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FOREIGN/NON-RESIDENT COMPANIES AND THE COMPANIES INCOME TAX (SIGNIFICANT ECONOMIC PRESENCE) ORDER, 2020

The President of Nigeria assented to the Finance Bill (now Finance Act) on January 13, 2020, and it hugely altered and impacted some provisions of the Companies Income Tax Act (CITA) amongst others. Prior to the Finance Act, a non-resident company is only liable to Nigerian tax if it has a fixed base in Nigeria, through which it carries on business. However, this has changed, as one of the major changes introduced by the Finance Act is the taxation of non-resident companies and business entities in Nigeria, including online and digital businesses, once they have a significant economic presence (SEP) in Nigeria and the profit is attributable to the activity. The Finance Act entrusted the duty of determining what constitutes SEP on the Minister.

In the discharge of this responsibility, the Honourable Minister of Finance, Budget and National Planning, Mrs. Zainab Shamsuna Ahmed, pursuant to her powers under Section 13 (4) of the Companies Income Tax Act, 2004 (as amended), issued the order on SEP. It has been published as the Companies Income Tax (Significant Economic Presence) Order, 2020 (“the Order”) in its Official Gazette No. 21, Vol 107 of 10 February 2020.

The Order has given guidance as to what constitutes SEP with respect to income or profit of any company other than a Nigerian company (“foreign/non-resident company”) in Nigeria, based on Section 13(2)(c) and (e) of CITA.

A company other than a Nigerian company shall have a significant economic presence (SEP) in Nigeria for the accounting year where it derives gross turnover/income of about ₦25 million naira or more, or its equivalent in other currencies from *inter alia*: digital, online or related activities that include streaming or downloading of e-books, music, games etc; transmission of data on Nigerian users; provision of goods and services; registration of a website address or usage of Nigerian domain name; etc. It is not clear whether this ₦25 million naira or more gross turnover or income threshold applies to the entire Order or only to section 1 of the Order.

The Order exempts companies from having SEP if the activity is purely professional, management or consultancy services, (except it receives payment from a person resident in Nigeria or a fixed base or agent of a foreign company in Nigeria); payment by a foreign fixed base of a Nigerian company; payments under a contract of

employment; teaching in an educational institution, etc.

Double Taxation Treaty (DTT) or Covered Tax Agreements (CTA) under a multilateral agreement/instrument (MLI) or consensus arrangement aimed at addressing challenges of digitalization of the economy, is recognized and applicable under the Order, if Nigeria is a signatory to the MLI. The Multilateral Convention to Implement Tax Treaty Measures to Prevent Base Erosion and Profit Shifting (Multilateral Instrument-MLI) was signed into law by Nigeria on August 17, 2017. The MLI came into effect on November 24, 2016, at Paris and prior to that time, Nigeria had signed DTTs with eighteen (18) countries, and later on with Singapore, and they all have different dates for the DTTs to come into effect and some others have no dates specified yet for it to come into effect.

The direct impact of the MLI on Nigeria's DTTs are incorporated in the Nigeria's BEPS MLI Position document which has provisional list of expected reservations and notifications to be made by Nigeria pursuant to Articles 28(7) and 29(4) of the MLI Convention.

Article 27 of the MLI deals with signature and ratification, acceptance or approval and states that as from 31 December, 2016, the Convention shall remain open for signature and it is subject to ratification, acceptance or approval. This implies that even if it is signed but it is not ratified, accepted or approved, then the mere fact that it has been signed will not suffice. It is noteworthy to also state that even though Nigeria signed the MLI on 17 August, 2017, it has not deposited the instrument of ratification, acceptance or approval as required by Article 34 of the MLI and consequently, it has not come into force.

As a result of the above, even though the Order allows the application of DTTs where they are in place, Nigeria is yet to ratify, accept or approve its DTTs, which in any case, does not contain provisions addressing the issues of tax challenges arising from digitalization of the economy (and presumably, taxation of technical, professional, management or consultancy services by foreign companies in Nigeria).

Comments

It is high time Nigeria ratified its DTTs to encourage foreign direct and portfolio investments in the country, including Foreign/Non-Resident companies taking advantage of this provision in the Order where applicable.

FIRS also needs to give further clarifications as to whether the ₦25 million naira or more gross turnover or income threshold applies to the entire Order or only to section 1 of the Order.

Dr Cyril Obika
obika@j-kgadzamallp.com



Click to download the Companies Income Tax (Significant Economic Presence) Order, 2020.

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The write-up is meant for general information purposes only. It is not a fully comprehensive work or legal advice on this area of law. In any event, if more clarifications, questions or our assistance is required, kindly, contact us at J-K Gadzama LLP, J-K Gadzama Court, Plot 1805, Damaturu Crescent by Kabo Way, P.O.Box 20304, Garki, Off Ahmadu Bello Way, Garki 2, Abuja, FCT. Tel: +234(0)96233600, E-mail: info@j-kgadzamallp.com, website:j-kgadzamallp.com.