FEDERAL INLAND REVENUE SERVICE NIGERIA
15 SOKEDE CRESCENT, WUSE ZONE 5, P.M.B 33, GARKI, ABUJA, NIGERIA

INFORMATION CIRCULAR

N0:2022/16 Date of Publication: 9TH May, 2022

SUBJECT: EXPLANATORY NOTES ON THE CRITICAL TAX ISSUES FOR THE OPERATION OF HOLDING COMPANY STRUCTURE IN NIGERIA

This Information Circular replaces the Circular on "Explanatory Notes on The Critical Tax Issues for the Operation of Bank Holding Company Structure in Nigeria, published on the 12th of April, 2012.

1.0 Introduction

The Information Circular is made to address issues arising in connection with the taxation of Holding Companies and their Subsidiaries pursuant to Section 61 of the Federal Inland Revenue Service (Establishment) Act, 2007, Cap F36, Laws of the Federation of Nigeria, 2004. The circular shall apply to Holding Companies and their Subsidiaries in Nigeria.

2.0 Background

The Federal Inland Revenue Service issued the Information Circular on "Explanatory Notes on the Critical Tax Issues for the Operation of Bank Holding Company Structure in Nigeria", pursuant to its powers under Section 61 of the FIRS (Establishment) Act 2007. The Circular was issued in response to the Regulations published by the Central Bank of Nigeria (CBN) on Scope of Banking Activities & Ancillary Matters, No. 3, 2010 (Regulation 3 of 2010), repealing the erstwhile Universal Banking Licence regime and modifying the scope and framework for banking business in Nigeria. The aforesaid CBN Regulations require that banking groups in Nigeria restructure their business operations by incorporating one or more Holding Companies to aggregate shareholder capital and hold ownership interest in operating companies conducting Banking and other permitted businesses separately.

Subsequently, the Service has received several requests for the application of the explanations and clarifications provided in the said Circular to other entities that have similar structures as contained in the

said CBN Regulations.

As a result of the foregoing, the Federal Inland Revenue Service pursuant to its powers under Section 61 of the FIRS (Establishment) Act, hereby issues the following guidelines to provide an enabling tax framework for Holding Companies in Nigeria.

3.0 Clarifications on the Relevant Tax Issues

The implication of Section 19 (2) (a) and 80 (3) of Company Income Tax Act (CITA) on HoldCo.

Section 19 of Companies Income Tax Act, CAP C21, LFN, 2004 (as amended) states that:

The provisions of subsection (1) shall not apply to-
(a) dividends paid out of the retained earnings of a company, provided that the dividends are paid out of profits that have been subjected to tax under this Act, the Petroleum Profits Tax Act, or the Capital Gains Tax Act;

Section 80 (3) of CITA, CAP C21, LFN, 2004 however provides that:

> "Dividend received after deduction of tax prescribed in this section shall be regarded as franked investment income of the company receiving the dividend and shall not be charged to further tax as part of the profits of the recipient company....."

In line with Section 19 (2) (a) of CITA, Franked Investment Income would not be subjected to further tax indirectly through the application of Section 19(1) of CITA.

3.1 Treatment of Withholding Tax on Dividend

Under the existing WHT administrative framework, FIRS understands that WHT on dividend payable to HoldCos being corporate entities would be remitted to FIRS. However, WHT on eventual distribution to individual shareholders by the HoldCos would be due to the relevant tax authority. In the case of individual shareholders, the relevant Tax Authority will be the State Internal Revenue Service, while for corporate entities, the FIRS would be the appropriate tax authority.

In view of the above and in order to avoid administrative challenges that may occur for the HoldCos, where an operating subsidiary has declared dividend, the subsidiary may pay the dividend due to the HoldCo gross of WHT. Whilst dividend due to the other minority shareholders of the

subsidiary companies should be paid net of WHT. WHT deducted from such minority shareholders should be remitted to the relevant tax authorities. However, for this treatment to be applicable, **the HoldCo must within 30 days of receiving the dividend from the subsidiaries, redistribute the full amount received to the ultimate shareholders to the relevant tax authorities.**

3.2 Exemption from Commencement and Cessation Rules

In view of the provision of Section 29(9) and (12) of CITA, where a HoldCo is formed as a result of restructuring, the Board of FIRS may direct on application by any of the companies that commencement and cessation rules shall not apply provided that:

(i) the formation of the HoldCo does not result in any change in ownership structure of the Group;

(ii) the business of the HoldCo and the subsidiaries are not discontinued, but may be transferred within the Group; and

(iii) the assets are sold or transferred at an amount equal to the residue of the qualifying expenditure, that is, at their tax written down values (TWDV).

However, unrelieved losses or unabsorbed capital allowance by a member of the Group cannot be transferred to another member.

NOTE: For other forms of merger and acquisition other than for the purpose of forming a 'Passthrough' HoldCo Structure, the existing procedure of case by case application for the Board's direction will continue to apply.

3.3 Capital Gains Tax

The creation of HoldCo Structure may result in divestment from some business activities, as a result of which the Group has to re-organize and move assets around the successor entities, including the HoldCo. The transfer/disposal of such assets will likely attract capital gains tax.

However, Section 32 of Capital Gains Tax Act Cap C1 LFN, 2004(as amended) provides that:

> "Where a trade or business carried on by a company is sold or transferred to a Nigerian company for the purposes of better organisation of that trade or business or the transfer of its management to Nigeria, and any asset employed in such trade or business is sold or transferred, no tax shall apply under this Act to the sale or transfer of the aforementioned assets to the extent that one company has control over the other or both are controlled by some

other person or are members of a recognised group of companies and have been so for a consecutive period of at least 365 days prior to the date of re-organisation: "

Provided that if the acquiring company were to make a subsequent disposal of the assets acquired within the succeeding 365 days after the date of transaction, any concessions enjoyed under this subsection shall be rescinded and the companies shall be treated as if they did not qualify for the concessions stipulated in this subsection as at the date of initial re-organisation"

In line with the provisions of Section 32, any assets transferred in exchange for shares issued shall not be subject to Capital Gains tax provided that the disposal was made at least 365 days prior to reorganisation.

3.4 Value Added Tax

The operation of the holding company structure may require re-organization and movement of assets around the successor entities (including HoldCo), which will continue different lines of business within their group. In this way, businesses previously conducted through a single company may now be undertaken by multiple entities under the control and supervision of HoldCo.

The transfer of assets within the group, may expose the re-organization to value added tax in line with Section 2 of the Value Added Tax (VAT) Act Cap V1, LFN 2004 1993 (as amended), which provides that "The tax shall be charged and payable on the supply of all goods and services (in this Act referred to as "taxable goods and services") other than those goods and services listed in the First Schedule to this Act".

In addition, Section 46 of the VAT Act states inter alia:

"supplies" means any transaction, whether it is the sale of goods or the performances of a service for a consideration, that is, for money or money's worth"

"supply of goods" means any transaction where the whole property in the goods is transferred or where the agreement expressly contemplates that this will happen and in particular includes the sale and delivery of taxable goods or services used outside the business, the letting out of taxable goods on hire or leasing, and any disposal of taxable goods".

However, "goods" for the purposes of this Act, means all forms of tangible properties, movable or immovable, but does not include, land and building, money or securities".

Based on the above provisions of the VAT Act, where the reorganisation involves transfer of land and building, or interest in land and building,

securities, interest in securities, money, interest in money then VAT will not be applicable.

Furthermore, for other assets not exempted above, Section 42 of VAT Act states that

> " Where a trade or business carried on by a company is sold or transferred to a Nigerian company for the purpose of better organisation of that trade or business or the transfer of its management to Nigeria, and any asset employed in such trade or business is sold or transferred, no tax shall apply under this Act to the sale or transfer of the assets to the extent that one company has control over the other or both are controlled by some other person or are members of a recognised group of companies and have been so for a consecutive period of at least 365 days prior to the date of reorganisation:

Provided that if the acquiring company were to make a subsequent disposal of the assets thereby acquired within the succeeding 365 days after the date of transaction, any concessions enjoyed under this subsection shall be rescinded and the companies shall be treated as if they did not qualify for the concessions stipulated in this subsection as at the date of initial reorganisation.

As such, VAT will apply where the assets transferred in the reorganisation process are disposed of within 365 days of the reorganisation.

3.5 Minimum Tax

Companies in Nigeria are liable to pay minimum tax under the Companies Income Tax Act, Cap C21, LFN 2004. This arises, where in any year of assessment, the assessable profits of a company result in a loss or where the total profits result in no tax payable or tax payable, which is less than the minimum tax payable under the CITA. The rationale for the minimum tax is to ensure that the Government receives a fair share of return from every economic entity.

Section 33 (1) and (2) of CITA, provides as follows:

(1) Notwithstanding any other provisions in this Act, where in any year of assessment, the ascertainment of total assessable profits from all sources of a company results in a loss, or where a company's ascertained total profits results in no tax payable or tax payable which is less than minimum tax, there shall be levied and paid by the company the minimum tax as prescribed by subsection (2) of this section.

(2) For the purpose of subsection (1), the minimum tax to be levied and paid shall be 0.5% of gross turnover of the company less franked investment income: Provided that—

(a) the applicable minimum tax is reduced to 0.25% for tax returns prepared and filed with respect to financial years ending on any date between 1 January 2020 and 31 December 2021, both days inclusive;

(b) where the company had filed its relevant tax returns for any year of assessment falling on any date between 1 January 2020 and 31 December 2021, both days inclusive, the applicable minimum tax is reduced to 0.25% for tax returns prepared and filed for any two accounting periods ending on any date between 1 January 2019 and 31 December 2021, both days inclusive; and

(c) for the purpose of this subsection, the application of the reduced rate shall be available for only two accounting periods either from 1 January 2019 to 31 December 2020 or from 1 January 2020 to 31 December 2021, as may be determined by the taxpayer"

Considering that "Franked Investment income" is exempted from the application of minimum tax, dividend received by HoldCo from their subsidiaries is deducted from their gross turnover before the application of minimum tax rate.

In addition, section 55(8) of CITA, provides that: -

> Any company which fails to comply with the provision of subsection (2) of this section and claims the minimum tax relief under section 33(2) of this Act shall be liable to pay as penalty for late filing, an amount equivalent to the relief sought.

This implies that companies claiming the minimum tax relief of 0.25% of gross turnover must file their tax returns timely, otherwise, they will be required to pay a penalty of an amount equivalent to the relief sought in addition to the late returns penalty as contained in Section 55(3) of CITA.

3.6 Payment of Stamp Duties

The re-organisation into Holdco structure would trigger the occurrence of a number of transactions, which will likely attract payment of stamp duties. These transactions include:

- incorporation of new entities e.g. a Holdco;
- mergers between existing subsidiaries;
- increase in share capital of existing companies;
- transfer of vested security interest between re-organising entities; and perfection of amendments to contractual arrangements.

However, pursuant to Section 104 (9) of the Stamp Duties Act, Cap S8, LFN 2004(as amended), where it is proved to the satisfaction of the Service that the HoldCo holds not less than 90% of the issued share capital of the

subsidiaries, stamp duty shall not apply in this regard.

4.0 Enquiries:

All Enquiries on any aspect of this publication should be directed to:

Executive Chairman
Federal Inland Revenue Service
Revenue House,
20 Sokode Crescent, Wuse Zone 5, Abuja.

Or

Director,
Tax Policy and Advisory Department
Federal Inland Revenue Service Revenue House,
No 12 Sokode Crescent, Wuse Zone 5, Abuja.

Or

Visit our website: www.firs.gov.ng
Email: tpld@firs.gov.ng