ÆLEX

ARTICLE SERIES

OIL AND GAS TANKERS: TAX DEMAND BY THE FIRS RAISES DUST

JULY 2023

www.aelex.com

INTRODUCTION

The FIRS has recently issued letters to owners, and in some cases, charterers of oil tankers used to export crude oil and LNG from Nigeria in connection with back taxes from 2010-2019. It appears that the letters were directed mainly at tanker owners and charterers that do not have an office in Nigeria.

In this article, we highlight some of the issues arising from the letters issued by the FIRS.

BACKGROUND

In 2015, the FIRS published a notice to remind all non-resident companies of their obligation to file tax returns. In 2021, the FIRS published a circular dated 3 June 2021 directed at companies to whom sections 14 and 15 Companies Income Tax Act ("CITA") applied, giving guidance on how, in its view, those provisions were to operate.

In December 2021, the FIRS published a notice directed at international shipping companies reminding them of their tax compliance obligations. The notice stated, amongst other things, that 'Operators of international shipping lines (owned, hired or chartered vessels) and their agents should take note and ensure full tax compliance immediately.' It also stated that 'The [FIRS], in collaboration with relevant government regulatory agencies in the maritime sector and the security agencies, is poised to enforce the tax laws against defaulting entities.'

In May 2022, the FIRS issued a circular withdrawing and replacing the earlier circular of June 2021.

One of the amendments introduced by the Finance Act 2023 mandates regulatory agencies in the shipping and air transport sector to request evidence of income tax filing and tax clearance certificates from companies in these sectors in order for such companies to continue to carry on business in Nigeria or obtain approvals and permits. If the requested evidence is not provided, approvals and permits may not be granted. With this amendment, the FIRS now has a tool with which to enforce payment.

IS THIS A NEW TAX?

The Companies Income Tax Act of 1961, provided for the taxation of outbound shipping in Nigeria. This provision was repeated in the Companies Income Tax Act 1979, which Act is reproduced in the Laws of the Federation of Nigeria, 2004.

WHY 2010- 2019?

It is not clear why the FIRS only went back as far as 2010. It is possible that the records that it was able to access from shipping regulators did not go beyond this date. In this respect, it may be recalled that the International Cargo Tracking Note Scheme, which was designed to track shipments in order to prevent the movement of dangerous cargo and arms, commenced in 2010.

STATUTE OF LIMITATION?

It is worth noting that the FIRS is barred from assessing taxpayers after six years. However, this time limit does not operate in a case where there has been 'fraud, wilful default or neglect'. Where a foreign shipping company has failed to file tax returns, it would be difficult to avoid the conclusion that there has been, at least, neglect and to argue that the six-year limit should apply.

WHO IS LIABLE TO PAY THE TAX?

S.14(1) of the CITA 1979 (as amended) reads: *'Where a company other than a Nigerian company carries on the business of transport by sea …, and any ship … owned or chartered by it calls at any port … in Nigeria, its profits or loss to be deemed to be derived from Nigeria shall be the full profits or loss arising from the carriage of passengers … or goods shipped, …, in Nigeria'.*

Where a foreign shipping company earns income from activities in Nigeria, and those activities do not fall within s.14 CITA, the applicable taxing provisions would be a combination of s.13(2) and s.9 of CITA.

The oil tankers used to export crude oil and LNG from Nigeria are sometimes owned by the buyers of the products, but more often they are procured under various charter arrangements. These could be bareboat charter, time charter, or voyage charter.

VOYAGE CHARTER

In this case, the owner of the tanker or a time charterer charters it to a voyage charterer to perform a specified voyage for a specified cargo or, sometimes, several consecutive voyages. The owner or time charterer provides the vessel, the crew, and bears all running and voyage costs, while the charterer is the owner of the cargo being shipped or arranges to carry a third party's cargo. In other words, the charterer, in essence, hires cargo capacity and not the vessel.

Where the voyage charterer is not the owner of the cargo, the charterer would receive payment for the carriage from the owner of the cargo. The vessel owner would also receive a fee from the voyage charterer in respect of the charter of the vessel.

Where the voyage charterer is the owner of the cargo, the voyage charterer would not have received any payment for the carriage, but the vessel owner would receive a fee from the voyage charterer for the charter of the vessel.

TIME CHARTER

In this case, the owner of the vessel charters it to a time charterer for a specified period of time. During that period, the charterer can order the vessel to load any permitted cargo from any permitted port. The owner provides the vessel and the crew. The charterer provides the fuel. The owner is paid a daily rate.

Where the time charterer is not the owner of the cargo, the time charterer would receive payment for the carriage from the owner of the cargo. The vessel owner would also receive a fee from the time charterer in respect of the charter of the vessel.

Where the time charterer is the owner of the cargo, the time charterer would not have received any payment in respect of the carriage, but the vessel owner would receive a fee from the time charterer for the charter of the vessel.

BAREBOAT OR DEMISE CHARTER

The owner puts the vessel (without any crew) at the complete disposal of the charterer. The charterer provides the crew and bears the running costs of the vessel. Sometimes, an oil company may bareboat charter a tanker from an independent owner but agree that the owner will manage the tanker on the oil company's behalf.

In respect of each of the foregoing charter arrangements, the question is: who amongst the charterer, the vessel owner, or the cargo owner should pay the tax under section 14?

After determining who the taxpayer should be, the next question is: what is the base on which the tax payable under section 14 is to be computed? The answer to this question is complicated by the fact that with chartered vessels, cargo freight is not always paid per carriage or per voyage.

The FIRS, in its 2022 Circular, attempted to provide guidance to the following questions but appears to have avoided these complications.

HOW MUCH TAX IS DUE?

Section 14 refers to the total or full 'sum receivable in respect of the carriage of … goods shipped … in Nigeria' being the basis for taxation. In the case of section 14(2), a profit/loss ratio is applied to this sum, and then a depreciation ratio is deducted. This may lead to a profit or loss for tax purposes. Any profit is then taxed at 30%. Where there is a loss, a minimum tax of 2% of the 'sum receivable' is payable, in accordance with section 14(4).

On the other hand, in the case of section 14(3), the FIRS will deem a fair percentage of the sum to be the profit for tax purposes, with no deductions being allowed. The current policy of the FIRS is to apply a deemed profit margin of 20%, which is then taxed at the rate of 30%.

6-MONTH GRACE PERIOD

On 17 June 2023, it was reported that the Federal Government had granted taxpayers "three months to come to the conclusion and we will also give a grace period of six months, when we will not enforce any of these laws, just to allow for reconciliation". This was done in order to forestall a boycott by tanker owners over fears that their tankers would be detained in Nigeria in order to enforce the payment of the tax. We understand from the FIRS that taxpayers have three months from 19 June 2023 to register with the FIRS and file tax returns and another three months to settle the tax liability.

ENFORCEMENT OF THE TAX

The FIRS would only be entitled to collect the tax where the assessment becomes final and conclusive (i.e. the taxpayer either failed to object within time or failed to file an appeal against the assessment). In such a case, the FIRS is entitled to distrain the taxpayer's property, which would include vessels. A warrant of distraint is an order under the official seal of the FIRS ordering the seizure of the property of a defaulting taxpayer to enforce payment of tax. If the tax is not paid within 14 days of the seizure, the FIRS can sell the property to recover the tax and other associated fees. It should be noted that in practice, the FIRS usually applies to the high court via an ex-parte application (without notice to the taxpayer) for an order of distraint to enable it to seize a defaulting taxpayer's property.

Alternatively, the FIRS may institute proceedings at the high court against a defaulting taxpayer to recover the unpaid tax.

Where the taxpayer loses its appeal at the TAT, the FIRS can apply to the high court for a writ of fifa as a judgment enforcement mechanism to seize a taxpayer's assets.

It is worth noting that a maritime law ship arrest would not be available for the enforcement of the collection of the tax. This is because a tax claim does not appear to be an arrestable claim under the Admiralty Jurisdiction Act.

OPTIONS AVAILABLE TO AFFECTED COMPANIES

The letters that were sent by the FIRS are not formal notices of assessment; but an advance indication of the FIRS' intention to issue formal noticesview of assessment.the tax liability.

After the expiration of the 3-month grace period to register and file tax returns, the FIRS could issue formal notices of assessment. Upon receiving a formal notice of assessment, a taxpayer has 30 days in which to respond to the FIRS with a notice of objection, requesting the FIRS to amend the assessment. Should the FIRS proceed to issue a notice of refusal to amend the assessment, the taxpayer has 30 days within which to file a notice of appeal at the Tax Appeal Tribunal.

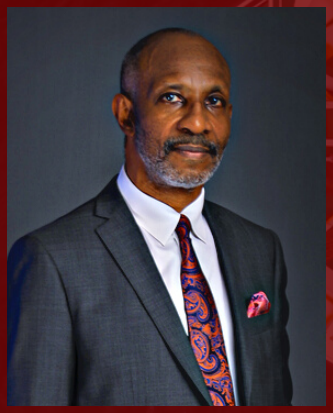
A taxpayer can object to the payment of the tax based on grounds such as the following grounds:
·it is not the party that earned cargo freight;
·it enjoys exemption under a double tax agreement;
·the FIRS ought not to have gone back more than six years. However, this ground would be difficult to sustain for taxpayers that have not previously filed tax returns;
·its actual cargo freight income was lower than the figures attributed to it in the letters; and
·the profits to be taxed should be computed on the basis set out in s.14(2) and not that in s.14(3) CITA.

Under Nigeria's double tax agreements with the United Kingdom, Italy, and China, no tax is payable in Nigeria in relation to freight income earned by a resident of these countries. As such, where an affected taxpayer is resident in any of these countries, it is not liable to pay tax in Nigeria.
The information contained in this article is not to be construed as legal or tax advice. Taxpayers are advised to seek professional advice on how to protect their interests.

ÆLEX

For additional information on any aspects of this publication, please reach out to:

CONTACTS



Theophilus I. Emuwa
tiemuwa@aelex.com

Jibrin Dasun
jdasun@aelex.com

ÆLEX is a full-service commercial and dispute resolution firm. It is one of the largest law firms in West Africa with offices in Lagos, Port Harcourt and Abuja in Nigeria and Accra, Ghana. A profile of our firm can be viewed here. You can also visit our website at www.aelex.com to learn more about our firm and its services.'

CONTACT DETAILS

LAGOS, NIGERIA

4th Floor, Marble House
1, Kingsway Road, Falomo
Ikoyi, Lagos

Telephone: (+ 234 1) 2793367; 2793368
4736296, 4617321-3;
Facsimile: (+ 234 1) 2692072; 4617092
E-mail: lagos@aelex.com

PORT HARCOURT, NIGERIA

2nd Floor,
Right Wing UPDC Building
26, Aba Road
P.O. Box 12636, Port Harcourt
Rivers State, Nigeria

Telephone: (+234 84) 464514, 464515
574628, 574636
Facsimile: (+234 84) 464516, 574628
E-mail: portharcourt@aelex.com

ABUJA, NIGERIA

4th Floor,
Adamawa Plaza
1st Avenue, Off Shehu Shagari Way
Central Business Area
FCT Abuja, Nigeria

Telephone: (+234 9) 8704187, 6723568,
07098808416
Facsimile: (+234 9) 5230276
E-mail: abuja@aelex.com

ACCRA, GHANA

Suite CCasa Maria
28 Angola Road
Kuku Hill, Osu
Accra

Telephone: (+233-302) 224828, 224845-6
Facsimile: (+233-302) 224824
E-mail: accra@aelex.com