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ENERGY

NIGERIA – ENERGY AND NATURAL RESOURCES UPDATE

WHISTLE BLOWING IN THE NIGERIAN OIL INDUSTRY: MATTERS ARISING

Introduction

In the past year, the whistle blowing concept has become increasingly popular in the fight against corruption in Nigeria.The Executive Arm of the Federal Government of Nigeria ("FGN") officially introduced its Whistle Blowing Policy("WBP")in Q4 2016. On 17 may 2017, the Nigerian Senate invited the heads of the Central Bank of Nigeria, Nigerian National Petroleum Corporation ("NNPC"), Federal Inland Revenue Service ("FIRS"), National Petroleum Investment Management Services and an International Oil Company ("IOC") to provide the details of an alleged $5billion tax fraud. The allegation arose from a petition to the Nigerian Senate by an alleged whistle blower that between 2001 – 2002, an IOC evaded tax to the tune of $343million through over bloating of its operational costs.The WBP and the facts of the allegation against the IOCraises many policy, legal and administrative issues, some of which are:

(i) Can the allegation of tax fraud trigger a further tax audit or investigation on the IOC by FIRS?
(ii) Does the allegation activate any contractual rights by NNPC against the IOC under the various contractual arrangements between NNPC and the IOC?
(iii) Can the FIRS conduct an audit on an issue that occurred about 15 to 16 years ago for which an audit may have been conducted at that time?
(iv) Does WBP absolve employees of their employee confidentiality obligation?

Can the allegation of tax fraud trigger a further tax audit or investigation on the IOC by FIRS?

As a natural process, an allegation of tax fraud will be an issue of interest to the revenue authority. Therefore, it is safe to assume that the FIRS will be examining the relevant laws to see if it can conduct further tax audits or investigations on the IOC based on the allegations. We assume that some form of tax audit may have been done in the past.

The IOC as a company engaged in petroleum operations is liable to income tax on the proceeds of the operations based on the Petroleum Profit Tax Act ("PPTA"). The provisions of the PPTA on the powers of the FIRS is therefore relevant. Section 36(4) provides that

"Notwithstanding the other provisions of this section, where any form of fraud, wilful default or neglect has been committed by or on behalf of any company in connection with any tax imposed under this Act, the [FIRS] may, at any time and as often as may be necessary, assess the company on such amount as may be necessary for the purpose of recovering any loss of tax attributable to the fraud, wilful default or neglect."

Thus, where there is any form of fraud or allegation thereof, the FIRS has the statutory right to assess a company on such amount as may be necessary for the purpose of recovering any loss of tax attributable to the fraud. It is significant that this power can be invoked at any time and as often as may be necessary. In other words, there is no limit to the number of audits or investigations that the FIRS can conduct on any company, once it can justify that any form of fraud, wilful default or neglect has been committed by or on behalf of the company.

Further, in assessing a company to additional PPT pursuant to Section 36(4) of the PPTA, Section 32(1) of the PPTA grants FIRS the power to call for further information in respect of a company's petroleum operations and request a company "*to produce for examination any books, documents, accounts and particulars which the [FIRS] may deem necessary."*

This statutory provision grants FIRS the power to conduct an audit at any time and as often as it may deem necessary.

Can the FIRS conduct an audit on an issue that occurred about 15 to 16 years ago for which an audit may have been conducted at that time?

Tax Practitioners will attest that tax audits and investigations often require significant amount of time and resources on the part of the tax payer. Experience shows that periods of tax audits and investigations often have a negative toll on the tax or finance function of businesses as personnel and time resources must be devoted to the audit, especially field audits. Hence, the relevant question is when and how often should the FIRS invoke its Section 36(4) powers? This may have to depend on the facts of any particular case. A convenient and defensible position is that the power of the FIRS in Section 36(4) is not absolute as an important qualifier to the exercise of that power is that a form of fraud, wilful default or neglect must have been committed in relation to petroleum profits tax ("PPT"). In other words, the FIRS may have to establish a prima facie case of fraud, wilful default or neglect in order to invoke its powers for repeated or multiple tax audits or investigations over the same subject matter. Similarly, a tax payer that seeks to resist FIRS' exercise of its power should be able to prove to the

contrary in addition to the facts of the losses or disadvantage it will suffer in the exercise of the disputed power.

NNPC's audit rights under the various contractual arrangements between the NNPC and the IOC

The facts of the applicable contractual arrangements between NNPC and the IOC for which the tax fraud is alleged is currently the preserve of the parties. It is however market knowledge that the NNPC and IOCs are partners under the Traditional Joint Venture ("TJV") arrangement and Production Sharing Contracts ("PSCs").

An allegation of fraud no doubt puts the NNPC on enquiry and this may lead to the NNPC examining its contracts with such an IOC to determine if it has any contractual rights or potential claims against it. The provisions oftypical Joint Operating Agreements ("JOAs") under the TJV and PSCs becomes relevant in determining the extent of NNPC's audit rights under such agreements.

Typical provisions of JOAs grant non-operators under the TJV rights to carry out an audit on all records relating to the Joint Operations. For example, standard audit clauses in JOAs within the Nigerian oil and gas industry provides that discrepancy in the accounts may be queried within a time frame (usually 36 months) from the date of receipt of the accounts by the non-operator(s). However, this time limitation does not apply in cases of fraud. Therefore, for assets covered under the TJV for which an is an operator, there is a potential risk that the fraud allegation may trigger an assertion of audit rights by NNPC. Where however, as the current fact suggests, records of between 15 to 16 years ago have to be reviewed, questions on the availability of sufficient audit trail becomes apposite. The IOC may accordingly have sufficient basis to push back based on its documents retention policy. Conclusively, there is the potential of a dispute between NNPC and the IOCon whether NNPC can exercise its audit rights.

As opposed to the TJV, the audit rights of NNPC are expressly limited and time bound under PSC arrangements. While typical provisions of PSCs grant NNPC audit rights,such right must be exercised within a time frame (usually two (2) years) following the end of the year in question. Failure to so do, the books and accounts relating to such year shall be deemed accepted by the parties as satisfactory. Furthermore, unlike JOAs, PSCs typically do not provide for audits in the event of a fraud.

Does the Whistle Blowing Policy encourage the breach of employee confidentiality obligations?

The WBP raises concerns around whether an employee who whistle blows can be found contractually liable for breach of any confidentiality obligation in his/her employment contract. A quick answer may be to respond in the affirmative to the effect that a whistle blower may be regarded to be in breach of the confidentiality obligations in a rightly-worded employment contract.

Most employment confidentiality obligations prohibit the divulging of an employer's information, whether such be as obtained or as generated by the employee in the course of employment or in or around the events leading to an employment or termination of the employment. A cursory examination of the issues would however call for caution in providing a definitive response.

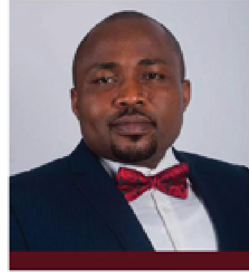
It is established under some foreign laws that an employee may not be held liable in breach of his/her confidentiality obligation where the act was done based on public interest. We are however unaware of such precedent under Nigerian law. The clear absence of a legislation on whistle blowing in Nigeria only compounds the issues, particularly for employees and ultimately for the WBP. Nigerian contract law is essentially a product of case law with minimal statutory intervention. A legislation on WBP, probably, exonerating employees from contractual liability on account of an act done in the public interest is a sure way to go. The Whistle Blower Protection Bill, currently before the National Assembly makes provision to this effect. Specifically, the Bill protects a whistle-blower from civil and criminal proceedings unless the information provided by such person is false and the disclosure was made with malicious intent. Also, the Bill voids provisions of employment contracts which tend to prevent an employee from making a disclosure. The Executive Arm of the Federal Government of Nigeria, being the architect of WBP, may as well, pending when defined legislative action is taken, put action to words or intentions, by agreeing to indemnify employees, who by their decision to whistle blow, breach their contractual obligations. Naturally, WBP should give employers reasonable concern in reviewing the terms of their employment contracts especially on confidential obligations.

Conclusion

In summary, an allegation of tax fraud which looks "simple" on the face of it may indeed have far reaching implications.

About AO2 Law

AO2 Law is a world-class law firm established to help clients achieve success through practical and innovative legal solutions. We think proactively thereby efficiently managing present and future business challenges. Through practical and innovative legal solutions we help our clients thrive in their business; delivering dependable services across our practices and in all matters we undertake. Led by a set of perspicacious Partners, AO2 Law is structured to deliver exceptional solutions to local and multinational organisations across various sectors in the global economy. We are instituted to consistently deliver result-oriented, best in class services to our clients. Our partners and associates are members of top ranking professional bodies bringing to bear experience and wealth of knowledge to the benefits of clients. We go beyond the call of duty. Our commitment to our clients is beyond just delivery of legal services; our clients' overall sustainability is our focus. With insights into the very core of how things really work, we deliver for you, the correct solutions that guarantees your place in the future you see.



Chinedu Anaje- Managing Partner

Chinedu (MCIArb- United Kingdom) is the firm's Managing Partner/Head of the Litigation, Arbitration & ADR practice group. A seasoned litigator and arbitrator with over twelve (12) years cognate experience. He specializes in commercial litigation and has litigated on extensive range of issues, including that pertaining, but not limited to corporate recovery, receiverships and insolvency, company and partnership disputes, oil and gas, environmental maters, maritime, real estate, intellectual property, telecommunications, finance and banking contracts, commercial law transactions, family law and general litigation both at trial and apallete levels.

Chinedu has represented different clients including banks, oil companies, telecommunication companies, professional service providers and high net worth individuals in litigation and advises on a wide range of commercial transactions.

Chinedu's litigation strategy in representing his clients is to add value to their businesses and reduce costs or financial exposures. He also offers criminal law pro-bono services.

Prior joining AO2 Law, Chinedu was Senior Associate at Aluko & Oyebode.

Bidemi Daniel Olumide - Partner

BD (Bidemi Daniel), as he is popularly called, leads the Tax, Corporate Commercial, Trusts and Criminal Law Practices of the firm. At the core of his professional life is his ability to provide Clients with time and cost-effective solutions to the most complex legal challenges. BD is known to avail the most-sophisticated Clients, a one-stop shop in legal advisory, management and representation services.

A practicing barrister and solicitor, BD's legal experiences straddle the following economic sectors: agriculture, energy, entertainment, construction, fast-moving consumer goods, financing, Government, information & communication technology, medical services, not-for-profits, professional services,real estates, solid minerals, telecommunications and transportation.

Prior to joining AO2 Law, BD was Senior Associate at the leading commercial law firm of Adefefun, Caxton-Martins, Agbor & Segun.

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