THE CORPORATE TAX PLANNING LAW REVIEW

FOURTH EDITION

Editors
Jodi J Schwartz and Swift S O Edgar

THE LAWREVIEWS

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PREFACE

We are pleased to present the fourth edition of *The Corporate Tax Planning Review*. This volume contains 19 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 those 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-state of Singapore and several nations in the Global South (Colombia, Malaysia and more). Echoing this geographical variety, *The Corporate Tax Planning Review* describes tax developments worldwide that are a response 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 revenue. These complex and at times conflicting goals present opportunities for the well advised and traps for the unwary.

Although 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 sometimes 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 Isabelle Gray, Nick Barette and Adam Myers at Law Business Research Ltd for their editorial acumen and dedication to this project.

Jodi J Schwartz
Swift S O Edgar
Wachtell, Lipton, Rosen & Katz
New York
May 2022

Chapter 12

NIGERIA

Stephen Chima Arubike, Marian Asuenimhen and Eberechukwu Benjamin-Akaogu[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 limited power to impose and collect taxes. The division of power 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 tax (CGT) and income tax, 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 CGT to the states.

The Constitution is silent on VAT and landed property tax. In practice, the former is imposed and collected by the federation, and the latter is imposed and collected by the states and local governments. The power of the federation over VAT is the subject of litigation in the courts. 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 raise more money for themselves and reduce the tax burden 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 state 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 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

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1 Stephen Chima Arubike is a partner, Marian Asuenimhen is a senior associate and Eberechukwu Benjamin-Akaogu 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.

High Court[4] has declared the Order void as it 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

The governments at all levels in Nigeria continue their aggressive drives to boost the country's tax revenue. The covid-19 pandemic exacerbated Nigeria's revenue crunch that started in 2014. The government's efforts in containing the pandemic and putting businesses back on track have somewhat paid off as the economy recorded 3.4 per cent growth in 2021. This is partly due to the government's fiscal measures in response to the pandemic and the recovery in crude oil prices and production.

Since 2019, it has become common practice in Nigeria for the government to enact the Finance Act to modify the tax laws and align them with the government's fiscal objectives for the relevant fiscal year. Hence, 2021 began with the enactment of the Finance Act, 2020 (the 2020 Act), which the President signed into law on 31 December 2020. Similar to the Finance Act, 2019 (the 2019 Act) and the Finance Act, 2020 (the 2020 Act), the President, on 31 December 2021, signed into law the Finance Act, 2021 (the 2021 Act). The 2021 Act makes significant changes to different tax laws and sheds more light on the modifications made in the earlier Finance Acts.

On 16 August 2021, the long-awaited Petroleum Industry Act (PIA) was passed into law. The Petroleum Profits Tax Act, 1958, which had governed the taxes of upstream petroleum operations companies for several decades, was accordingly repealed by the PIA. Among other things, the PIA introduced a new legal regime for the taxation of these companies.

In 2021, the courts and the tax tribunals also rendered key decisions, resolving several tax disputes between taxpayers and the revenue authorities and between governments. We also saw the momentous decision of the Federal High Court on VAT and other issues bordering on the appropriate government authorities to collect certain taxes in Nigeria. Some of these developments and decisions are discussed below.

i Entity selection and business operations

The business organisation vehicles recognised in Nigeria include companies limited by shares (CLSs), partnerships and trusts. 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. The Companies and Allied Matters Act, 2020 (CAMA 2020) has introduced limited partnerships and limited liability partnerships (LLPs) into federal law. They had previously been in existence only in some states.[5] 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 regular partnerships for tax purposes.

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

5 The Lagos State Partnership Law (2009).

Tax-exempt vehicles include approved charitable organisations, 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. Educational institutions no longer enjoy tax exempt status[6] as they have now been excluded from the list of tax-exempt vehicles under the 2021 Act.

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 (WHT) 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 are treated as shareholders for income tax purposes. However, dividends distributed to unit holders in a unit trust are exempt from tax.

Domestic income tax

Nigerian companies pay income tax on their worldwide income to the extent that the income has not been subject 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.

Nigerian companies also pay tertiary education tax at 2.5 per cent[14] of their assessable profit[15] (excluding small companies) and contribute 0.005 per cent of their net profit[16] to the trust fund established under the Nigerian Police Trust Fund Act, 2019 (NPTF Act) (as

6 This exclusion does not apply to incorporated trustees set up for educational purposes, which continue to enjoy tax exemption.

7 See the material under the following header titled 'Domestic income tax'. With the enactment of the 2019 Act, CLSs that qualify as small companies pay no companies income tax, but CLSs that qualify as medium-sized and large companies pay income tax at the rate of 20 per cent and 30 per cent, respectively.

8 See footnote 15 below.

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 of 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 2021 Act, Section 28.

15 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 whether a lottery company that qualifies as a small company can take advantage of the exemption under the Finance Act.

16 Section 4(1)(b) of the NPTF Act.

amended by the Finance Act, 2021).[17] Telecommunications 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. Prior to the enactment of the PIA, upstream oil and gas companies paid income tax at rates ranging between 50 per cent and 85 per cent, depending on the nature of each company's operations. However, the PIA has now introduced the national hydrocarbon tax (NHT) and companies income tax to replace petroleum profit tax. NHT is chargeable and assessed on the profits of upstream companies that operate onshore or in shallow waters at a rate of 30 per cent in respect of petroleum mining leases and 15 per cent for petroleum prospecting licences.[18] Also, the petroleum mining leases and petroleum prospecting licences are liable to company income tax[19] at 30 per cent and education tax at 2.5 per cent.

Nigerian companies are also obliged to withhold and remit tax at 10 per cent to the relevant tax authority on dividend, interest, royalty and rent income paid to any person, whether or not resident in Nigeria. If an entity whose income has been subjected to WHT is also 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 (DTT) with Nigeria,[20] WHT is to be remitted at the rate of 7.5 per cent. Thus, using vehicles organised in DTT 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, bridge, 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.[21] This change remains applicable under the PIA regime.

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 might have arisen and whether they have been brought into or received 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

17 It is important to note that a recent decision by the Federal High Court declared this provision of the NPTF Act unconstitutional following a suit by the Rivers State government. There is, however, a likelihood of an appeal of the judgment to the Court of Appeal by the federal government. We await the outcome.

18 PIA, Sections 261 and 267.

19 PIA, Section 260.

20 Nigeria currently has double taxation treaties (DTTs) with 13 countries, namely the United Kingdom, the Netherlands, Canada, South Africa, China, the Philippines, Pakistan, Romania, Belgium, France, Mauritius, South Korea and Italy.

21 2019 Act, Section 24.

through a bank or other dealer licensed for the purpose by the Central Bank of Nigeria.[22] 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 significant economic presence (SEP) in Nigeria and profits attributable to their activities in Nigeria. The 2021 Act empowers the Federal Inland Revenue Service (FIRS) to assess and charge tax on a fair and reasonable percentage of that part of the turnover attributable to their presence in Nigeria on NRCs with SEP rendering digital services in Nigeria.[23] Furthermore, NRCs providing professional, consultancy, management and technical services to Nigerian residents (to the extent that these companies have SEP in Nigeria (if not already subject to income tax)) will be subject to WHT on their income derived from the services at the rate 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 other things, 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 Companies Income Tax Act (Significant Economic Presence) Order, 2020 (the SEP Order) enacted further to the 2019 Act[24] has provided the basis for determining SEP. The principles in the SEP Order are largely modelled after the OECD's principles. By the SEP Order, a company will be deemed to have an 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 is empowered to apply a deemed profit rate on the turnover derived from Nigeria in determining the applicable tax. In practice, the FIRS has used the rate on WHT – 10 per cent – but the statute does not specify a rate or limit. This may no longer apply to NRCs providing digital services in view of the deemed profit tax provision under the 2021 Act. This provision is new and evolving and it is unclear how it will be implemented.

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-orientated 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.[25] They are now obliged to file tax returns with the FIRS. Companies engaged in gas utilisation enjoy a three-year tax-free period that is renewable for two years, with certain conditions, to the effect that the tax incentive cannot be claimed by a company more than once and cannot be enjoyed by any company that is created by the restructuring of companies or by companies that have formerly enjoyed the incentive. It is also not applicable to companies that have already claimed an incentive for trade or business of gas utilisation under any other law in Nigeria.[26]

22 CITA, Section 23(k).
23 2021 Act, Section 8.
24 2019 Act, Section 4.
25 Section 18 of the Nigeria Export Processing Zones Authority Act.
26 2021 Act, Section 11.

A non-resident may also consider investing in Nigeria by way of debt rather than equity. There are two 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.[27] 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 earnings before interest, taxes, depreciation and amortisation (EBITDA)), unlike dividends, will be deductible in calculating the taxable profits of the subsidiary. Furthermore, 'securities' are expressly excluded from the definition of 'goods and services' for the purposes of VAT.[28] However, interest payable on bonds and notes issued by companies as well as short-term government securities, which formerly enjoyed income tax exemption, no longer enjoy this exemption following the expiration of the Companies Income Tax (Exemption of Bonds and Short-Term Government Securities) Order, 2011 on 1 January 2022. Following the expiration of the Order, the FIRS has issued a public notice advising on the requirements of payment of income tax on profits from bonds and short-term government securities effective from 2 January 2022.

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

Capitalisation requirements

There are now thin capitalisation rules in Nigeria since January 2020. 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.[29]

Nigeria also 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.[30] The minimum tax is now fixed at the rate of 0.5 per cent of gross turnover (or gross income and gross premium for life and non-life insurance businesses, respectively), less franked investment income. However, the minimum tax concession rate of 0.25 per cent applies for the financial years ending between 1 January 2020 and 31 December 2021 and between 1 January 2019 and 31 December 2021. The reduced rate is available only for two accounting periods.[31] Also, the exemption once enjoyed by companies with up to 25 per cent of imported equity from minimum tax is no longer in force. Hence, importing 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.

27 CITA, Section 11; 2019 Act, Section 23 and Third Schedule.

28 2020 Act, Section 46.

29 2019 Act, Section 10(b) and Seventh Schedule.

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

31 2021 Act, Section 10.

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 (other deferred tax assets) 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.

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 expenses no longer require prior governmental approval to be deductible once the same complies with Income Tax Transfer Pricing Regulations (TP Regulations).

Furthermore, dividend income received by a parent from its subsidiary is not subject to further tax when redistributed to the shareholders of the parent. Such dividend income, having been subjected to WHT, qualifies as franked investment income under Nigerian law.[32]

International intercompany transactions

Nigerian authorities have been taking active steps to prevent multinational enterprises (MNEs) from shifting income exposure to low-tax jurisdictions. Both the Companies Income Tax Act (the CITA) and the Capital Gains Tax Act prohibit companies from engaging in artificial or fictitious transactions. In addition, Nigeria now has specific TP Regulations promulgated in 2012 and revised in 2018.[33] The regulations compel a connected person to declare their relationship with the other connected persons, whether resident in or outside Nigeria, and to make an annual disclosure of all their related-party transactions. The Income Tax (Country by Country Reporting) Regulations 2018 (the CbC Regulations) 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.

32 Capital Gains Tax Act, Section 80(3).

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

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, VAT or *ad valorem* stamp tax. The 2021 Act ushered in the payment of CGT on disposition of shares. CGT is currently chargeable at the rate of 10 per cent of the realised gains from share transfers except where: (1) the proceeds from the share disposal are reinvested to acquire shares in the same company (or another Nigerian company within the same year of assessment, but portions of the proceeds not reinvested will be taxed accordingly); (2) the aggregate share disposal proceeds in a period of 12 months is below 100 million naira, on the condition that the person making the disposals renders annual returns to the FIRS; or (3) the share disposal is between an approved borrower and lender in a regulated securities lending transaction conducted under the rules made by the Nigerian Securities and Exchange Commission.[34] Share disposal or exchange in a group reorganisation context continues to enjoy both CGT and VAT exemptions.

Assets for cash transactions, however, attract CGT, *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.[35] 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 cash and one of the entities is dissolved. However, if assets transferred in a merger include land, the surviving entity might have to pay registration and consent fees at the land registry of the state where the property is located. Regulatory practice on this point varies from state to state.

Disposal of the interests of holders of oil leases, prospecting licences or production licences to a third party, whether by share sale or exchange, asset sale or purchase, or merger, requires the prior consent of the federal minister in charge of petroleum resources. Stamp duty and CGT 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 CGT 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 (where CGT exemption applies). Corporate reorganisation involving the sale of a business or its asset would not be subject to either CGT 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

34 2021 Act, Section 2(2).

35 Stamp Duty Act, Section 105.

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'.[36]

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 may or may not be subject to CGT, depending on whether the disposition fulfils any of the exemption conditions applicable to disposal of shares.

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.[37]

However, for CGT on asset disposals, residency rules apply. Disposal of assets situated outside Nigeria will be liable to CGT 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 (i.e., someone who stays in Nigeria for over 182 days in the same year).[38] Gains realised from disposal of shares of non-Nigerian entites attract no CGT. Where the circumstances permit, transactions should be structured to let the disposing entity be a foreign one rather than a local one. In that case, CGT will not apply unless the disposal proceeds are received in or brought into Nigeria.

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 VAT rate was increased from 5 per cent to 7.5 per cent,[39] but businesses with an annual turnover of less than 25 million naira are exempt from VAT collection obligation, excluding companies engaged in upstream petroleum operations.[40]

By virtue of the 2019 and 2021 Acts, 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 or representative for tax compliance purposes. These new provisions have firmly endorsed the 'destination principle'

36 Finance Act, Sections 45 and 49.

37 'An electronic document, receipt or instrument executed outside Nigeria is received in Nigeria if: a. it is retrieved or accessed in or from Nigeria; b. it (or an electronic copy of it) is stored on a device (including a computer and magnetic storage, etc.) and brought into Nigeria; or c. it (or an electronic copy of it) is stored on a device or computer in Nigeria. FIRS Information Circular on Clarifications on the Provisions of the Stamp Duties Act.

38 CGTA, Section 4.

39 2019 Act, Section 34.

40 2021 Act, Section 32.

rule – a rule of which its applicability in Nigeria has been controversial before now.[41] In addition, 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.[42]

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. In addition, excise duty is now chargeable on non-alcoholic, carbonated and sweetened beverages at the rate of 10 naira per litre.[43]

III INTERNATIONAL DEVELOPMENTS AND LOCAL RESPONSES

i OECD-G20 BEPS initiative

Nigeria has been responsive to the OECD's Action Plan on 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 the CbC Regulations and revised the TP Regulations, which incorporate the 2017 updates to the OECD's TP Guidelines and the African Tax Administration Forum's Suggested Approach to Drafting Transfer Pricing 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 in respect of reportable accounts of individuals and companies.

Nigeria participated in the OECD-G20 BEPS project on the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy and introduction of a global minimum tax. Unfortunately, only 23 African nations, including South Africa, Senegal and Egypt, participated in the reform project. Nigeria has, however, backed out amid uncertainty over how much the proposed policy would benefit the developing countries. In any case, Nigeria has gone ahead to implement some of the OECD initiatives concerning taxation of the digital economy. For instance, under the 2021 Act, NRCs with SEP that offer digital, technical, professional, management and consulting services are now subject to tax on their incomes derived from Nigeria.

ii EU proposals on taxation of the digital economy

Nigeria has now taken legislative action in response to the European Commission's proposal on the taxation of the digital economy following enactment of the 2019 Act. Currently, income derived by NRCs providing digital products or services will now be taxable in Nigeria[44] if the NRC has an SEP in Nigeria and the relevant income is attributable to this activity. Similarly,

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

42 *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; *Attorney General of Lagos State v. Eko Hotel Limited* (2017) LPELR-43713(SC).

43 2021 Act, Section 17.

44 See under 'International tax' in Section II.i and footnote 19.

NRCs providing technical, management, consultancy or professional services outside Nigeria to a person resident in Nigeria are taxable in Nigeria to the extent that the company has an SEP and profit can be attributable to this activity.

iii Tax treaties

Nigeria entered into DTTs to attract foreign investment into the country by preventing double taxation. Nigeria has been taking steps to assist taxpayers in assessing the DTT provisions. Since 21 February 2019, guidelines[45] have been in place to clarify the procedures for accessing a mutual agreement procedure (MAP) for dispute resolution purposes under the DTT between Nigeria and each of its treaty partners. A taxpayer resident in Nigeria can apply for an MAP if either Nigeria or its treaty partners' 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, which 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 BEPS and other treaty-abusing designs of MNEs. Nigeria DTTs set out the WHT 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 WHT 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 currently only 14 tax treaties in force. The federal legislature ratified 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

To generate more revenue from taxation, the Nigerian tax authorities remain unwavering in their drive to increase tax revenue generated from businesses. This has resulted in many tax disputes and consequent litigation in the past year. Both the regular courts and tribunals delivered momentous decisions on some of the tax litigation.

On 24 August 2021, the tax tribunal in Lagos ordered MultiChoice Nigeria to deposit an amount equal to half of the assessed tax (about 1.8 trillion naira) being contested before it could go forward with the appeal hearing. This is the first time the controversial provision in the law[46] mandating a statutory deposit as a condition for hearing an appeal has been invoked

45 Guidelines on mutual agreement procedure.

46 Section 15(7) of the Fifth Schedule to the Federal Inland Revenue Service (Establishment) Act, 2007.

by the tribunal.[47] Thus, the ruling has raised a lot of debate on whether it constitutes a breach of the fundamental right to a fair hearing for a tribunal to make such an order without hearing and deciding the substantive appeal. Similar to this decision is the provision of the practice directions of the Federal High Court and the new tribunal rules, both mandating a deposit by the taxpayer of an amount equal to 50 per cent of the contested tax into a designated account as security for prosecuting an appeal at the tribunal. These provisions have generated many issues since its enactment.[48]

On 9 August 2021, the Federal High Court restrained the federal government from collecting VAT from residents of Rivers State. The Court further held that the power to legislate on VAT is not within the legislative competence of the National Assembly as it is not contained within the Exclusive Legislative List of the Nigerian Constitution and that the State is empowered to impose and collect VAT, among other taxes. This seminal decision has challenged a long-standing legal position that the taxes are federally administered taxes. An appeal arising from this decision is pending before the Court of Appeal and perhaps will be ultimately decided by the Supreme Court.[49] The uncertainty about which agency has the authority to impose and collect VAT, if not managed properly, might expose taxpayers to a breach of the law.

The tribunal has held in effect that an oil prospecting licence (OPL) is an asset for the purpose of CGT and the realised gains from the transfer of an interest in an OPL is liable for CGT at 10 per cent.[50] In *Max Aluminium & Allied Products v. Federal Inland Revenue Service*,[51] the tribunal held that the tax authority could not rely on the audited financial statements of a single year to determine a company's assessable profit for subsequent years. In other words, it is illogical and unreasonable for the FIRS to take an isolated audited statement of a year for use as an estimate of the company's profit in subsequent years.

In *SV Gaming Limited v. EKIRS*, the tax tribunal ruled that WHT applies to commissions deducted up front by betting agents and that the betting company as a principal has an obligation to withhold and remit the same to the relevant tax authority.[52]

V OUTLOOK AND CONCLUSIONS

Nigeria's tax space continues to experience rapid changes consistent with the government's drive for increased tax revenue.

While we await the appellate court decision on the appropriate authority to collect VAT in Nigeria, the National Assembly, on 2 March 2022, turned down the constitutional proposal to include VAT in the Exclusive Legislative List. The eventual outcome of the decision will be a game changer in the yearning for fiscal federalism by the states and will impact the balance of the Nigerian federation.

47 *Multichoice Nigeria Ltd v. FIRS* (Suit No: TAT/LZ/CIT/062/2021).

48 Tax Appeal Tribunal Procedure Rules 2021, Order 3 Rule 6. On 8 March 2022, the tax tribunal in *Investment Holdings Limited v. FIRS* ruled in effect that the primary statute on the security deposit requirements overrides the civil procedure rules on the subject. Thus, the burden is on the tax authority to satisfy the tribunal that the security deposit is necessary based on the fact of the case, and it is not a condition precedent for suing the tax authority.

49 *A.G. Rivers State v FIRS et al.* (Suit No: FHC/PH/CS/149/2020).

50 *Sahara Energy Exploration & Production Limited v. Federal Inland Revenue Service* (TAT/LZ/005/2013).

51 (TAT/SEZ/003/2020).

52 *SV Gaming Limited v. EKIRS*, unreported ruling of the Tax Appeal Tribunal.

We expect the tax authorities to commence the enforcement of the recently introduced tax regimes (e.g., CGT on share disposals, the police trust fund levy and the national hydrocarbon tax) and those taxes whose exemption period has passed (e.g., income tax on bonds and short-term debt instruments, and educational institutions). The Tertiary Hospitals Development Tax Fund Bill for improvement of tertiary healthcare in Nigeria, which the senate passed in October 2021, awaits legislative action at the House of Representatives. If the bill is eventually passed into law, the implementation will worsen the problem of multiple taxations and negatively impact the costs of doing business in Nigeria.

With the enabling law now in place, the taxation of non-resident providers of digital services will start. This will increase the tax authorities' audits, investigations and enforcement actions against the global tech companies providing digitalised services to Nigerians.

The Nigerian rejection of the OECD's two-pillar solution for taxation of the digital economy implies that we will embark on the full implementation of the SEP Order. This will intensify transfer pricing audits for MNEs that started in 2021.

Appendix 1

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