Legal Alert: **Capital Gains Tax & You**

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Reactions to Last Newsletter

Our last Newsletter was on the Law and the management of a Landlord and Tenant relationship. We got more responses from the Landlords who were having problems with their Tenants. Again, our advice is that in Life, knowledge, patience, compromise and management of problems are very important. Be informed before entering any contract.

We also were opportune to notarise an Affidavit for a prospective Tenant whose prospective Landlord insisted that she provided him with the following information, with authority to confirm them: (1) The names, addresses and phone numbers of her current Landlord; (2) The period of her stay in her current accommodation; (3) Name & Address of current Employer, length of service, positions held, number of cars owned, etc; (4) Names and addresses of Bankers; (5) Duration of use of Bankers; (6) Names, addresses and phone numbers of References for the accommodation. This can also be a useful guide for you, no matter the side of the divide that you are in.

Our New Web Site

We announced during this month that we have a web site, which though under construction, should be visited by all our Clients. We have received many favorable comments about the site especially as it's content and navigation are very easy. Some Visitors however informed us that they had problems logging onto the site. The correct name of the site is www.oseroghoassociates.com We welcome you to regularly visit the site and access the materials on it, which we intend to update regularly.

Starting Your Web Site

Some of our Clients have disputes with Companies or persons that they instructed to establish, host and design their web site. Because of these disputes, we have tried to exercise a lot of caution when we started our web site. First, it is recommended that you register your domain name directly yourself. This you can easily do using your credit card on the Internet. Alternatively, you can have a trusted associate, that have a credit card, do it for you. This secures the domain name to you.

Secondly, arrive at a firm understanding with your web site developer that you have the absolute authority to transfer your hosting rights to another hosting Company at any time chosen by you. Interview the developer and ensure that you have the necessary inner trust that he will deliver on what he promises.

We must acknowledge and thank our web site designer, Gabriel Lessor - of Lessor Studios (www.lessorstudios.com) - who though was in the United States at the time we gave the instructions, stayed with us on what we exactly wanted, answered all our ?annoying? questions and ensured that we provided materials he needed in due time, for the site. This is commendable, as when it comes to quality and service delivery, we are a demanding Attorney and Client.

Legal Alert: Capital Gains Tax & You

We draw your attention to a Tax called Capital Gains Tax. This is because there is an increase in the number of people planning to acquire landed property either for investment purposes or for private residence. Though this Tax is NOT only applicable to gains from landed property, its applicability to land transactions is more pronounced when a Purchaser of land seeks to formally register the transfer of the land to him or herself.

Also, from experience, the first contact when seeking to acquire a landed property is with an Agent who may have some personal or religious influence with the intending Purchaser. Many of these agents will not disclose the existence of this Tax until the intending Purchaser seeks to register his title with the Government.

What is Capital Gains Tax?

Capital Gains Tax is a tax payable by the Owner of any disposal asset on the profit he derived from selling the asset, over and above the original costs of his purchasing the asset, maintaining the asset, costs of disposal, etc. Simply put, Capital Gains Tax is a tax payable on the profit on the disposal of assets. The Law does not recognise or include losses in this definition.

To arrive at what amount is chargeable/liable to Capital Gains Tax, the following deductions should be made from the total sum paid for disposing off the asset: -

(a.) The amount or value of acquiring the asset;

(b.) The Income of the Owner of the asset charged under Personal Income Tax;

(c.) Allowances incurred wholly, exclusively and necessarily for the acquisition of the asset;

(d.) Incidental costs for the disposal of the asset;

(e.) Expenditure for the improvement/enhancement of the value of the asset;

(f.) Any expenditure for the establishment, preservation and defending of the title of the asset;

(g.) Any incidental costs of the disposal of the asset.

What is a Disposal?

A quick mention must be made that Capital Gains Tax was introduced in Nigeria in 1967. This was just before the Nigerian Civil War and the Nigerian Government, at the time, foresaw that it would require more revenue to prosecute the coming war. Further, a similar tax was introduced in the United Kingdom some years prior to this time and both legislation carefully define when an asset is disposed and liable to this tax; this is to prevent tax avoidance.

The Capital Gains Tax Act, which is the applicable Law to this tax, defines a disposal to include " .. any other disposition of asset, notwithstanding that no asset is acquired by the person paying the sum".

Assets attracting Capital Gains Tax.

Some assets are enumerated under the Capital Gains Tax Act as being typical in attracting capital gains tax. They include:

(i.) Plant and machinery, land and buildings, goodwill of a business, etc.

(ii.) Debts, options, incorporeal property generally.

(iii.) Profits from foreign exchange transactions.

(iv.) Any other form of property by a person disposing of it.

Rate of Capital Gains Tax.

The rate of charge for Capital Gains Tax is Ten Percent (10%) of the exact gain made by the Owner of the disposed assets after deducting all allowable allowances. The period of accessing and charging this Tax is January to December of each year. This is so even where the Owner of the asset dies in that year of assessment provided the gain was made before he died.

Who Administers Capital Gains Tax?

Although the Capital Gains Tax Act is a Federal legislation, many States have also re-enacted this Law in their Statute books. In practice, the States Board of Internal Revenue (SBIR) are responsible for collecting capital gains tax from individuals while the Federal Board of Internal Revenue (FBIR) is responsible for the ones from corporate bodies.

Exemptions to paying this Tax

Not all disposable assets are liable to the charge of Capital Gains Tax. Owners of the following mentioned assets are exempted from paying this Tax when disposing off their asset; this is to encourage enterprise in some sectors of the Nigerian economy and also private individuals in some areas of life.

1. Gains on Stock, shares, and other government securities such as treasury bonds, premium bonds and savings certificates.

2. Ecclesiastical, charitable or educational institutions of a public character.

3. Any statutory or registered friendly society.

4. Any co-operative society registered under the Co-operative Societies Law of any State in the Federation of Nigeria.

5. Any trade union registered under the Trade Union Act.

6. Gains on a decoration awarded for gallantry conduct.

7. Gains accruing to statutory bodies.

8. Gains arising from acquisitions, mergers, or takeovers provided that no cash payment is made in respect of the shares acquired.

9. Gains on policies of assurance or deferred annuity unless the beneficiary is not the original Owner as in an estate.

10. Compensation for a wrong or injury of libel, slander, enticement, loss of office in a personal or professional capacity.

11. Gains from the main or only private residence of the individual provided that the area does not exceed one acre.

12. Gains on private vehicles.

13. Gains on any asset used for the purpose of a trade or business provided that the gain is used for replacing the old asset sold.

14. Gains from a provident or retirement benefit scheme.

15. Unit holders of a Unit Trust provided the proceeds are not reinvested.

16. Any diplomatic body.

Disadvantages of the Capital Gains Tax Act

There are many problems with the management and administration of Capital Gains Tax as presently implemented. They include: -

1. The principal problem is that of a lack of data or record
keeping in order for the tax authorities to be aware of when a capital gain has being made and liable to payment of this tax. This is especially as Nigeria continues to maintain a cash based economy as opposed to credit or electronic one.

2. In real practice, what is charged by the Tax Authorities, as
Capital Gains Tax, is the entire amount or capital derived by the Owner of the asset when disposing off that asset. This is in marked contrast with the provision of the Law which requires that only the exact gain, after deducting the allowable amounts stated above, are chargeable to capital gains tax. Again, the problem is that of a lack of reliable and genuine data and typical bureaucratic laziness to investigate what the capital gain is.

A possible solution to the above problem will be for the Owner of the asset to maintain a good data of the transactions on the asset; fill his tax returns faithfully and challenge any assessment that is contrary to what the Law provides for.

3. In land transactions, the intending Purchaser usually fails to
inquire, negotiate and obtain some credit upfront for this tax by deducting it from the total amount to be paid to the Vendor. This therefore exposes the Purchaser to this charge as the State Government is not interested in who pays the tax provided it is paid. This is particularly so as these land transactions are the main avenue for collecting this tax.

Unfortunately, the above government practice is very unfair to the Purchaser who will want to register his title to his new property in order for it not to be in any jeopardy from a third party.

4. Though the government is allowed to charge and collect this tax
in the event of a profit, same is not allowed in the event of a loss as the Owner bears the loss alone. It would have being expected that this Law should have allowed a loss to be treated as an allowable deductible expense.

Mr. Ade Ipaye, a Law Lecturer at the University of Lagos, in his article titled ?Capital Gains Tax? and published by the Chartered Institute of Taxation of Nigeria in the Book ?Tax Guide & Statutes?

enumerated other problems with this Law as noticed by him and other commentators. They include:

5. The Capital Gains Tax Act is unwieldy as it is not always easy to identify the subject matter of the tax.

6. The high rate of inflation in Nigeria wipes out the real value of the asset such that the Owner is at the losing end in real terms when disposing off the asset. He recommended that allowance should be made for inflation when paying this tax as is done in some other countries.

7. The rate of the tax is high and this will encourage avoidance.

In conclusion, I am in agreement with many other Commentators that the rate of the Capital Gains Tax should either be reduced after amending the Law to accommodate the above disadvantages or the entire Law should be merged with the Personal Income Tax. The latter is more practical and realistic in successfully administering this tax and reducing its current high rate of avoidance.

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