COMMENTARIES ON THE FIRS + NEPZA MARRIAGE OF UNLAWFUL PROPOSITIONS

Key Contacts

Bidemi Olumide
Partner
bidemi.olumide@ao2law.com

Uwem Atakpo Jnr.
Senior Associate
uwemedimo.atakpo@ao2law.com

Oluseun Olayiwola
Associate
oluseun.olayiwola@ao2law.com

Background:

On Wednesday, February 21, 2024, the Federal Inland Revenue Service (**FIRS**) in conjunction with the Nigeria Export Processing Zones Authority (**NEPZA**) issued a public document, captioned "Guidelines for Tax Compliance by Approved Enterprises Operating in Nigeria Export Processing Zone" (the **Guidelines**). The Guidelines is issued, purportedly, pursuant to the provisions of the Federal Inland Revenue Service (Establishment) Act 2007, as amended (**FIRS Act**), the Companies Income Tax Act, Cap. C21, LFN 2004, as amended (**CITA**), Value Added Tax Act, Cap. VI LFN 2004, as amended (**VAT Act**), and the Nigeria Export Processing Zones Act, Cap N107 LFN 2004, as amended (**NEPZA Act**). Summarily, the Guidelines which seeks to provide guidance on the tax obligations of Approved Enterprises operating within the Export Processing Zones (**EPZs**) (distinct from the Oil and Gas Export Free Zone) requires all Approved Enterprises in the EPZs, to:

a. file Annual Income Tax Returns;
b. collect, and remit Value Added Tax (**VAT**) on service(s) offered to persons outside the EPZs or to Approved Enterprises whose licences have been invalided by NEPZA to the FIRS;
c. deduct and remit Withholding Tax (**WHT**) to the FIRS on transactions subject to WHT conducted with entities that are not Approved Enterprises;
d. withhold applicable taxes from payments due to non – resident companies/individuals on relevant transactions and remit to the FIRS;
e. file WHT and VAT Returns with the FIRS;
f. comply with Transfer Pricing Regulations in respect of its transactions with related parties; and
g. subject themselves to FIRS' routine compliance audits, with defaulting Approved Enterprises to be subject to FIRS' sanctions and penalties.

In this brief, we succinctly highlight the existing tax compliance obligations applicable to Approved Enterprises operating within the EPZs, while critiquing the validity of the Guidelines' attempt at expanding existing tax compliance obligation on Approved Enterprises.

Commentaries:

The EPZs are a unique creation of the NEPZA Act and have since 1991 operated within the Nigerian economic landscape under distinct legal framework and quite a handful of incentives, the most obvious one being *tax exemptions*. By virtue of Section 8 and 18(1)a of the NEPZ Act 2004, Approved Enterprises operating within the EPZs are, in very clear terms, exempt from all Federal, State and Government taxes, levies, and rates. This exemption applies to all activities of Approved Enterprises carried on within and outside the EPZs.

While Approved Enterprises enjoy broad tax exemptions, the more recent emendation of Section 18(1)a of the NEPZA Act 2004 by Section 58 of the Finance Act 2020 requires all companies registered and operating as Approved Enterprises within the EPZs to file their Annual Income Tax Self-Assessment Returns with the FIRS in accordance with Section 55(1) of CITA, highlighting information on its Audited Accounts as well as its profits for the year of assessment. It imposes all penalties prescribed in the CITA and the FIRS Act on non-compliance with Section 55(1) of CITA on such Approved Enterprise in the event of their default. It is thus safe to conclude that the FIRS is empowered to enforce this obligation on all Approved Enterprises within the EPZs. Thus, and by the amended Section 18(1)(a) of the NEPZA Act, the sole obligation of Approved Enterprises in relation to taxes, is the requirement to file their Annual Income Tax Self-Assessment Returns with the FIRS in accordance with Section 55(1) of CITA.

The relevant thrust of this commentary is to ask the question(s): what then is the legal basis of the Guidelines which imposes on Approved Enterprises, fiscal obligations that exceeds that of Section 55(1) of CITA – the filing of Annual Income Tax Self-Assessment Returns with the FIRS? Where does the Guidelines derive the power to impose such obligations as the filing of VAT and WHT Returns or that of requiring compliance with the Transfer Pricing Regulations, 2018?

By virtue of the combined provisions of Sections 8, 25, 18(1)a of the NEPZA Act (as amended by Section 58 of the Finance Act 2020), Approved Enterprises operating within the EPZs are firstly, exempt from all tax liabilities, subject only to the obligation to file Annual Income Tax Self-Assessment Returns with the FIRS in compliance with Section 55(1) of CITA. Said differently, the amended Section 18(1)a of the NEPZA Act specifically delimits the tax obligations and legislations applicable within the EPZs to the filing of Annual Companies Income Tax Self-Assessment Returns with the FIRS as well as the imposition of the penalties and enforcement of the provisions of the CITA and FIRS Act as it relates to non-compliance with Section 55(1) of CITA only. This requirement is strictly on filing Self-Assessment Returns with the FIRS on the income of Approved Enterprises and does not in anyway translate to any other obligation as the Guidelines seeks to introduce.

Lawyers will readily resonate with the principle of statutory interpretation that states: *the express mention of one thing in a statutory provision automatically excludes any other stipulation which would otherwise have been applied by implication*. Similarly, the Courts have as a settled principle of law upheld and interpreted tax legislations strictly and based squarely on clear wordings, leaving no room for intendments or implications. In this context, it means that the express mention of Section 55(1) of CITA in the amended Section 18(1)a of the NEPZA Act automatically excludes any further implication as to the applicability of other tax legislations or other tax compliance obligations on Approved Enterprises. To this end, the FIRS and NEPZA lack the statutory power to, by the Guidelines seek to expand the scope of tax compliance obligations and tax legislation applicable to Approved Enterprises in EPZs.

Specifically, the power to amend and expand the scope of wide-reaching tax exemption provisions as Sections 8 and the amended 18(1)(a) of the NEPZA Act lies exclusively with the Legislature, in this case, the National Assembly. The Executive Arm of Government, as represented both by FIRS and NEPZA, cannot by an unlawful alliance, seek to rewrite the laws of the Federal Republic of Nigeria. The Guidelines is overreaching to the extent it extends beyond imposing obligations on Approved Enterprises to file their Annual Income Tax Self-Assessment Returns with the FIRS. The Guidelines, being at variance with Sections 8 and 18(1)a of the NEPZA Act as amended, is *void* and *ultra vires* to the extent of its variance.

Conclusion:

The Guidelines suggests the thrust of the Federal Government of Nigeria to go hard on tax compliance in the EPZs. But then, the EPZs operate under a separate legislative regime, carefully carved out by the combined wisdom of legislators and policy makers. Any intention to change the policy direction of the EPZs cannot begin with the Guidelines; the party must

begin in the hallowed chambers of the National Assembly where the proponents of Nigeria's Special Economic Zones and the tax revenue adherents have to wit-battle their ideas on which direction Nigeria should go in attracting such investments to be found in the EPZs. Nigeria's Legislature has, since 1991, laid part of the foundations of Nigeria's Special Economic Zones with the NEPZA Act; with investment-skyscrapers having been built thereon. It is reasoned that the administrative Guidelines of nails and hammers is fundamentally too small to unlay the legislative foundations of the Special Economic Zones as exemplified by the NEPZA Act; this should be declared so by the Courts of the land, save and until the Legislature chooses to restructure the landmark foundations once again – perhaps this is a party for lobbyists after all.

At AO2LAW, we maintain a foremost Africa Investments Incentives (advisory, representation, and compliance) Practice. Situated within our Commercial and Criminal Law Practice Group (CCLP), our Investments Incentives Practice additionally brings to bear our expertise in Tax and Government Liaison Practice to assist businesses navigate the complexities of the African market.

For further information on the foregoing (none of which is a legal advice) or related matters, please generally contact us at cclp@ao2law.com, or specifically reach out to the key contacts