THE Corporate Tax Planning Law Review

Third Edition

Editors
Jodi J Schwartz and Swift S O Edgar

THE LAWREVIEWS

THE

CORPORATE TAX PLANNING LAW REVIEW

THIRD EDITION

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PUBLISHER
Clare Bolton

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PREFACE

We are pleased to present the third edition of *The Corporate Tax Planning Review*. This volume contains 21 chapters, each devoted to a different country and each providing expert analysis by leading practitioners of the most important aspects of tax planning for multinational corporate groups in that country, with a particular focus on recent developments.

The jurisdictions represented in this volume are diverse and include established major economies (e.g., the United States, Germany and Korea); EU countries both that have become popular destinations for new business organisations and those where multinationals tend to form entities to facilitate local operations or investments; the city states of Singapore and Monaco; and several nations in the Global South (Colombia, Venezuela, Malaysia and more). Echoing this geographical variety, *The Corporate Tax Planning Review* describes tax developments worldwide that respond to different challenges in different places. At the same time, many countries share goals of preventing jurisdiction-shopping, protecting against erosion of the tax base, promoting local investment and raising revenues. These complex and at times conflicting goals present opportunities for the well advised and traps for the unwary.

While each chapter discusses issues at the cutting edge of tax law, the authors have contextualised their analyses with sufficient background information to make this volume accessible and useful to generalists and to tax practitioners outside each particular jurisdiction. Although *The Corporate Tax Planning Review* is by its nature an abbreviated overview, we hope it will at least serve as a workable compass to in-house counsel and outside advisers as they attempt to navigate their clients through the unsteady and at times uncharted waters of contemporary corporate tax planning.

We are extremely grateful to the contributors who have assiduously distilled a wealth of expertise to create this volume and to Nick Barette, Gavin Jordan, Tommy Lawson and Adam Myers at Law Business Research Limited for their editorial acumen and dedication to this project.

Jodi J Schwartz
Swift S O Edgar
Wachtell, Lipton, Rosen & Katz
New York, NY
April 2021

Appendix 1

ABOUT THE AUTHORS

JODI J SCHWARTZ

Wachtell, Lipton, Rosen & Katz

Jodi J Schwartz focuses on the tax aspects of corporate transactions, including mergers and acquisitions, joint ventures, spin-offs and financial instruments. Ms Schwartz has been the principal tax lawyer on numerous domestic and cross-border transactions in a wide range of industries. She was elected partner in 1990.

Ms Schwartz is recognised as one of the world's leading lawyers in the field of taxation, including being selected by *Chambers Global Guide to the World's Leading Lawyers*, *Chambers USA Guide to America's Leading Lawyers for Business*, *International Who's Who of Business Lawyers* and as a tax expert by *Euromoney Institutional Investor Expert Guides*. In addition, she is a member of the Executive Committee and past chair of the Tax Section of the New York State Bar Association, and also is a member of the American College of Tax Counsel.

WACHTELL, LIPTON, ROSEN & KATZ

51 West 52nd Street
New York, NY 10019
United States
Tel: +1 212 403 1212
Tel: +1 212 403 1398
jjschwartz@wlrk.com
ssoedgar@wlrk.com
www.wlrk.com

Chapter 13

NIGERIA

Stephen Chima Arubike, Marian Asuenimhen and Emeka Ezekwesiri[1]

I INTRODUCTION

Nigeria is a federation with 36 states and a federal capital territory. The federation, the governments of the federating states, and the local governments within each of the states all have a limited power to impose and collect taxes. The division of powers among these levels of government is not without controversy. Very broadly speaking, by virtue of the Constitution,[2] the federation imposes stamp duties, capital gains and income taxes, and by legislation, it can also collect these taxes from companies, but the federation has by legislation delegated the collection (not the imposition) of personal income tax and, where both parties are private individuals, stamp duties and capital gains taxes, to the states.

The Constitution is silent on value added and landed property taxes. In practice, the former is imposed and collected by the federation, while the latter is imposed and collected by the states and local governments. The powers of the federation over value added tax are the subject of litigation pending at the Supreme Court. The states have a record of, in effect, usurping the constitutional powers of the local governments in respect of signage permits, tenement rates, liquor licences and market fees. Consistent with the Constitution, the states also have a record of imposing taxes on various matters such as the environment, the development of infrastructure, hospitality, entertainment, advertisement and provision of social services.

To help the states to raise more money for themselves and reduce the burden of tax on the taxpayers, the Taxes and Levies (Approved List for Collection) Act (the Taxes Act) was enacted by the Federal Military government in 1998 shortly before the Constitution came into force in 1999. The Taxes Act also established the Joint Tax Board (JTB), whose members comprise the heads of tax authorities for the federal and states governments. JTB's role is mainly to harmonise the administration of personal income taxes throughout the country.

By the Taxes Act (Amendment) Order, 2015 (the Order), the Minister of Finance (the Minister) purported to amend the Schedule to the Taxes Act to extend the states' power to impose taxes beyond what the Constitution apparently allows, for example: land use charge; hotel, restaurant or event centre consumption tax; entertainment tax; ecological fees; produce sales tax; infrastructure maintenance charge, property tax; economic development levy; social service contribution levy; and signage and advertisement.[3] However, the Federal High

1 Stephen Chima Arubike is a partner, Marian Asuenimhen is a senior associate and Emeka Ezekwesiri is an associate at G. Elias & Co.

2 The Constitution of the Federal Republic of Nigeria, 1999 (as amended).

3 Schedule to the Taxes and Levies (Approved List for Collection) Act (Amendment) Order, 2015.

Court[4] has declared the Order void as the same constitutes an impermissible encroachment to the constitutional law-making powers of the National Assembly. Given the foregoing and numerous other points that are outlined below, the law covered in this chapter is complex and continuously changing.

II LOCAL DEVELOPMENTS

Tax issues remained topical in Nigeria all through 2020 and into 2021. Nigeria's oil revenue crunch that started in 2014 reached an all-time low in 2020 following the covid-19 pandemic and its devastating economic effect. The government's attention has been focused on containing the pandemic and putting businesses back on track. These efforts have partly paid off. Nigerian economy went into recession in the third quarter of 2020 but quickly came out of it in the last quarter of 2020.

The year 2020 was ushered in with the passage into law of the Finance Act 2019 (2019 Act), which came on the heels of active legislative and regulatory intervention in tax administration and enforcement. The authorities immediately took steps to clarify some provisions of the statutes that the 2019 Act amended. The Minister enacted the Value Added Tax (Modification Order), 2020 (VAT Order), expanding the list of goods and services exempted from value added tax (VAT). Furthermore, the Minister also promulgated the Companies Income Tax (Significant Economic Presence) Order 2020 (SEP Order) to provide guidance on the definition of 'significant economic presence' (SEP) concerning income earned by non-resident companies doing business in Nigeria. Similarly, the FIRS issued eight circulars giving its interpretations and guidance on implementing some key amendments made to the tax laws by the 2019 Act (the Circulars). Contrary to the ministerial orders, the Circulars merely serve as guidelines for taxpayers and have no binding effect.[5]

In August 2020, the President assented to the Companies and Allied Matters Act (CAMA), 2020 (CAMA 2020). CAMA 2020's central aim is to improve the ease of doing business in the country. The Act thus introduced measures to ensure efficiency in the registration and regulation of corporate entities, reduce the compliance burden of small and medium-sized enterprises, and enhance transparency and stakeholders' engagement in corporate organisations.

In the wake of the pandemic, the federal and some state governments introduced several tax and economic measures. These include waivers of penalties and interest on tax debts, extensions of timelines for tax compliance, exemptions of medical supplies from VAT and import duty, and the digitalisation of tax administration and enforcement.

Similar to 2020, 2021 has also begun with the enactment of the Finance Act, 2020 (2020 Act), which the President signed into law on December 31, 2020. The 2020 Act provides more clarity on the changes introduced by the 2019 Act and has introduced notable changes across a broader range of tax laws.

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4 *Registered Trustees of Hotel Owners and Managers Association of Lagos v. A.G. Federation et al.* (FHC/L/CS/1082/2019).

5 *FIRS v. CNOOC Exploration and Production et al.* (2018) LPELR-45345(CA); and *Saipem Contracting Nigeria Limited v. FIRS* (2018) LPELR – 45118 CA.

Despite the covid-19 pandemic, the courts and the tax tribunals still rendered key decisions, resolving several tax disputes between taxpayers and the revenue authorities. Some of these developments and decisions will be discussed below.

i Entity selection and business operations

The business organisation vehicles recognised in Nigeria include companies limited by shares (CLSs), partnerships and trust. By law, a single individual can now form a small private CLS. Partnerships are organised under both state and federal laws, although the right to use any business name (including for a partnership) exclusively is a matter of federal law. CAMA 2020 has now introduced limited partnerships and limited liability partnerships (LLPs) into federal law. They had earlier been in existence only in some states.[6] The established position is that partnerships in Nigeria (as distinct from the partners themselves), whether limited or not, are mere 'pass-through-vehicles' and do not pay income tax. However, the law is as yet unclear on whether LLPs will be treated in a similar way to the regular partnerships for tax purposes.

Tax-exempt vehicles include approved charitable organisations, educational institutions, cooperative societies, religious bodies, trade unions and companies formed to promote sports. These vehicles may be organised either as trusts at common law or under CAMA 2020, either as companies limited by guarantee (CLGs) or as incorporated trustees. The tax-exempt status of these vehicles is limited to income generated from their explicitly mandated activities and does not apply where they engage in business outside those activities.

Businesses in Nigeria can also be organised as statutory corporations created directly by legislation. Statutory corporations may or may not be tax-exempt depending on the establishing law and the purpose of setting up the relevant corporations. For instance, statutory corporations set up to foster socio-economic development are typically tax-exempt. However, some statutory corporations, such as the Nigerian National Petroleum Corporation, pay tax.

CLSs pay income tax on their taxable profits.[7] In addition, their distributable dividends are subject to withholding tax before they are paid out to the shareholders. Unlike CLSs, partnerships pay one level of tax on the partners' income only, and the rate for human partners (maximum of 24 per cent) is lower than the income tax rate for CLSs that are large companies (approximately 32 per cent)[8]. Trusts are taxed on the income paid out to the beneficiaries. The trustee of a unit trust scheme is treated as a company and the unit holders treated as shareholders for income tax purposes.

6 The Lagos State Partnership Law (2009).

7 See the material under the following header titled 'Domestic income tax'. With the enactment of the Finance Act, CLSs that qualify as small companies pay no companies income tax, but CLSs that qualify as medium and large companies would pay income taxes at the rate of 20 per cent and 30 per cent respectively.

8 See text to note 15 below.

Domestic income tax

Nigerian companies pay income tax on their worldwide income to the extent that the income has not been subjected to other Nigerian tax.[9] The tax rates for large companies[10] and medium-sized companies[11] are 30 per cent and 20 per cent of their taxable profit[12] respectively. However, small companies[13] pay no income tax but are required to file tax returns annually. Real estate investment companies approved by the Securities and Exchange Commission are exempted from income tax on rental income and dividends earned in a financial year provided that at least 75 per cent of this income is distributed within 12 months.

Nigerian companies also pay tertiary education tax at 2 per cent of their assessable profit[14] (excluding small companies) and contribute 0.005 per cent of their net profit[15] to the trust fund established under the Nigerian Police Trust Fund Act, 2019. Telecommunication companies, cyber companies and internet providers, pension fund managers and related companies, banks and other financial institutions and insurance companies with an annual turnover of 100 million naira and above are also required to pay 1 per cent of their profit before tax to the National Information Technology Development Fund. Upstream oil and gas companies pay income tax at rates ranging between 50 per cent and 85 per cent depending on the nature of each company's operations.

Nigerian companies are also obliged to withhold and remit tax at 10 per cent to the relevant tax authority (WHT) on dividend, interest, royalty and rent income paid to any person, whether resident in Nigeria. If an entity whose income has suffered WHT is subject to Nigerian tax, credit will be given on the WHT paid. For non-residents, WHT is a final tax. However, if the non-resident is from a country with a double taxation treaty with Nigeria[16], WHT is to be remitted at the rate of 7.5 per cent. Thus, using vehicles organised in double taxation treaty countries for direct investment in Nigeria is a widely used tax planning device. The WHT rate on payment for services rendered to companies engaged in road, bridges, building and power plant construction contracts has been revised and cannot exceed 2.5 per cent. Furthermore, the 2019 Act has removed the exemption from WHT on income or dividends paid out of after-tax petroleum profits enjoyed by upstream oil and gas companies.[17]

International tax

The foreign income of a Nigerian company is taxable in Nigeria where the income is brought into or received in Nigeria. The profits of a Nigerian company are deemed to be income in Nigeria wherever they may have arisen and whether they have been brought into or received

9 Companies Income Tax Act, 1977 (CITA), Section 9; 2019 Act, Section 1.
10 Companies with annual revenue of 100 million naira and above.
11 Companies with annual revenue between 25 million naira and 100 million naira.
12 Taxable profit is essentially profit after recurrent expenses and allowances.
13 Companies with gross turnover of 25 million naira (annual revenue approximately US$55,000) or less.
14 Assessable profit is essentially profit before expenses and allowances. Lottery companies are subject to a separate tax regime under the National Lottery (Amendment) Act, 2017. It is not clear also whether a lottery company that qualifies as a small company can take advantage of the exemption under the Finance Act.
15 Section 4(1)(b) of the NPTF Act.
16 Nigeria currently has double tax treaties (DTTs) with 13 countries, namely the United Kingdom, The Netherlands, Canada, South Africa, China, Philippines, Pakistan, Romania, Belgium, France, Mauritius, South Korea, and Italy.
17 Section 24.

in Nigeria. Nigerian companies with foreign income may, therefore, manage their tax exposure by incorporating in tax-friendly jurisdictions foreign subsidiaries that will generate foreign export receipts and keep those receipts abroad rather than bringing them into Nigeria immediately. However, the passive investment income of a Nigerian company derived from a source outside Nigeria is exempted from tax to the extent that it is brought into Nigeria through a bank or other dealer licensed for the purpose by the Central Bank of Nigeria.[18] The taxation of the income of a Nigerian company from foreign sources may be subject to treaty arrangements between Nigeria and the source country.

Non-resident companies (NRCs), including Nigerian branches of foreign companies (on the rare occasions where these branches are permissible), are liable to tax only on their profit derived from Nigeria. NRCs providing digital services to residents in Nigeria will now be subject to income tax in Nigeria if they have SEPs in Nigeria and profits attributable to their activities. Furthermore, NRCs providing professional, consultancy, management and technical services to Nigerian residents to the extent that these companies have SEPs in Nigeria (if not already subject to income tax) will be subject to WHT of 10 per cent, which shall be the final tax. An NRC taxable in Nigeria (other than by way of WHT) is required to file tax returns with the tax authorities, and include in the filing, among others, its full audited financial statements, financial statements of its Nigerian operations, and tax computation schedules based on the profits attributable to its Nigerian operations.

The SEP Order enacted further to the 2019 Act[19] has provided the basis for determining SEP. The principles in the SEP Order are largely modelled after the OECD position on the issue. By the SEP Order, a company will be deemed to have a SEP in Nigeria if it derives a gross turnover or income of more than 25 million naira, or its equivalent in other currencies, in any accounting year from persons in Nigeria. Where the actual profits of an NRC cannot be determined, the FIRS has the power to apply a deemed profit rate on turnover derived from Nigeria in determining the applicable tax. In practice, the FIRS has used the rate on WHT – 10 per cent – here, but the statute does not specify a rate or limit.

Several sectors enjoy tax holidays of up to five years on both the profits of operating companies and dividends declared by them. These sectors include manufacturing; export-oriented businesses; agricultural loans; petrochemical projects; and research and development activities. In addition, enterprises in the various free trade zones are exempt from taxes, levies and duties and foreign exchange restrictions.[20] The 2020 Act now obligates them to file tax returns with the FIRS.

A non-resident may also consider investing in Nigeria by way of debt rather than equity. There are three significant benefits here. A foreign loan on arm's length terms with a repayment period of seven years or more and a moratorium for two years enjoys a 70 per cent income tax exemption.[21] Second, where the Nigerian subsidiary pays interest on the loan, the interest (subject to a ceiling of 30 per cent of the Nigerian subsidiary's EBITDA), unlike dividends, will be deductible in calculating the taxable profits of the subsidiary. Third, interest payable on bonds and notes enjoys an exemption from companies' income tax under regulations that, for now, are set to expire on 1 January 2022. However, the exemption on

18 CITA, Section 23(k).

19 2019 Act, Section 4.

20 Section 18 of the Nigeria Export Processing Zones Authority Act.

21 CITA, Section 11, 2019 Act, Section 23, and the Third Schedule.

bonds and notes with respect to personal (as distinct from companies) income tax is for an indefinite period. Furthermore, the 2020 Act now expressly excludes 'securities' from the definition of 'goods and services' for the purposes of VAT.[22]

Thus, widely used tax planning steps include pursuing free zone status, tax holiday certificates, foreign investment in Nigeria by way of long-term debt and investments in bonds and notes.

Capitalisation requirements

The 2019 Act has introduced 'thin capitalisation' rules in Nigeria. The rules limit the deductible interest expense from a company's taxable profit to a cap of 30 per cent of EBITDA in a connected party debt, including third-party debt guaranteed implicitly or explicitly by a connected person. Any interest expense of more than 30 per cent of EBITDA can be carried forward but for a period of five years only.[23]

The former controversy[24] on the deductibility of interest on related-party loans concerning upstream oil and gas companies has now been resolved. Interest in the intra-group loans of such companies will be tax deductible[25] if they are made on arm's-length terms.

Nigeria has 'alternative minimum tax' rules. A company that has been in existence for over four years is liable to pay a minimum rate of income tax if, in any year of assessment, it makes no profit or profit that is less than the applicable minimum tax.[26] The minimum tax is now fixed at the rate of 0.5 per cent of gross turnover (or gross premium for non-life insurance business, and gross income for life insurance business), less franked investment income. The exemption once enjoyed by companies with up to 25 per cent of imported equity from minimum tax is no longer in force. Hence, imported equity as a tax planning device in this context is no longer attractive. However, investing in agriculture or small companies (both still exempt from minimum tax) is still a tax planning consideration.

ii Common ownership: group structures and intercompany transactions

Ownership structure of related parties

Nigerian laws do not provide for tax consolidation for a group of companies. Hence, group relief and group loss-sharing are not allowed in Nigeria. Each legal entity within a group is treated as distinct and separate for tax purposes and is not allowed to file group tax returns.

Although group loss sharing is not allowed in Nigeria, tax losses survive a change of ownership. Thus, a company in a group could merge with another to utilise the other's tax losses for income tax purposes. The law ignores capital gains losses. Companies are permitted to carry losses indefinitely.

Furthermore, Nigerian laws do not make any specific provisions relating to controlled foreign companies. There are also no specific rules in Nigeria relating to tiered partnerships.

22 2020 Act, Section 46.

23 2019 Act, Section 10(b); Seventh Schedule.

24 This arose from the conflicting provisions in the Petroleum Profits Tax Act: Section 10(1)(g) (providing for tax-deductible interest on inter- company loans) and Section 13(2) (disallowing deduction of interest on loans between related entities).

25 *Nigeria Agip Oil Company Limited v. FIRS* (2014) 16 TLRN 25.

26 CITA, Section 33; 2019 Act, Section 14.

Domestic intercompany transactions

Companies in Nigeria are permitted to deduct related-party payments to reduce their overall net income. The only condition is that the transactions on which the payment arose must have been conducted at arm's length and the amount must be wholly, exclusively, and necessarily applied to carry out the operations of the related party in generating profits chargeable to tax. Management services expense no longer requires prior governmental approval to be deductible once the same complies with TP Regulations.

Furthermore, dividend income received by a parent from its subsidiary is not subjected to further tax when redistributed to the shareholders of the parent. Such dividend income, having suffered WHT, qualifies as franked investment income under Nigerian law.[27]

International intercompany transactions

Nigerian authorities have been taking active steps to prevent multinational enterprises from shifting income exposure to low-tax jurisdictions. Both the CITA and the Capital Gains Tax Act (CGTA) prohibit companies from engaging in artificial or fictitious transactions. Additionally, Nigeria now has specific TP Regulations promulgated in 2012 and revised in 2018.[28] The regulations compel a connected person to declare its relationship with the other connected persons, whether resident in or outside Nigeria and to make an annual disclosure of all its related-party transactions. The Income Tax (Country by Country Reporting) Regulations 2018 (CbCR) complement the TP Regulations in preventing profit shifting to low-tax jurisdictions. The way to manage the risk here is to ensure that transactions are concluded on arm's-length terms and are specifically reported annually.

iii Third-party transactions

Third-party transactions can be structured through sales or exchange of shares, contractual transfer through assets for cash or statutory mergers resulting in dissolution without winding-up or other schemes of arrangements.

Sales of shares or assets for cash

Broadly speaking, share sales and exchanges are the most tax-efficient way of carrying out third-party transactions. Shares sales and exchanges do not attract income tax, capital gains tax, VAT, or *ad valorem* stamp tax. Since 1998, no capital gains tax has been payable on dispositions of shares. Only nominal stamp duty is payable on these transactions.[29]

Assets for cash transactions, however, attract capital gains tax, *ad valorem* stamp duty tax where the assets are not goods and, where the assets are goods, VAT. On deals made between companies that have 90 per cent common ownership, *ad valorem* stamp duty is not charged.[30] Furthermore, if the assets are landed property, the transfer will not attract VAT but will attract state registration fees and other landed property taxes that vary from state to state.

Third-party transactions for the acquisition of business assets can also be effected through statutory mergers. Payment of stamp duties is avoided where the consideration is not

27 CITA, Section 80(3).

28 Income Tax Transfer Pricing Regulations 2018 (the TP Regulations).

29 In practice, the authorities insist on payment of *ad valorem* duties where parties execute a well-drawn agreement for the transaction rather than a mere share transfer form.

30 Stamp Duty Act, Section 105.

cash, and one of the entities is dissolved. However, if assets transferred on a merger include land, the surviving entity may have to pay registration and consent fees at the lands' registry of the state where the property is located. Regulatory practice on this point varies from state to state.

Disposals of the interests of holders of oil leases, prospecting licences, or production licences to a third party, whether by share sales or exchange, assets sale or purchase, or merger, require the prior consent of the federal minister in charge of petroleum resources. Stamp duty and capital gains tax will arise on such disposals in principle, but in practice negotiation with the FIRS for relief on such transactions is not unknown.

Tax-free or tax-deferred transactions

Asset for cash transactions may result in rollover relief. Rollover relief allows a party to defer the payment of capital gains tax where the disposal proceeds of a business asset are reinvested in a new, replacement business asset. The deferral is achieved by deducting the chargeable gain from the cost of the new assets. This relief could be either full or partial.

Asset for cash transactions that qualify for rollover relief lead to tax deferral as distinct from tax-free transactions arising from sale of shares. Corporate reorganisation involving a sale of business or its asset would not be subject to either capital gains tax or VAT if (1) the companies involved are related and have been so for a period of at least 365 days prior to the date of the reorganisation and (2) the transferee or purchaser company holds this trade or business (or assets employed therein) for no less than 365 days after the transaction date. Where the statutory minimum holding period is not adhered to, the tax authority can treat the companies as 'if they did not qualify for the concessions . . . as at the date of the initial reorganisation'.[31]

International considerations

There are no special tax considerations in cross-border third-party transactions or differences between the tax consequences of similar structured domestic and cross-border deals. Gains realised from the sale of shares by a non-resident (whether resident in or outside Nigeria) are treated in the same way as sales by a resident company and thus not taxable.

To avoid paying stamp duty, a company may keep transaction documents abroad as Nigerian law mandates stamping a document only when the document is brought into Nigeria.

However, for capital gains tax on asset disposals, residency rules apply. Disposals of assets situated outside Nigeria will be liable to capital gains tax in Nigeria where the disposition of the assets is by an individual who is liable to pay tax in Nigeria by virtue of the residency rules; that is, someone who stays in Nigeria for more than 182 days in that same year.[32] Where the circumstances permit, transactions should be structured to let the disposing entity be a foreign one rather than a local one.

31 Finance Act, Sections 45 and 49.

32 CGTA, Section 4.

iv Indirect taxes

VAT has been a significant indirect tax in Nigeria since the first federal statute on it was passed in 1993. It is chargeable on the supply of all goods and services except those specifically exempted. All business vehicles, government agencies and departments must charge and deduct VAT on their incoming invoices and transactions with counterparties and remit the same to the FIRS. Effective February 2020, the 2019 Act increased the VAT rate from 5 per cent to 7.5 per cent,[33] but exempts businesses with an annual turnover of less than 25 million naira from VAT.

By virtue of the 2019 Act, VAT is now chargeable for services rendered by a non-resident with no physical presence in Nigeria to a Nigerian recipient. NRCs that supply taxable goods or services in Nigeria are required to register for VAT and obtain a tax identification number. An NRC may, however, appoint a local agent for tax purposes. These new provisions have firmly endorsed the 'destination principle' rule – a rule whose applicability in Nigeria has been controversial before now.[34] Additionally, some states now charge and collect consumption taxes on hotels, restaurants, and event centres. The constitutionality of these other taxes is still the subject of controversy.[35]

Nigeria also levies customs duties on goods imported into Nigeria. The amount payable is based on the costs of freight and insurance, which is the complete shipping value. The rates vary for different items and are assessed with reference to the prevailing harmonised commodity and coding system.

III INTERNATIONAL DEVELOPMENTS AND LOCAL RESPONSES

i OECD-G20 BEPS initiative

Nigeria has been responsive to the Organisation for Economic Co-operation and Development (OECD) and G20 Base-Erosion and Profit-Shifting (BEPS) and other measures to curb double non-taxation.

On 17 August 2017, Nigeria signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS and the Common Reporting Standard Multilateral Competent Authority Agreement.

Further to the signing of these multilateral instruments, the government introduced CbCR and revised the transfer pricing regulations, which incorporate the 2017 updates to the OECD's TP Guidelines and the African Tax Administration Forum's Suggested Approach to drafting TP legislation. Furthermore, the FIRS in July 2019 issued the Common Reporting Standard Regulations, 2019 (the CRS Regulations). The CRS Regulations require the relevant financial institutions to file annual returns with respect to reportable accounts of individuals and companies.

33 2019 Act, Section 34.

34 *Vodacom Business Nigeria Limited v. FIRS* (Appeal No. CA/LA/L/556/2018).

35 *The Registered Trustees of Hotel Owners and Managers Association of Lagos (Hotel Owners) v. Attorney-General of Lagos State*, Suit No. FHC/L/CS/360/18; 2. *Attorney General of Lagos State v. Eko Hotel Limited* (2017) LPELR-43713(SC).

ii EU proposals on taxation of the digital economy

Nigeria has now taken legislative actions in response to the European Union Commission's proposal on the taxation of the digital economy following the enactment of the 2019 Act. Presently, income derived by NRCs providing digital products or services will now be taxable in Nigeria[36] if the NRC has a SEP in Nigeria and the relevant income is attributable to this activity. Similarly, NRCs providing technical, management, consultancy, or professional services outside of Nigeria to a person resident in Nigeria is taxable in Nigeria to the extent that the company has a SEP and profit can be attributable to this activity.

iii Tax treaties

Nigeria entered DTTs to attract foreign investment into the country by preventing double taxation. Nigeria has been taking steps to assist taxpayers in assessing the DTTs provisions. On 21 February 2019, the FIRS issued Guidelines on Mutual Agreement Procedure (MAP) to clarify the procedures for accessing MAP for dispute resolution purposes pursuant to the DTT between Nigeria and each of its treaty partners. A taxpayer resident in Nigeria can apply for MAP if either Nigeria or its treaty partner's tax authorities, or both, impose any tax on the taxpayer outside the relevant DTT. On 4 December 2019, the FIRS also issued a Public Notice on its Information Circular No. 2019/03 regarding tax treaty benefits claims in Nigeria (the Circular). The Circular guides and clarifies the requirements and processes for accessing and computing various tax treaty benefits for residents and non-residents deriving income from Nigeria and its treaty partners.

Notable typical or model provisions

The OECD model forms the basis for Nigeria's DTTs. Hence, Nigeria's current DTTs tackle base erosion and profit shifting and other treaty-abusing designs of multinational enterprises (MNEs). Nigeria DTTs set out the withholding tax rights of the respective countries on dividends, interest and royalties. The rate does not exceed 7.5 per cent of the gross amount, which is lower than those of non-treaty countries that pay a flat withholding tax rate of 10 per cent.

Recent changes to and outlook for treaty network

Nigeria's DTT network is not very wide, but it has been expanded recently. There are presently only 14 tax treaties in force. The federal legislature ratified the DTTs with Spain, Sweden and South Korea in January 2018. Those with Singapore, Ghana and Cameroon have been approved but not yet ratified. The TP Regulations identify international and regional treaties as ways of attracting foreign direct investments to Nigeria and signify the federal government's plans to further expand its DTT networks.

IV RECENT CASES

The aggressive tax drives by the tax authorities and the resultant litigation slowed due to the covid-19 pandemic. The FIRS and several state revenue authorities suspended tax audits following the pandemic. Yet, both the regular courts and the tax tribunals delivered several rulings and judgments on matters that had been heard before the pandemic lockdown.

36 See general the 'International tax' subheading in Section II and text to note 19.

The tax tribunals rendered conflicting decisions on whether rental income from leases is liable to VAT. A tribunal sitting in Benin-City held that rental income from leases is liable to VAT, while another tribunal sitting in Lagos held that such income is not liable to VAT. The 2020 Act has now resolved the controversy by expressly exempting VAT on rental income from leases of residential and commercial property. In its first judgment based on the TP Regulations, the tax tribunal upheld the tax authority's use of Gross Profit Margin as the profit level indicator in line with best practices and the OECD's recommendation.[37]

The Federal High Court has also ruled that import duty is not payable on the personal and household goods in a passenger's baggage.[38] The tax tribunal has now interpreted 'sales in the ordinary course' of a company's business for the purpose WHT exemption. The tribunal has ruled[39] that whether a transaction constitutes a sale in the ordinary course of business is a question of fact, and such transaction must have a reasonable connection with the taxpayer's normal course of business.

In *Citibank Nigeria Ltd. v. RSBIR*, the tax tribunal reaffirmed the six years limitation period for tax audits and investigations, except where there is fraud, wilful default or neglect on the part of the taxpayer. Furthermore, the Appeal Court[40] has resolved that a tax authority lacks the power to distrain an employer's assets for a failure to deduct pay-as-you-earn tax from employees' emoluments because the employer is not a taxable person under the law. The remedy of the relevant tax authority lies in an action for debt recovery with no power to distrain.

V OUTLOOK AND CONCLUSIONS

Nigeria's tax space continues to experience rapid changes consistent with the government's drive for increased tax revenues. The enactment of the 2019 Act and the 2020 Act has redefined and reshaped Nigeria's tax space. The changes in the various tax statutes will shape Nigeria's tax environment in the year 2021 and beyond. There will certainly be a rethink of the tax planning activities of the MNEs in response to these changes.

The remainder of the Petroleum Industry Governance Bill (PIGB) (and the other petroleum industry bills) still await legislative actions. When eventually passed, the PIGB will harmonise the tax rates applicable to oil and gas companies (currently covered under the Petroleum Profit Tax Act), with that applicable to other companies under the CITA. We expect the tax authorities to continue in their drive to digitalise the tax administration and enforcement.

It is expected that the OECD consensus-based solution to the taxation of digital products, which was delayed due to the covid-19 pandemic, would be finalised this year to put a stop to the unilateral measures being taken by countries in addressing the tax challenges of the digital economy. Perhaps Nigeria will align its digital tax laws with the OECD consensus-based solution when the same takes effect.

37 *Prime Plastichem Nigeria Limited v. FIRS* (Suit No.: TAT/LZ/CIT/015/2017).

38 *Ogunwumiju v. Nigerian Customs Service Board et al.* (Suit No: FHC/ABJ/CS/1113/2019).

39 *Tetra Park West Africa Limited v. FIRS* (TAT/LZ/WHT/007/2019).

40 *NDDC v. RSBIR (2020) 3 NWLR* (Pt. 1711) 371 (CA).

Appendix 1

ABOUT THE AUTHORS

STEPHEN CHIMA ARUBIKE

G Elias & Co.

Stephen Chima Arubike is a partner in the firm with a demonstrated history of advising top multinational corporations and indigenous start-ups in aspects of Nigerian business law. He has represented leading global clients in seminal tax litigation before the tax tribunal and superior courts in Nigeria and before regulators during tax audits and investigations. He has also advised on the tax dimension to numerous seminal corporate and financial transactions and commercial arrangements. He recently led the firm's tax team that successfully prosecuted separate tax appeal tribunal cases involving a leading Nigerian oil service company and a Nigerian subsidiary of a global technology company.

Stephen graduated with first-class honours from the Nigerian Law School, winning one of the overall best prizes. Stephen is a fellow of the Chartered Institute of Taxation of Nigeria and a member of the Nigerian Bar Association, the Lagos Court of International Arbitration, and the Chartered Institute of Arbitration.

MARIAN ASUENIMHEN

G Elias & Co.

Marian Asuenimhen is a senior associate in the firm's dispute resolution, tax, and corporate practices. She regularly advises clients on structuring tax-efficient transactions. She also represents clients before the regulators during tax investigations and audits, and in tax tribunals and Nigeria's superior courts. She has advised clients on compliance and structuring issues under the Nigerian transfer pricing regulations regime. She was a member of the Firm's tax team that successfully represented a Nigerian subsidiary of a global tech company on several tax issues including the deductibility of intra-group service expenses. Marian is also a member of the team currently representing two Nigerian subsidiaries of a global oil giant in court on tax claims by a state tax authority exceeding US$160 million (circa 60 billion naira) regarding alleged shortfall in pay-as-you-earn tax and other tax remittances.

EMEKA EZEKWESIRI

G Elias & Co.

Emeka Ezekwesiri is an associate and member of the firm's disputes, tax, energy and finance groups. He has excellent academic qualifications. He graduated with first class honours from both the Nigerian Law School and Nigeria's premier university, the University of Ibadan. He represents clients at court and arbitral proceedings. Emeka is a member of the team currently representing two Nigerian subsidiaries of a global oil giant in court on tax claims by a state tax authority exceeding US$160 million (circa 60 billion naira) regarding an alleged shortfall in pay-as-you-earn-tax and other tax remittances. He regularly advises on the tax dimensions to such transactions and tax considerations for foreign investors and international entities looking to set up operations in Nigeria.

G ELIAS & CO
6 Broad Street
Lagos Island
Lagos State
Nigeria
Tel: +234 1 460 7890 / 280 6970
Fax: +234 1 280 6972
steve.arubike@gelias.com
marian.asuenimhen@gelias.com
emeka.ezekwesiri@gelias.com
www.gelias.com

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