolving the issues.

Such approach will communicate FMCGs' views of its Counterparties as critical to its continuing success and leadership in the market place. It will also exemplify the collaborative mindset that should underlie resolution of the issue. It is thus prescient that FMCGs should hold off on commencing the VAT source deductions whilst consultations with the FIRS is ongoing; the totality of the foregoing will put the minds of Counterparties at ease, and further the mutually beneficial relationship between the parties.

Conclusion

The author's considered opinion is that the ***FIRS Notice*** issued is inconsistent with applicable ***VATA*** and ***FIRSEA*** provisions, for that reason it is *ultra vires,* null and void and of no effect whatsoever. Thus, FMCGs can consider the resolution options as discussed above, but without effecting the VAT source deduction that FIRS seeks; whilst FMCGs will continue to discharge its WHT statutory agent obligations in respect of commission payments to Counterparties. Also, it may be particularly helpful to fashion out an industry approach (at the level of FMCG subsector of MAN, and other industry platforms) for a more compelling voice to get the FIRS to change its stance on VAT source deduction exemplified in the ***FIRS Notice***.



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