FIRS issues circular on the requirements for Funds, Bodies and Institutions to receive tax deductible donations

August 2021

www.pwc.com.ng

Background

The FIRS recently issued a circular (FIRS Circular 2021/02) detailing procedures for donations made to Funds, Bodies and Institutions of a public character (FB&Is), to be tax deductible in the hands of the donors.

Section 25 of the Companies Income Tax Act (CITA) provides that donations made to FB&Is listed in Schedule 5 of the Act, are tax deductible. The section also empowers the Minister of Finance (MoF) to amend Schedule 5, but specifies that DFIs that can be added to the list are those that established in Nigeria and are of a public character.

The MoF subsequently issued Regulations that expanded the list, and highlighted some administrative procedures to certify eligibility of the FB&Is in the expanded list, to receive tax deductible donations. The circular seeks to clarify these matters.

Eligibility criteria and approval procedures

The categories of FB&Is that may be included in the 5th Schedule are:

a. Public Funds
b. Statutory bodies or institutions
c. Ecclesiastical, charitable, benevolent educational and scientific institutions.

These entities must be of a "public character". The circular clarifies that an entity should meet the public character requirement if it:

a) is registered under a relevant Nigerian law
b) does not distribute its profits in any manner to its members.

An entity which meets the eligibility criteria will apply to the FIRS, pay an application fee of **N250,000** and submit the required documents as included in the Regulations issued by the MoF (see link).

Where the application is approved, FIRS will issue a certificate ("Tax Deductible Certificate" or "TDC") to the applicant and notify the MoF. If the application is denied, the FIRS will notify the applicant within 30 working days.

The MoF may amend the 5th Schedule to list the certified FB&Is. Tax Deductible Certificates are valid for 3 years and are renewable subject to meeting relevant legal requirements. TDCs can also be revoked, and the relevant FB&Is will no longer be eligible to receive tax deductible donations. In such scenario, the FIRS is required to notify and justify the revocation to the MoF, within 30 days.

An expired TDC can be renewed upon submission of relevant documents and payment of **N150,000** renewal fee.

Takeaway

The Circular clarifies the administrative procedures already included in earlier Regulations issued by the MoF (see earlier link).

The Circular also relies on Section 105 of CITA (as amended by the Finance Act 2020) to define "public character", which includes where an entity is "registered in accordance with relevant law in Nigeria". This should not be restricted to incorporation in Nigeria, but should cover where the FB&I is duly registered with the approved regulator or other relevant oversight body in Nigeria. We discussed these matters in an earlier article (see here).

From the perspective of the recipient, not obtaining the certificate should not impact on whether the income is taxable/exempt, as this is a separate consideration covered under Section 23 of CITA.

The Regulations and the Circular state that the MoF may amend Schedule 5 to list the certified FB&Is. However, the TDC is only valid for 3 years and renewable subsequently. Does the expiration of the TDC affect an entity listed in the Schedule 5 by an amendment? What are the practical implications of amending Schedule 5 every time the TDC of an FB&I expires?

Perhaps the more critical consideration is whether the Minister of Finance actually has the powers to amend or expand Schedule 5. Based on a recent Tax Appeal Tribunal (TAT) decision in The Registered Trustees of Hotel Owners and Managers Association of Lagos vs. Attorney General of the Federation & Minister of Finance (HOMAL case), it was held that the amendment of a legal provision by the MoF, President or an other non-legislative body, is unconstitutional. Therefore, until the HOMAL case is overruled, it may be inferred that the Regulations were not validly made and the 5th Schedule of CITA contains an exhaustive list of FB&Is to which tax deductible donations can be made.

In view of the yearly amendments to the tax laws through the Finance Act, the National Assembly may utilise the opportunity to amend Section 25 of CITA and Schedule 5 in a way to avoid the above issues and to list other entities that can receive tax deductible donations.

For a deeper discussion, please contact any member of our Tax team below or your usual contact within PwC Nigeria:

Kenneth Erikume
kenneth.y.erikume@pwc.com
Partner

Emeka Chime
chukwuemeka.x.chime@pwc.com
Associate Director

Dera Igweagu
chidera.igweagu@pwc.com
Associate