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Federal Ministry of Finance issues Circular on Fiscal Incentives for the Presidential Gas Growth Initiative

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The Federal Ministry of Finance, through the Office of the Honorable Minister of Finance and Coordinating Minister of the Economy ('the Minister'), recently released a Circular titled the **"Fiscal Incentives for the Presidential Gas Growth Initiative"** (hereafter referred to as "the Circular").

The overarching goal of the initiative is to create a conducive environment for increased investment in the gas sector and increased supply and utilization of gas, thereby contributing to the nation's economic development. This is in line with the Federal Government's stated commitment to improving the investment climate in Nigeria.

The Circular is deemed to have taken effect from the date of issuance.

Highlights of the Circular

The Circular delineates key fiscal incentives aimed at stimulating and supporting the growth of the gas sector within the framework of the Presidential Gas Growth Initiative. The highlights of the Circular are as follows:

1. **Import Duty Waiver:** All items of equipment imported relating to Compressed Natural Gas (CNG) and Liquefied Petroleum Gas (LPG) will now be at zero percent duty rate.

2. **Zero-rated Value Added Tax (VAT):** The following items are subject to zero-rated VAT:

   i. Feed Gas for all processed gas[1].

   ii. Compressed Natural Gas.

   iii. Imported Liquified Petroleum Gas[2].

   iv. Compressed Natural Gas (CNG) equipment components, conversion, and installation services.

   v. Liquefied Petroleum Gas (LPG) equipment components, conversion, and installation services.

   vi. All equipment and infrastructure related to the expansion of CNG, LPG, and the Presidential CNG Initiative, including conversion kits.

3. **Import and Customs Duty Exemption** Applications: Importers of Compressed Natural Gas equipment seeking exemption from import and customs duty are required to obtain a letter of support from the Office of the Special Adviser to the President on Energy.

4. **Import Duty and VAT Exemption for LPG:** Importation of LPG under HS Codes 2711.12.00.00, 2711.13.00.00, and 2711.19.00.00 are exempt from both Import Duty and Value-Added Tax.

5. **Withdrawal of Debit Notes:** Debit Notes issued to Petroleum Marketers, who imported LPG using codes 2711.1.2.00.00 and 2711.13.00.00 from August 26, 2019, to the present date, should be withdrawn by the Nigeria Customs Service in line with the previous approval.

6. **Extended Exemption List:** An extended list of items exempted from import duty and VAT, along with their Common External Tariff (CET) Codes, is provided in the Circular's appendix.

7. **Immediate Tariff Review Implementation:** The tariff review for the CNG and LPG sub-sector takes immediate effect from the date of this Circular, with strict and prompt compliance expected.

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[1] Prior to now, only gas supplied to electricity generating companies was exempt from VAT. This new policy has now extended the exemption to the raw gas that enters any processing gas plant.

[2] The Value Added Tax (VAT) Act (Modification) Order 2021 currently exempts locally produced LPG from VAT. With the policy change, LPG, whether imported or locally produced is now exempt from VAT.

Commentary

We commend the Honourable Minister of Finance and Coordinating Minister of the Economy for issuing the Circular. The implementation of the Circular should help in creating a friendly tax and business environment for companies operating in the gas sector. This will also play a significant role in moderating inflation.

However, while the Circular offers numerous benefits, the legality of the instrument used to implement it remains a major concern. The extent to which legislative powers can be delegated to other arms of government, particularly in relation to amendments, variations, and/or modifications of Acts enacted by the National Assembly, needs to be examined.

The Circular rightly notes that Section 5 of the Customs, Excise Tariff, etc. (Consolidation) Act (CETA), CAP C49, LFN 2004 waives import duties ordinarily payable on importation of gas equipment. Given that VAT is levied along with custom duties in practice, the Circular then links the import duty waiver to VAT exemption by leveraging the statutory powers of the Minister under Section 38 of the VAT Act to exempt items from VAT, by an order published in the Gazette.

It should be noted that the legality of Section 38 of the VAT Act was challenged in the case between ***The Registered Trustees of Hotel Owners and Managers Association of Lagos ("the Plaintiff") and the Attorney-General of the Federation & Minister of Finance ("the Defendants")***, where the Federal High Court ruled that the Minister lacks the authority to revise or rewrite the laws of the Federation under the Constitution. Consequently, the Schedule to the Act, being an integral part of the Act, cannot be amended except through the same legislative process applicable to the Act itself, that is, an amendment of such Act by the National Assembly.

Interpreting this decision in the context of the Circular suggests that the Minister may not possess the appropriate authority to independently exempt items from VAT by revising the Schedule of the VAT Act which is an extant law of the Federation. This potentially raises a question on the legality of the Circular. Nonetheless, we understand that the FHC's decision is currently being appealed at the Court of Appeal, and in view of this, the statutory power of the Minister to vary the Schedule to the VAT Act may be seen to subsist until judgment is delivered.

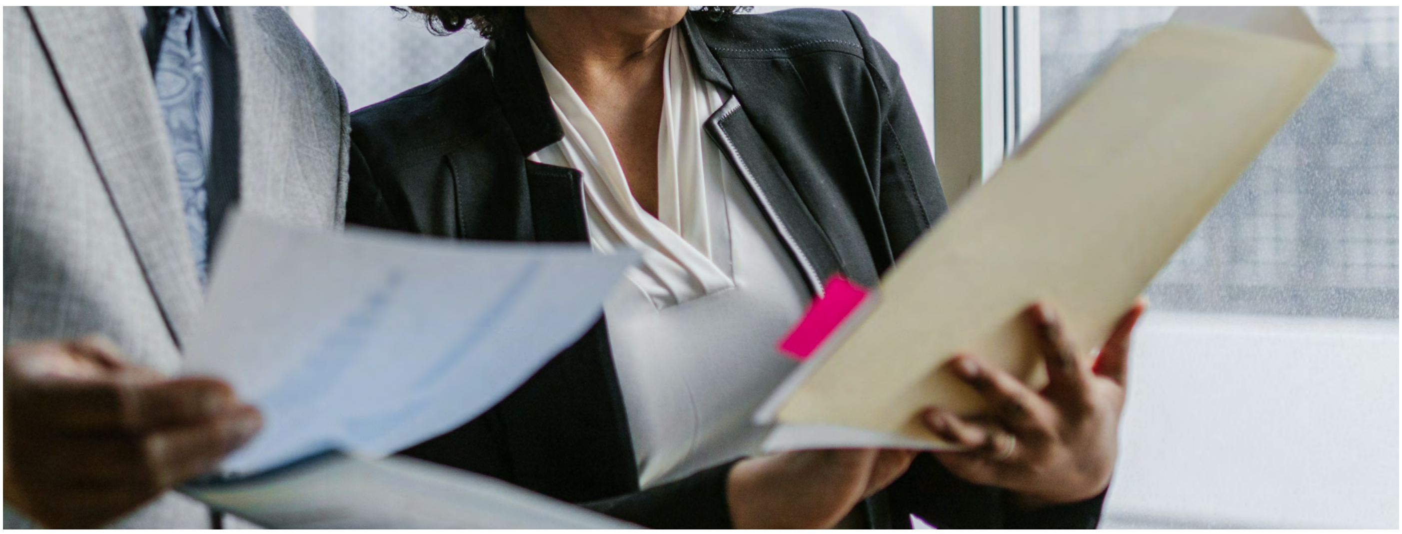
A related issue, which may arise, is the timing of the commencement of the Circular. The VAT Act requires the Minister to exercise the power to amend its provisions by way of an order published in the Gazette. Thus, it is imperative for the Circular to be published in the Gazette for it to properly take effect. We encourage the Minister to ensure this step, made compulsory by the VAT Act, is undertaken to regularize the Circular.

The requirement to obtain a letter of support from the Office of the Special Adviser to the President on Energy before CNG equipment can enjoy the import duty waiver may result in a bureaucratic barrier, potentially at odds with the Principal Act. The enabling Act expressly provides for the waiver of custom duties on qualifying equipment. There is, therefore, no need for any other requirement to slow down the process. It might be beneficial for the Minister to re-visit this requirement to ensure the Circular's adherence with the law and promote the ease of its implementation.

Overall, the Circular and the inclusion of CET Codes in the Circular for VAT-exempt items would provide clarity to the tax authorities, importers, the Nigeria Customs Service, and port authorities on the appropriate import duty and VAT treatment of the affected items and expedite their clearance at the ports of entry.

Meanwhile, government may also consider extending the exemption from VAT to crude oil imported or locally supplied to domestic refineries. This will go a long way in managing inflation and reducing the cost of doing business in the country.

Please click here to download a copy of the Circular.



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