Tax Alert

No VAT on the rent of buildings even before recent tax law amendments, says the TAT

Background

NGX Real Estate Limited (the "Company") is a Nigerian real estate company in the business of acquiring, leasing, hiring, or part-exchanging real property. The Company earned rental income from real properties in 2020 and did not pay Value Added Tax (VAT) on the income. The Federal Inland Revenue Service (FIRS) audited the Company's 2020 financial records and issued a tax assessment of N36,185,564.25 for an unremitted VAT.

In arriving at the assessment, the FIRS:

- claimed that the Company did not fully discharged its VAT obligations for the 2020 accounting year
- calculated penalty and interest on the assessment.

The Company was dissatisfied with the assessment and approached the Tax Appeal Tribunal (TAT) for a ruling.

Issues considered

- Whether or not the FIRS was right to have imposed VAT on the Company's activities. The Company argued that the definition of "goods" in the VAT Act as amended by the Finance Act (FA) 2019, excluded the transfer of interest in land, and therefore VAT should not apply on the sale of buildings, being extensions of land. However, the FIRS contended that "land" and "buildings" were separate concepts and the exemption available to land did not extend to buildings. The FIRS argued that this was the reason that the exemption was expanded in the following year by the FA 2020 to cover both land and buildings;

- Whether or not the FIRS rightfully applied interest and penalties in respect of the non remittance of taxes, even before the assessment became determined as final and conclusive

TAT's ruling

The TAT ruled in favour of the Company that;

- The FIRS was wrong to have charged VAT on rent of buildings as legal references to 'land' also extend to permanent attachments to land in line with the Land Use Act and judicial precedents. Therefore, VAT did not apply on the sale of buildings by the Company.

- The Company is not liable to any interests and penalties since there was no determined tax liability.

Takeaway

The issue of the applicability of VAT on land and building was an interesting and contentious one before recent amendments that have introduced more clarity.

Historically, an FIRS circular stated that VAT was not applicable on residential rent. There was arguably no basis for this exemption in the tax laws, but it was upheld in practice because it reduced the tax burden on the most vulnerable in society, similar to other exemptions in the VAT Act. In 2020, the TAT issued 2 divergent rulings on whether VAT applied on commercial rent for periods prior to 2020, in Chief J.W. Ellah, Sons & Company Limited v FIRS ("Ellah") and Ess-Ay Holdings Limited v FIRS ("Essay"). In Ellah, the TAT ruled that rent on commercial buildings was liable to VAT based on the definition of "supply of goods" in the VAT Act. However, in Essay, the TAT ruled that property leases were incorporeal rights which were not subject to VAT. In 2020, a VAT Modification Order was issued which provided that the rental of residential accommodation by persons other than corporate entities, was VAT exempt.

The TAT's ruling has clarified that VAT was exempt on the sale of interest in land and buildings in 2020, following the FA 2019 amendment. Further amendments by FA 2020 in the subsequent year have removed ambiguities in the reading of the law. There is no distinction in the VAT treatment with regards to the transfer of interest in residential or commercial real estate, as they are both VAT exempt based on the law. However, assessments need to be done in certain instances such as providing packaged accommodation (e.g "serviced apartments", "short lets"), provision of office space as a service and so on, as these may not meet the exemption criteria in the VAT Act.

For more Information, Contact:

Kenneth Erikume
Tax Partner, PwC Nigeria
kenneth.y.erikume@pwc.com

Emeka Chime
Associate Director, PwC Nigeria
chukwuemeka.x.chime@pwc.com

Maduabuchi Eleje
Senior Associate, PwC Nigeria
maduabuchi.eleje@pwc.com