AN OVERVIEW OF TAXATION OF NON-RESIDENT COMPANY IN NIGERIA

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It is a known principle of law that every entity, be it an individual or a corporation, is subject to tax to be imposed by a relevant tax authority within a year of assessment. More specifically, a company is chargeable to a tax payable at a specified rate upon its profits accruing in, derived from, brought into or received in Nigeria in respect of certain transactions. This is provided for in section 9 (1) of the Companies Income Tax Act, Cap. C21, LFN, 2004. For the purpose of imposing company tax, a company is defined as "any company or corporation (other than a corporation) solely established by or under any law in force in Nigeria or elsewhere" (Section 105, Company Income Tax Act).

The position is indisputable that every company is subject to tax. However, the company so taxed could be a resident or non-resident company. A company is resident in Nigeria if it is incorporated in Nigeria. On the other hand, a non-resident corporation is a company or corporation that is not registered or incorporated in Nigeria but which derives income or profits from Nigeria. It could also be referred to as a foreign company and it means any company established under any law in force in a territory or country outside Nigeria. In the case of a non-resident corporation, the exemption from incorporation does not confer exemption from payment of tax on any company. Thus every company, resident or non-resident, is liable to tax in Nigeria if its income is liable to tax under the provisions of the Companies Income Tax Act.

This paper will deal specifically with the taxation of non-resident companies doing business in Nigeria. Before delving into that, the position seems to be that a Nigerian or resident company is taxable on its worldwide income. This is a directive of the statutory provisions as contained in the Companies Income Tax Act. Section 9 of the Act provides that tax shall be payable on the profits of any company accruing in, derived from, brought into or received in Nigeria in respect of any trade or business for whatever period of time such trade or business may have been carried on. This provision was interpreted in Tufic K. Koran v. Commissioner for Income Tax (WACA) 25 May 1948 wherein the court held that the words "accruing in" and "received in" import a clear territorial limitation to Nigeria. The court further stated that the words "derived from" appear to be designed to meet among other things, cases where profits arise from transactions carried out in Nigeria by non-resident taxpayers.

On the other hand, a non-resident entity is liable to tax in Nigeria on its profits attributable to the business or trade carried on in Nigeria. This position seems to be because it is legally possible for a non-resident company to directly derive income from Nigeria. Therefore, the Companies Income Tax Act by virtue of section 13(2) thereof provides that a non-resident company is only liable to corporate tax in Nigeria in the following circumstances:

1. If the non-resident company has a fixed base in Nigeria to the extent that profits are attributable to the fixed base.
2. If the non-resident company habitually operates in Nigeria through dependent agent authorised to conduct on its behalf or on behalf of some other companies controlled by it.
3. If that trade or business or activities involves a single contract for surveys, deliveries, or installations or construction, the profit from that contract.
4. If the transactions between associated members are artificial or fictitious.

In all of these circumstances, the non-resident company would be subject to the corporate tax on any investment (passive) income earned by it such as dividend, interest, royalty and rent by way of
In this review, each of the circumstances shall be considered perfunctorily in seriatim:

- **Fixed Base or Business**

  Paragraph 4.1 of the Federal Inland Revenue Service (FIRS) Circular 9302 deals with the specific instance of fixed base as a way of taxing a non-resident company. If a non-resident company has a fixed base from which it carries on its business or trade in Nigeria, the profit is from such activities would be deemed to be derived from Nigeria. The term "fixed base" implies that the place must be easily identifiable and must possess some degree of permanence. It includes:

  1. Facilities such as a factory, an office, a branch, a mine, gas or oil well, or a gas field
  2. Activities such as building, construction, assembly, or installation, and
  3. Furnishing of services in connection with the activities mentioned above.

  In this instance, the Federal High Court in Saipem Contracting Nigeria Ltd. & 2 ors v. Federal Inland Revenue Services & 2 ors, Unreported Suit No. FHC/L/CS/108/09 held that Saipem Portugal and Saipem France are liable to company income tax in Nigeria on the contract between them and Shell Nigeria Exploration and Production Company Limited on the basis of the fact that a fixed base was established in Nigeria through Saipem Nigeria.

- **Operation of a dependent Agent**

  A non-resident company can have two types of agents in Nigeria – an independent agent or a dependent agent. An agent is regarded as possessing independent status when he acts on behalf of a non-resident corporation in the ordinary course of his business. The status may however change if he devotes his activities wholly or almost wholly on behalf of the company. See Paragraph 4.2 of the FIRS Circular 9302. It must be noted that the non-resident company must operate habitually which implies that it must be repetitive and not isolated. In this sense, where a dependent agent makes an isolated sale of goods on behalf of a principal, that may not necessarily constitute from such an operation a deemed profit liable to Nigerian tax. However, where the facts show that the sale of goods on behalf of the principal or of any company associated to it by the agent is on a regular pattern, this arrangement will conform with the intention of the term "habitually". see Paragraph 4.3 of the FIRS Circular 9302.

- **Profit on a Turnkey Projects**

  Paragraph 4.4 of the FIRS circular 9302 defines a turnkey project as "a single contract involving survey, deliveries, installation, or construction". It further provides that the profit on a turnkey project should not be split between the Nigerian source and offshore profits but taxed wholly in Nigeria. In Saipem Contracting & 2 ors v. FIRS & 2 ors, Suit No FHC/L/CS.108/09, the court held that the contract between Shell Nigeria with Saipem Portugal and Shell France is within the contemplation of applicable laws as money derived from Nigeria under a single contract under section 13 (2)(c) and section 30 of the Companies Income Tax Act. On that basis, all the necessary activities leading to the execution of the contract (and payments) were carried out in Nigeria and as such, making monies therefrom Nigerian sourced and liable to payment of withholding tax in Nigeria.

- **Transactions not at arm's length**

  The transactions not at arm's length hold when the following circumstances exist:

  1. Where there is a controlling interest in the Nigerian company.
  2. The presence of a control of a Nigerian company may be exercised directly or indirectly by a parent company or any other company associated to it.
  3. The impositions of conditions in the financial and commercial relations by the continuing interest.
  4. Where there is a controlling interest in the Nigerian company.
  5. Such relationship and conditions lead to the transfer of goods and services at prices not at arm's length and
  6. Consequently, the profits declared for the Nigeria tax are understated.

  Where the conditions analysed above hold, the profit deemed to be derived from Nigeria shall be as determined by the Board. In such circumstances, the Board will carry out comparative cost and price to establish the true market prices and make necessary adjustments to determine the true profit for tax purposes.

  In all these circumstances as specifically analysed above, the income of the non-resident company would be subject to company tax (even by way of withholding tax) and the court should always uphold those circumstances in order to catch the non-resident company within the Nigerian tax net whenever specific situations come up for determination before the court. Also, it appears from the analysis above that there exists a strong legislative framework for the taxation of non-resident companies in Nigeria for all dividends, profits or income they derive from the Nigerian economic environment.

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