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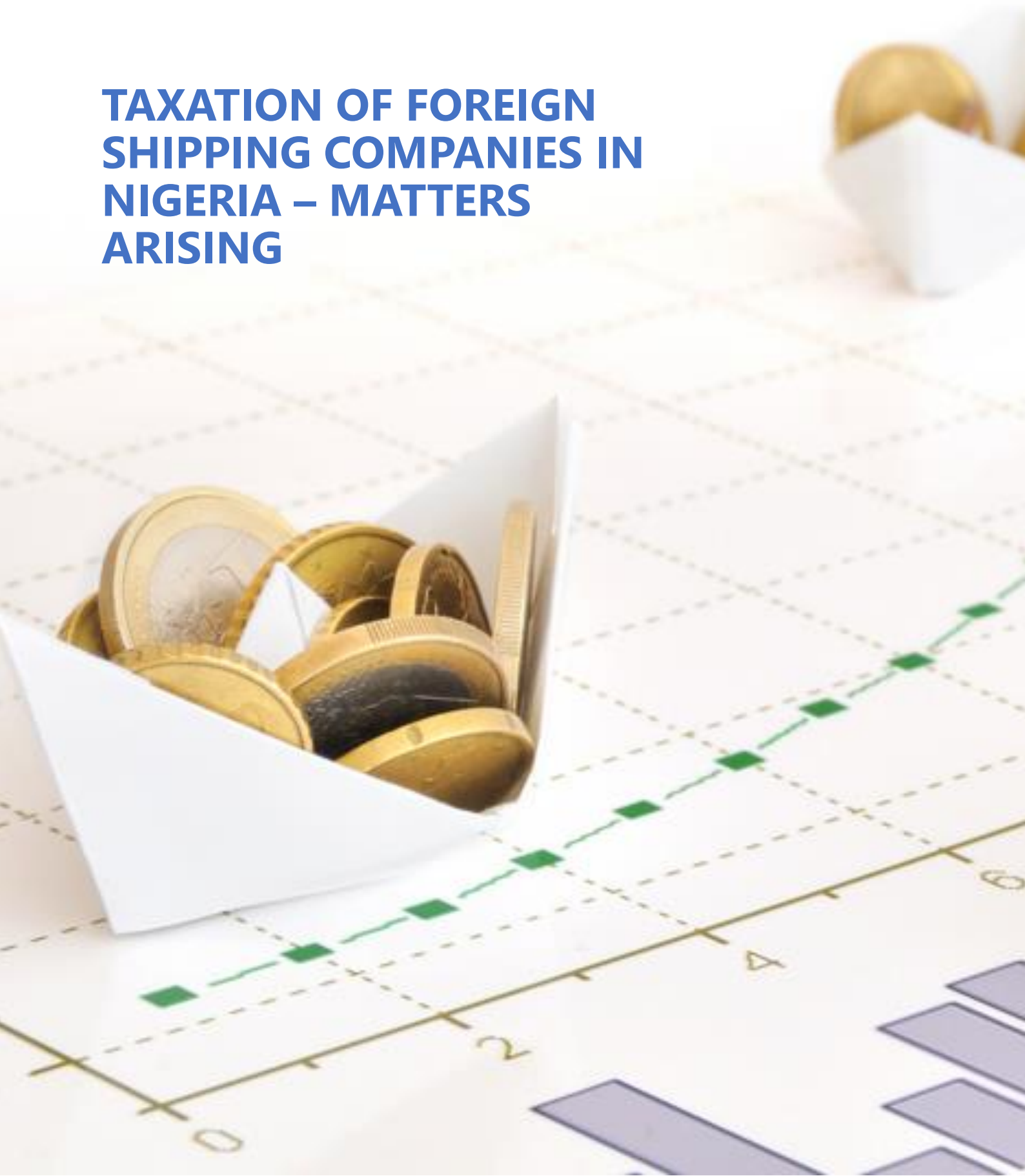
TAXATION OF FOREIGN SHIPPING COMPANIES IN NIGERIA – MATTERS ARISING



Background

One of the amendments made by the Finance Act 2023 (FA 2023) to the Companies Income Tax Act, Cap C.21, LFN 2004 (as amended) ("CITA") is the introduction of Section 14(6), which makes it mandatory for non-resident companies ("NRCs") engaged in shipping and air transport operations in Nigeria to present evidence of income tax filings for the preceding year, and tax clearance certificates ("TCCs") showing income taxes paid for the three preceding tax years, in order to continue carrying on business in Nigeria or obtain any relevant approvals or permits. Prior to this amendment, the Federal Inland Revenue Service ("FIRS") had issued an information circular in May 2022 to provide detailed clarification on the tax regime of companies engaged in shipping and air transport business.

In a public notice published in the Daily Trust on 17 December 2021, the FIRS directed all international shipping companies ("ISCs") operating in Nigerian territorial waters as either containerised, bulk cargo, fishing trawlers, crude oil or natural gas lifting vessels, dredging, survey, FPSO (floating production storage and offloading) or other gainful activities, to regularise their tax compliance status. The FIRS further notified operators of international shipping lines (owned, hired or chartered vessels) and their agents to ensure full tax compliance immediately and conclude the regularisation of their tax compliance status no later than 28 February 2022.

Subsequent to the publication of the FIRS' circular, the FIRS issued tax assessment notices to several ISCs, petroleum tanker owners and vessel operators for back taxes that have accrued from 2010 -2019 years of assessment. Companies that were served assessment notices by the FIRS have expressed various concerns about the FIRS' actions and the legal basis for them. These concerns have been further exacerbated by the amendment of Section 14 by the FA 2023 and are causing disruptions, particularly in the shipping industry, where many of the affected companies have suspended shipping activities within Nigeria, pending adequate clarification on the matter. The petroleum industry has been the most hit, resulting in a mounting volume of petroleum cargo awaiting shipment at the ports, which have been stalled by the suspension of activities. This article considers some areas of concern for affected companies.

The Period of Assessment for Back Taxes

Section 66(1) of the CITA provides that if the FIRS discovers or is of the opinion at any time that any company liable to tax has not been assessed or has been assessed at a less amount than that which ought to have been charged, the FIRS may, within the year of assessment or within six years after the expiration thereof and as often as may be necessary, assess such company at such amount or additional amount, as ought to have been charged.

The proviso to section 66(1) empowers the FIRS to assess a company to additional taxes for periods exceeding 6 years if any form of fraud, wilful default, or neglect has been committed by or on behalf of any company. Section 35 of the Federal Inland Revenue Service Establishment Act 2007 (as amended) ("FIRS Act") further empowers the FIRS to investigate or cause an investigation to be conducted to ascertain any violation of any tax law in Nigeria. The assessment notices issued to the ISCs exceed the 6-year period, which suggests that the FIRS is relying on the proviso to section 66 (1) of the CITA. If this is the case, the FIRS will have the onus to prove fraud, willful default or neglect on the part of the ISCs and this is based on the Tax Appeal Tribunal's decision in Ecobank Plc. v Delta State Board of Internal Revenue (TAT/SSZ/005/2020), where the Tribunal held that if FIRS issues an assessment notice to a company for a period beyond six years, the onus is on the FIRS to furnish particulars of the fraud, willful default, or neglect committed by the company.

Application of Double Tax Treaty ("DTT") Provisions

We understand that the FIRS has issued assessment notices to various ISCs regardless of the country where these ISCs are tax-resident. This is a critical issue because Nigeria has DTTs with several countries across the globe, with provisions that entitle the ISCs incorporated within such jurisdictions to either a partial or full tax exemption on income derived from their operation in Nigeria. The issuance of additional tax assessments to these ISCs without due consideration for existing DTTs could result in a situation where some ISCs are subjected to income tax in Nigeria in contravention of the applicable DTTs which exempt such ISCs from tax in Nigeria. While some DTTs exempt ISCs from tax in Nigeria, other DTTs create reciprocity obligations between the contracting countries. In light of this, we recommend that when issuing these assessment notices, the FIRS should, rather than apply a one-size-fits-all approach, consider the peculiarity of the DTTs applicable to each ISC to avoid situations where some ISCs are deprived of treaty benefits.

Lack of Clarity on the Obligations Sought to be Enforced by the FIRS

It is not clear whether the FIRS requires companies who have been in default of tax obligations for the assessment period of 2010-2019 to fulfill their obligations retroactively. NRCs who have been remitting their taxes but are now required, under Section 55 of the CITA (as amended by Finance Act 2019), to file tax returns with the FIRS for each relevant year of assessment, cannot be compelled to file tax returns for years prior to the 2020 year of assessment. This is because the CITA did not require NRCs to file tax returns prior to the Finance Act 2019, and therefore, the obligation cannot be imposed retroactively to include any period that precedes 2020.

Peculiarities of Shipping Arrangements

In practice, companies enter into different shipping arrangements, including the leasing of vessels and ships. This could either be on—(i) a voyage or time basis; or (ii) a bare-boat or demise basis. Under the former arrangement, the charterer leases the ship or a part of it for a

particular voyage or for an agreed period of time, but the ship owner retains possession of the ship through its the employment of the master and crew. On the other hand, the charterer in a bare-boat or demise arrangement takes possession of the ship, hires its own master and crew, and bears legal and financing responsibility for it. While it may be clear under a voyage or time basis arrangement that the income tax obligations lie with the ship owner, it is not so clear for bareboat charters seeing as possession and risk pass to the charterer who may use the vessel to conduct freight business in Nigeria. In issuing its assessment, the FIRS should be mindful not to issue additional tax assessments to the wrong party. It is not sufficient for the FIRS to issue additional tax assessments to shipowners or companies whose details are reflected in the shipping register kept by regulators like the Nigerian Maritime Administration and Safety Agency ("NIMASA"), without considering their peculiar arrangements.

Conclusion

Certainty remains one of the cardinal principles of taxation. The developments discussed in this article have caused uncertainty within the shipping and air transport sectors. Non-resident companies operating in these sectors should seek professional advice to assess their position and the level of risks that these changes may expose them to while doing business in Nigeria.

This update has been provided by the Tax team at Udo Udoma & Belo-Osagie. For more information about our Tax practice group offerings, please visit our website at www.uubo.org or email us at CorpTaxTeam@uubo.org.