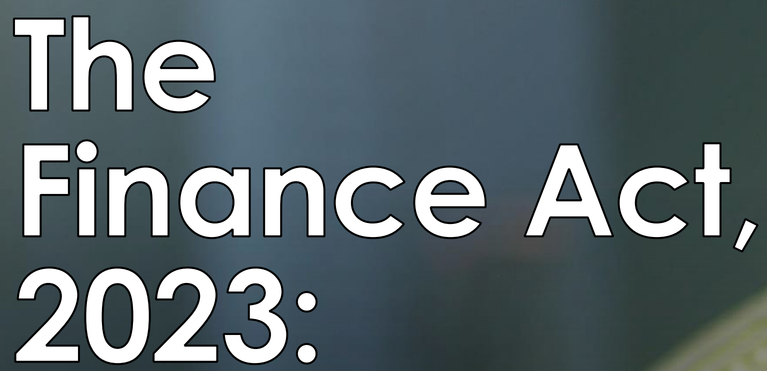

The Finance Act, 2023:

An Analysis

G. ELIAS

Introduction

The Finance Act, 2023 (the **"Act"**) became law on May 28, 2023, at the tail end of the tenure of President Muhammadu Buhari's administration. The Act was borne out of the renewed revenue drive of the government in the face of dwindling revenue and rising debt service costs.

The Act is to take effect (A) from May 1, 2023, or (B) such other date indicated by the National Assembly by law, or the President by assent or order. In order to ensure a smooth transition and adjustments to the changes introduced by the Act, His Excellency, President Bola Tinubu, has signed into law the Finance Act (Effective Date Variation) Order, 2023 (the "**Variation Order**"), postponing the Act commencement date to September 1, 2023.

As with previous Finance Acts, the Act amended a number of extant tax and fiscal laws: the Capital Gains Tax Act (**CGT Act**); Companies Income Tax Act (**CIT Act**); Personal Income Tax Act (**PIT Act**); Value Added Tax Act (**VAT Act**); Petroleum Profit Tax Act (**PPT Act**); Customs, Excise, Tariff etc. (Consolidation) Act (**CET Act**); Stamp Duties Act (**SDA**); Tertiary Education Trust Fund (Establishment Etc.) Act (**TET Act**) etc. A common underlying principle guiding these amendments was the emphasis on widening the tax net and minimizing or eliminating potential tax avoidance loopholes.

In the succeeding paragraphs, we have highlighted the key changes introduced by the Act and the implications of these changes to fiscal and business operations in Nigeria.

A. CAPITAL GAINS TAX

1. Imposition of Capital Gains Tax (CGT) on Digital Assets

The Act amended the CGT Act to expressly include digital assets as chargeable assets liable to CGT.[1] Although the existing provisions of the CGT Act prior to the amendment apply to all forms of property created or acquired by the person disposing it (including incorporeal property), the amendment adds clarity to the CGT Act by making it unarguably clear that digital assets qualify as chargeable assets for the purposes of CGT. Hence, chargeable gains derived from the disposal or transfer of digital assets are subject to CGT at 10%.

Unsurprisingly, the Act did not define "digital assets". This follows a similar pattern in the CGT Act, which failed to define other forms of assets like "options" and "incorporeal property". It would appear that the overarching philosophy is to allow the tax authority to delineate the contours of what amounts to digital assets, and to allow the concept to retain its common usage meaning.

Nevertheless, the lack of certainty on the meaning of "digital asset" is likely to affect compliance by taxpayers engaged in digital transactions. It is also doubtful if the tax authorities have the competence and necessary tools to monitor the digital space and enforce compliance with respect to the payment of CGT on the disposal of digital assets. Consequently, compliance will, to a large extent, be driven by self-assessment and voluntary compliance. It is expected that tax authorities will issue a circular that will clarify the nature of digital assets that are caught by the CGT Act, as amended.

[1] CGT Act, s. 3(a) (as amended).

2. Loss Relief for Capital Gains

The Act brought about the much-needed amendment on the deductibility of losses incurred by a person upon the disposal of an asset. Prior to the enactment of the Act, the CGT Act s. 5 stipulated that any loss which accrues to a person upon the disposal of any asset shall not be deductible from gains on the disposal of other assets by the same person. With the amendment introduced by the Act, losses incurred by a person on the disposal of any asset are now deductible from gains accruing to that person on the disposal of other assets of the same type as the asset on the disposal of which the losses were accrued.[2]

Further, where the aggregate capital losses in a tax year exceed the aggregate chargeable gains, the taxpayer is now allowed to carry forward the losses for deduction from chargeable gains arising from the disposal of the same type of asset. These capital losses can be carried forward and utilized for a maximum period of 5 years, immediately succeeding the year in which the loss was incurred.[3]

3. Roll-Over Relief on Disposal of Share and Stocks

The Act further complements and consolidates the provisions of the CGT Act s. 30 by expressly adding “stocks and shares” as part of the class of assets that are eligible for roll-over reliefs. A roll-over relief allows a taxpayer to dispose of an asset and reinvest the proceeds in the acquisition of new assets of the same class without paying CGT. The exemption from CGT can be absolute (where all the proceeds are applied as aforesaid) or partial (where only a proportionate part of the proceeds is applied). The amendment does not materially change the existing position of the law with respect to the disposal of shares and stocks.

B. COMPANIES INCOME TAX

4. Filing of Income Tax Returns by Non-resident Shipping and Airline Companies

The Act has eased the burden of filing separate financial statements by non-resident shipping and airline companies in respect of their Nigerian operations. It now permits non-resident shipping and airline companies that are unable to provide a separate financial statement of their operations in Nigeria, for the purpose of filing tax returns to submit, in the alternative, detailed gross revenue statements of their Nigerian operations showing the amount of full sums earned during the period and supported with all invoices issued to the relevant customers.[4] The gross revenue statements must be certified by one of the company’s directors and external auditor.

5. Additional Requirements for Regulatory Approvals

Regulators in the airline and shipping industry are now mandated to request taxable companies to present evidence of income tax filings for the preceding tax year of assessment and tax clearance certificates for taxes paid for the three preceding tax years in order to enable them to continue to carry on their business or to obtain relevant approvals and permits.[5]

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[2] CGT Act, s. 5(1) (as amended).
[3] CGT Act, s. 5(2) (as amended).
[4] CIT Act, s. 14(4)(A) (as amended).
[5] CIT Act, s. 14(6) (as amended).

6. Deletion of Reconstruction Investment Allowance and Rural Investment Allowance

Before now, companies enjoy an investment allowance at the rate of 10% on qualifying capital expenditures on plants and equipment. CITA s. 32. The Act has deleted the provisions of CITA s. 32. However, any company, which has incurred expenditure on plants and equipment on or before the Effective Date, shall continue to enjoy the allowance until it is fully utilized. The implication is that companies can no longer claim investment allowance on the expenses they incur on plants and equipment after the Effective Date.

CITA s. 34 grants a rural investment allowance on capital expenditures incurred on the provisions of facilities for the purpose of a trade or business located in rural areas, at least 20 kilometres away from such available facilities provided by the government. The Act has also deleted CITA s. 34. However, where a company has incurred capital expenditures on such facilities before the Effective Date, the company shall continue to enjoy the allowance until it is fully utilized.

7. Deletion of Tax Exemption for Reserved Funds for Tourism Development

Prior to the Act, CITA s. 37 exempts from income tax, twenty-five per cent (25%) of incomes in convertible currencies derived by companies from tourists, provided such incomes are deposited in a reserve fund to be utilised within five years for the purpose of tourism development in Nigeria. The Act has now deleted CITA s. 37. However, a company that has already set aside reserved funds prior to the enactment of the Act, shall continue to enjoy the tax exemption on the twenty-five per cent (25%) of the income derived until the reserved funds are fully utilized or until the effluxion of the five (5)-year limit, whichever occurs first.

C. EXCISE DUTIES

8. Imposition of 0.5% Import Levy on Goods Imported from outside Africa

The Act imposes a levy of 0.5% on all eligible goods imported into Nigeria from outside Africa. The revenue proceeds derived from the Levy will be used to finance capital contributions, subscriptions and other financial obligations to multilateral institutions (such as the African Union, African Development Bank, African Export-Import Bank, ECOWAS Bank for Investment and Development etc.) and as may be designated by regulation issued by the Minister of Finance.[6] The Act is silent on (A) what amounts to eligible goods and (B) the collection process of the levy. It is expected that regulations detailing the eligible goods and the process of collection will be issued by the Minister of Finance in due course.

9. Excise Duty on Telecommunication and Other Services

The Act introduced excise duties on all services provided in Nigeria, including telecommunication services.[7] The businesses and individuals providing or utilizing telecommunication services in Nigeria would be required to pay the excise duties as determined by the President. Other than telecommunication services, it is not clear what other specific "services" are subject to the new excise duties. It is expected that specific

[6] CET Act, s. 13(4) (as amended).
[7] CET Act, s. 21(2) (as amended).

details, such as the rate and implementation guidelines, will be outlined in an official Order issued by the President.

D. PERSONAL INCOME TAX

10. Allowable Deductions on Life Insurance Premiums and Deferred Annuity Payment

The Act amended the PITA to allow for the deduction of premiums paid during a year of assessment to an insurance company in respect of the life insurance of a taxpayer/spouse or contract for a deferred annuity on the life of a taxpayer/spouse.[8] However, any portion of the deferred annuity withdrawn before the end of five years from the date the premium was paid shall be subject to personal income tax at the point of withdrawal.

This amendment implies that premiums paid on life insurance and contracts for the deferred annuity are granted as tax relief in the computation of personal income tax for a taxpayer. The imposition of tax on pre-mature withdrawal of any portion of the deferred annuity will also serve as a benefit to insurance industries as a means of encouraging extended and long-term savings.

E. PETROLEUM PROFIT TAX

11. Contributions to Approved Funds and Schemes for Decommissioning and Abandonment are Tax Deductible

The Act amended the PPTA to provide that any money contributed to any fund, scheme or arrangements approved by the Nigerian Upstream Petroleum Regulatory Commission (NUPRC) for the purpose of decommissioning and abandonment is now tax deductible.[9] The tax deductibility of this contribution is subject to the production of the statement of account of the decommissioning and abandonment fund. However, the surplus or residue of the fund after the decommissioning and abandonment of the fund shall be subject to tax. This amendment is in alignment with section 263(3) of the Petroleum Industry Act, 2021 ("**PIA**") and addresses any issue in relation to the tax treatments of contributions made to a fund, scheme or arrangement for decommissioning and abandonment.

12. Additional Chargeable Tax

Section 23 of the PPTA was amended to reflect the tax treatment of additional chargeable tax accrued where the amount of chargeable tax for an accounting period under the provisions of the PPTA is lesser than the amount of chargeable tax calculated using the fiscal oil price set by the Commission (this revenue is derived by multiplying the number of barrels of crude oil determined at the measurement point by the fiscal oil price per barrel.)[10]

The amendment aligns with section 268 of the PIA which provides the basis for determining the total value of chargeable oil for a period and imposes an obligation on the Company to pay the additional chargeable tax concurrently till the final installment of the chargeable tax payable for that period.[11]

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[8] PIT Act, s. 33(3) (as amended)
[9] PPT Act, s. 10(1)(A) (as amended).
[10] PPT Act, s. 23 (as amended).
[11] PPT Act, s. 23(4) (as amended).

13. Preparation of Accounts for Tax Assessment

The PPTA now mandates every company engaged in petroleum operations to make accounts of its profits and losses and prepare certain particulars for the purpose of determining the PPT. Those particulars include a statement of account of its profits or losses, computation of actual adjusted profit or loss, computation of actual chargeable profits, duly completed self-assessment form attested to by the principal officer of the company etc.

In addition, the companies that are yet to commence bulk sales or disposal of chargeable oil, shall file with the Service its audited accounts and returns. In the case of a newly incorporated company, within 18 months from the date of its incorporation; and for other companies, within five months after any period ending on 31 December of the following year. Where there is an interval between December 31 of the preceding year and the date on which the company commences the bulk sale or disposal of chargeable, the interval shall be deemed to form part of the preceding period.

14. Imposition of Increased Fines for Late Filing and Incorrect Accounts

The Act has amended the PPTA to revise the applicable penalties for non-compliance with the provisions of the PPTA, in conformity with the currency value and economic realities in Nigeria.

For late filing of returns, there is a new penalty of ₦10 Million on the first day and ₦2Million every subsequent day in which the failure continues.[12] Failure to comply with any of the provisions of PPTA for which no penalty is provided attracts an administrative penalty of ₦10 Million on the first day of such offence and ₦2Million every subsequent day in which the failure continues. The previous rate is ₦10,000 on the first day and ₦2,000 every subsequent day in which the failure continues.[13]

The penalty for making incorrect accounts is ₦15 Million or 1% of the amount of tax that has been undercharged, whichever is higher.[14] The previous penalty was ₦1,000 and double the amount of tax in respect of which the offence was committed. The penalty for false statement and returns are ₦15 Million or 1% of the amount of tax that has been undercharged, whichever is higher.[15] The previous penalty was ₦1,000 and triple the amount of tax in respect of which the offence was committed.

F. STAMP DUTIES

15. New Sharing Formula for allocation of proceeds from Electronic Money Transfer Levy

The Act amended the SDA to provide for a revised sharing formula for the allocation of revenue accrued from the Electronic Money Transfer Levy (the "**Levy**"). The SDA now provides that revenues generated from the Levy shall, on the basis of derivation, be distributed as follows; 15% to the Federal Government and the Federal Capital Territory, Abuja, 50% to the State Governments, and 35% to the Local Governments.[16] The initial sharing formula was between the Federal Government and State Government as 15% and 85% respectively. Thus, Local Governments shall now participate in the allocation of revenues derived from the Levy. This will make more funds available to the Local Government for grassroots development.

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[12] PPT Act, s. 30(4) (as amended).
[13] PPT Act, s. 51. (as amended).
[14] PPT Act, s. 52 (as amended).
[15] PPT Act, s. 53 (as amended)
[16] SDA, s. 89(A) (as amended)

G. VALUE ADDED TAX

16. Power of the Federal Inland Revenue Service to Review Related-Party Transactions

The Act amended the VAT Act by empowering the FIRS to review and assess transactions between related parties to ensure compliance with the arm's length principle for the imposition and assessment of VAT accordingly. [17] Pursuant to the VAT Act 7(3), the FIRS may disregard or adjust any such artificial or fictitious dispositions or transactions as considered appropriate to counteract the reduction of the VAT liability contemplated.

This amendment will help to prevent the Base Erosion and Profit Shifting (BEPS) menace, which is prevalent in related-party transactions and ensure that related parties are dealing on an arm's length basis.

17. Appointment of VAT Withholding/Collection Agents and New VAT Filing Deadline

The Act amended the VAT Act by empowering the FIRS to appoint any person to withhold or collect VAT and remit the same to the FIRS.[18] The Act further revised the due date for filing in respect of VAT withheld at source by appointed VAT collection agents to the 14th day of the month following the month of transaction. This is against the backdrop of the Finance Act, 2021, which earlier stipulated a 21-day deadline for the remittance of the VAT by collection agents. This amendment re-emphasises the powers of the FIRS to appoint any person to act as its VAT collection agent, and the obligation to remit the VAT collected in the currency of the transaction within the statutory time as already stipulated in the Finance Act, 2020. The shortened deadline, however, may pose a challenge to the timely compliance with the revised remittance requirements by the VAT withholding/collection agents.

18. Removal of the Point of Entry Administration of VAT on Imported Goods Purchased Through Digital Platforms Operated by Appointed Non-resident Collection Agent

The VAT Act has removed the administration/collection of VAT at the point of clearance by the Nigerian Customs Service (NCS) on imported goods purchased via electronic/digital platforms through a non-resident supplier that has been appointed by the FIRS as a collection agent.[19] This is to avoid incidences of double imposition of VAT, as it is expected that the FIRS appointed collection agent would have collected and remitted the VAT to FIRS at the point of checkout during the purchase of the goods.

The VAT Act now requires importers who purchase taxable goods through online electronic or digital platforms operated by a non-resident supplier who has been duly appointed as a collection agent by the FIRS to provide proof of such registration or appointment and such other document as may be required by the FIRS, and the imported goods shall not be subjected to further tax before clearing by the NCS.

19. Movable Structures on Land Now Subject to VAT

The VAT Act was amended to introduce a new definition of "building" for the purposes of imposition of VAT. "Building" is now defined to mean "structures permanently affixed to land affording protection and shelter including a house, garage, dwelling apartment, hospital and institutional building, factory, warehouse, theatre etc. but excludes fixtures or structures

[17] VAT Act, s. 7(3) (as amended)
[18] VAT Act, s. 14(3) (as amended)
[19] VAT Act, s. 16(3).

easily removed from such land such as radio and television masts, transmission lines, cell towers etc".[20] The Finance Act 2020 had amended the definition of VATable "goods" to mean all forms of tangible properties, movable or immovable, but does not include land and building, money or securities.

Following the new definition, the implication is that structures that are not permanently affixed to land shall be subject to VAT accordingly.

H. TERTIARY EDUCATION TAX

20. Increased Rate of TET

The Tertiary Education Tax ("**TET**") is now chargeable at the rate of 3% on the assessable profit of a company registered in Nigeria. The Act has increased the TET rate from 2.5% to 3%. This innovation is coming one year after the TET rate was increased from 2% to 2.5% under the Finance Act, 2021. The TET is applicable to only companies incorporated in Nigeria. Thus, non-resident companies, small companies, and unincorporated businesses such as sole proprietorships etc. are exempt from tertiary education tax. The increase in the TET rate will definitely increase the tax burden of medium and large Nigerian companies.

I. CORRUPT PRACTICES AND OTHER RELATED OFFENCES ACT (the "CPORO Act")

21. Punishment of Public Officers Awarding Contracts Without Due Process

The Act amends the CPORO Act to provide for the punishment of public officers who sign contracts without ensuring that the necessary administrative approvals and budget provisions have been obtained. A public officer who, in the discharge of official duties, awards or signs any contract without budget provisions, administrative approvals and procurement plan shall be guilty of an offence and liable on conviction to three (3) years imprisonment or a fine of Ten Million Naira.[21]

J. PUBLIC PROCUREMENT ACT (THE "PPA")

22. Modalities for Government Procurement

The PPA is amended to provide that an approved procurement plan constitutes a condition for the conduct and formalization of procurement proceedings. Henceforth, all public procurement shall, amongst other conditions, be based strictly on procurement plans and no procurement proceedings shall be formalised until the procuring entity has ensured that there is an approved procurement plan, subject to the threshold in the regulations and guidelines issued by the Minister of Finance and has obtained a "Certificate of No Objection to Contract Award".[22]

K. MINISTRY OF FINANCE (INCORPORATED) ACT, 1959 (THE "MOF ACT")

The Act amended the MOF Act to introduce some structural changes, including the establishment of (A) a Governing Council, (B) an Executive Board, and (C) a Management Team for the day-to-day management of the Ministry of Finance Incorporated (MOFI). These

[20] VAT Act, s. 46.
[21] CPORO, s. 22 (as amended)
[22] PPA, s. 16(1)(b) (as amended)

appointments are to be made by the President on the recommendation of the Minister of Finance.[23]

The amendment also empowers the MOFI to develop, amend, or supplement appropriate regulations, codes, internal guidelines, and procedures to advance or further its objectives. The Minister of Finance must be consulted before the adoption of the MOFI's initial regulations, internal guidelines, and subsequent material change. The Amendment seeks to enhance the supervisory role of the Minister of Finance and empowers the MOFI further.

Conclusion

Nigeria's fiscal and tax space continues to experience rapid changes consistent with the government's drive for increased tax revenue. The Act represents another significant step in the government's ongoing efforts to boost revenue generation. In the coming days, it is expected that tax authorities will issue additional guidelines and regulations to provide clarity on the implementation of the newly introduced levies under the Act.

Nevertheless, the continuous rise in the tax exposure of companies operating in Nigeria may impact the country's attractiveness as a favourable destination for foreign direct investments. To navigate these changes effectively, taxpayers are strongly encouraged to carefully review the provisions introduced by the Act and assess their tax position accordingly. Understanding the implications of these amendments will be crucial in making informed decisions regarding tax planning and compliance.

Disclaimer:

The foregoing constitutes an analytical examination of the Act for information purposes only and should not be construed or read as legal advice. Do not hesitate to contact our Stephen Chima Arubike (steve.arubike@gelias.com; +2348037629931) or Emeka Ezekwesiri (emeka.ezekwesiri@gelias.com; +2348062421406) should you wish to discuss how the Act specifically impacts your business.

[23] MOF Act, s. 3 (as amended)

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