

Tax Authorities seek to Tax early withdrawal of Voluntary Pension Contribution

Introduction

On the 21 August 2017, the Lagos State Internal Revenue Service (LIRS) released Public Notices captioned “*Tax Reliefs on Voluntary Pension Contribution*”. Similarly, on the 24 August 2017, the Joint Tax Board (JTB) also issues a Public Notice captioned “*Abuse of Voluntary Pension Contribution Scheme*”. The Public Notices raises the following issues, among others:

a) Whether Public Notices can be used by the Tax authorities to amend the law?

Public Notices do not have the force of law; hence it will be difficult to impose measures stated in the Public Notices, where they are not in line with extant Laws.

b) Whether deducting unlimited and uncapped Voluntary Contribution amounts from employees’ pay and treating as it tax deductible is an offence under the Pension Reform Act (PRA), 2014?

Our view is that an offence occurs only when an action by an individual runs contrary to the provisions of the law; which is not the case here. The question is whether the action of the employer in deducting amounts contributed by the employees into their Retirement Savings Account constitutes an offence under the Pension Reform Act; to which we think the answer is in the negative.

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c) Whether truly there was an obnoxious practice or infraction of the Pension Reform Act, 2014 by Pension Fund Administrators?

The Tax Authorities also alleged that the PFAs are marketing and aiding the employees to contribute an unlimited/uncapped amount and withdraw same without regards to time and conditions specified by Section 16 of the Pension Reform Act, 2014.

The Tax Authorities need to note that the legal authority to contribute voluntarily does not lie with the PFAs, and the decision to withdraw is at the discretion of the employees.

d) Whether the Labour Act Cap L1 Laws of the Federation of Nigeria 2004, Section 5(7) can be used to set limits on the Pension Reform Act, 2014? And Whether the Labour Act relate to voluntary contributions (not employer deductions)?

The Tax Authorities have also referred to section 5(7) of the Labour Act, regarding the total amount of deductions that can be made from a worker's wage. According to this section of the Labour Act, the total deduction (including Pension) that can be made from a worker's wages should not exceed one third of the worker's wage for the month.

First, the Labour Act makes reference to "workers". The Labour Act defines "Workers" to exclude certain categories of persons; for instance:

".. persons exercising administrative, executive, technical or professional functions as public officers or otherwise"

Considering the meaning of "worker" has limited application and does not cover all classes of employees. It is doubtful if the JTB's reliance on Section 5 (7) of the Labour Act 2004 can validly apply to all employees. The question is whether the Tax Authorities may have relied on the Labour Act out of context; as there is no exclusionary clause as to any categories of employees under the PRA.

e) Whether Section 5(2) of the Labour Act, did not empower the employee to direct any amount of deductions from his salary?

The Labour Act, Section 5(2), is explicit that an employer can only deduct from an employee's wage and pay to any authority after receiving the employee's consent.

Our view is that under the provisions of the Labour Act, which the Tax Authorities relied upon, the employee is appropriately empowered to direct deductions from his salary.

f) Whether Tax Avoidance as against Tax Evasion is an offence?

The Tax Authorities may have painted a picture, by this publication, which suggests that the practice of voluntary contribution by some employees has taken the semblance of Tax evasion as against Tax avoidance.

Whereas Tax evasion is an offence punishable under the respective Tax Laws; Tax avoidance is an arrangement which reduces a tax liability without contravening the law and in no way an offence. It is only on account of tax morality that a taxpayer may not take advantage of the law in sympathy to the state.

g) Whether the JTB's publication is not only in an advisory capacity?

One of the cardinal functions of the JTB is to promote the uniformity of the application of the Personal Income Tax Act.

As an advisory body, the JTB publication may lack an enforcement capacity, as it does not have the weight of the law.

Conclusion:

While we recognise the duties of the Tax Authorities to enforce the law, we do believe that such enforcement should be within the ambit of the express provisions of the law. An attempt to remedy a lacuna in the law made by the National Assembly through publications by Tax Authorities may be open to a couple of legal challenges.

Also, employers, who may be pursued by the Tax Authorities for alleged underpaid taxes as a result of the adverse tax treatment of Voluntary Contributions, may wish to seek legal defence. This is because they are not parties to the transactions

between the Pension Fund Administrators and their employees, and are not privy to the decisions on appropriation of their employees' Pension funds.

From a legal stand point, the contract between the Pension Fund Administrators & employees on one hand, and employers & employees on the other hand, are distinct and different.

Hence, the Tax Authorities will need to provide the legal basis for the recovery of the alleged underpaid

taxes from employers, having fully fulfilled their full obligations under the Pay As You Earn (PAYE) tax scheme.

In summary, the Notices highlight certain gaps in the PRA that requires legislative amendment, and not mere Public Notices. Until these amendments are made, Tax Authorities will continue to face legal difficulties in imposing these measures.

Disclaimer Please note that this memorandum is not intended to give specific technical advice and it should not be construed as doing so. It is designed to alert clients to some of the issues. It is not intended to give exhaustive coverage of the topic. Professional advice should always be sought before action is either taken or refrained from as a result of information herein. In any case, Ascension does not accept any responsibility for any decision whatsoever made based thereon or any liability incurred for failure to consult with professionals on any specific areas of issues raised.