THE CORPORATE TAX PLANNING LAW REVIEW

Editors
Jodi J Schwartz and Swift S O Edgar

THE LAWREVIEWS

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PREFACE

We are pleased to present the inaugural edition of *The Corporate Tax Planning Law Review*. This volume contains 20 chapters, each devoted to a different country and 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 (such as the United States, Germany and Korea); EU countries 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 (including Colombia, Venezuela and Malaysia). Echoing this geographical variety, *The Corporate Tax Planning Law 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 both generalists and tax practitioners outside each particular jurisdiction. Although *The Corporate Tax Planning Law 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 Gina Mete, Nick Barette, Gavin Jordan and Adam Myers at Law Business Research for their editorial acumen and dedication to this project.

Jodi J Schwartz and Swift S O Edgar
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Chapter 12

NIGERIA

Stephen Chima Arubike and Chinyere Okafor[1]

I INTRODUCTION

Nigeria is a federation with 36 states and a federal capital territory. Each of the federation, the governments of the federating states and the local governments within each of the states has 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, the federation imposes stamp duties, capital gains taxes and income taxes, and by legislation it can also collect these taxes, but the federation has by legislation delegated the collection (not the imposition) of personal income 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 aspects of infrastructure, hospitality, entertainment, advertisement and 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 the states governments. JTB's role is mainly to harmonise the administration of the personal income taxes throughout the country.

By the Taxes Act, the federal government purported to extend states' powers to impose taxes beyond what the Constitution appears to allow, 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.[2] The courts have not yet determined the extent to which the Taxes Act passes constitutional muster.

In view of such constitutional issues and many other points that will be made below, the law covered in this chapter is complex and uncertain, and is constantly changing. The opportunities and risks concerning tax planning are considerable.

1 Stephen Chima Arubike is a senior associate and Chinyere Okafor is an associate at G Elias & Co.

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

II LOCAL DEVELOPMENTS

The dip in global oil prices in 2014–2016 led the federal, state and local governments to embark on vigorous efforts to raise tax revenues. The governments' actions are mainly directed at widening the tax base and increasing the tax compliance rate.[3] Among these actions is the federal government's issuance of a series of executive orders. One of these, the Voluntary Assets and Income Declaration Scheme (VAIDS), introduced a tax amnesty scheme to compel taxpayers to declare their income and assets voluntarily, then pay taxes on them. The amnesty window spanned between July 2017 and 30 June 2018 and was further extended to September 2018.

Following VAIDS,[4] the government introduced another scheme, the Voluntary Offshore Assets Regularization Scheme (VOARS). VOARS also proposes an amnesty for previous tax defaults covering the preceding 30 years to taxpayers who declare their foreign assets and income within 12 months starting from 8 October 2018 and make payments amounting in effect to 32 per cent of the value of the assets.

The federal government released the revised National Tax Policy (NTP) in 2017 and instituted a committee to carry out the recommendations in the revised NTP. In 2018, the Committee came up with five tax amendment bills (covering the Companies Income Tax Act, Value Added Tax Act, Personal Income Tax Act and Industrial Development (Income Tax Relief) Act) and two executive orders. The Federal Executive Council has approved these legislative proposals, but the executive orders are yet to be gazetted and the bills have not yet been presented to the National Assembly.

The federal government has also introduced the Road Infrastructure Development and Investment Tax Credit Scheme to permit private sector funding of road infrastructure projects in Nigeria. The participants are guaranteed timely and full recovery of funds expended for the infrastructure projects through tax credits.

The attempt to enact into law the revised tax incentives reliefs suffered a setback in 2018. The federal government in 2017 reviewed the tax holidays incentive scheme by adding 27 more industries to the list of industries to enjoy the incentive. Parliament passed into law the Industrial Development (Income Tax Relief) (Amendment) Bill, 2018. However, the President declined to assent to the Bill to enable relevant government departments and agencies to agree on the appropriate tax holidays incentives and for agriculture and agro-processing businesses to be included in the incentive scheme.

The Federal Inland Revenue Service (FIRS), the federal tax authority, in 2018 enacted two key regulations to give effect to the latest OECD Base Erosion and Profit Shifting (BEPS) initiatives and recommendations. They are the Income Tax (Country by Country Reporting) Regulations 2018 (CbCR) and the Transfer Pricing Regulations 2018 (Revised TPR). Failure to disclose transactions subject to the Revised TPR attracts a fine of 10 million naira or 1 per cent of the value of the controlled transaction (whichever is higher) and 10,000 naira for every day on which the failure continues.

3 At 6 per cent, Nigeria's tax to GDP ratio is one of the lowest in the world. www.imf.org/~/media/Files/Publications/CR/2018/cr1864.ashx last assessed 04/03/2019.

4 https://qz.com/africa/1152820/nigeria-tax-collection-vaids-scheme-collects-17-billion-naira-in-six-months/.

The tax authorities at all levels continue to intensify tax compliance endeavours to generate more revenue to the governments. FIRS recorded massive success with a significant boost in revenue generation – in the last quarter of 2018, a 5.3 trillion naira boost in its revenue.

Curiously, the federal government did not reconstitute the tribunals to resolve tax disputes until late 2018. This was not entirely expected. The extent to which the Constitution makes it mandatory for tax disputes to be resolved by the Federal High Court (rather than by the tax tribunals) is unclear, and governments at all levels seem to prefer using self-help methods of tax collection to using the formal judicial process. For instance, the FIRS has been freezing taxpayers' bank accounts even before making the requisite demands and assessments or otherwise fulfilling the conditions precedent set out in tax legislation.

Nevertheless, the courts have been handing down important judicial decisions on contentious areas of the tax laws. Some of these decisions relate to the 'reverse charge' mechanism for value added tax (VAT), the legality of property-based assessments of income tax liability and the deductibility of interest on intra-group loans for oil and gas upstream companies. We will discuss some of these decisions in succeeding paragraphs.

i Vehicle selection and business operations

The business organisation vehicles recognised in Nigeria include companies limited by shares (CLS), partnerships and trust. CLSs (private or public) are organised under the Companies and Allied Matters Act (CAMA).

By law, two or more adult individuals can form a CLS. Partnerships are organised under state laws, although the right to use any business (including partnership) name exclusively is a matter of federal law. The Lagos State Partnership Law (2009) and those of some other states introduced limited partnerships. Partnerships in Nigeria (as distinct from the partners themselves), whether limited or not, are mere 'pass-through-vehicles' and do not pay income tax.

Tax-exempt vehicles include approved charitable organisations, educational institutions, cooperative societies, religious bodies, trade unions and companies formed to promote sports. Such vehicles may be organised either as trusts at common law or under CAMA, either as companies limited by guarantee (CLGs) or as incorporated trustees. While CLGs have only members and directors, incorporated trustees have both members and 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 law establishing the corporation and the purpose for which the corporation is set up. For instance, statutory corporations set up to foster socio-economic development are typically tax-exempt. On the other hand, statutory corporations such as the Nigerian National Petroleum Corporation pay tax.

CLSs pay income tax on their taxable profits. Besides, 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 20 per cent) is lower than the income tax rate for CLSs (32 per cent). Thus, organising a business as a partnership can have a huge tax advantage over organising it as a CLS. Business organisations have no right to elect whether taxes are imposed on any particular entity type or 'flow through' to the individual owners.

A foreign investor can be a limited partner in a Nigerian partnership or buy shares in a Nigerian company without getting incorporated in Nigeria (the general partner will be the entity actually conducting the business), but it cannot do business in Nigeria except through a company that it incorporates in Nigeria for the purpose unless it has a special federal government permit to do so, and such permits are very uncommon. 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.

Domestic income tax

Nigerian companies pay income tax on their income from sources in Nigeria. Income 'accruing in, derived from, brought into, or received in Nigeria'[5] is taxable. The flat tax rate is 30 per cent of the taxable profit.[6] However, small companies – companies engaged in agriculture, manufacturing, mining and those engaged wholly in exports, within the first five years of operation, and where the annual turnover is less than 1 million naira – pay income tax at the rate of 20 per cent of their total taxable profit.

Additionally, Nigerian companies also pay tertiary education tax at 2 per cent of the assessable profit.[7] 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 or not 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 (e.g., United Kingdom, France, the Netherlands, Panama and Pakistan, WHT is to be remitted at the rate of 7.5 per cent rather than 10 per cent. Using vehicles organised in double taxation treaty countries for direct investment in Nigeria is a widely used tax planning device.

International tax

The foreign income of a Nigerian company is taxable in Nigeria at the rate of 30 per cent 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 or not 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

5 CITA s. 9.
6 Taxable profit is essentially profit after recurrent expenses and allowances.
7 Assessable profit is essentially profit before expenses and allowances.

that it is brought into Nigeria through a bank or other dealer licensed for the purpose by the Central Bank of Nigeria.[8] 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, including Nigerian branches of foreign companies (on the rare occasions where such branches are permissible) are liable to tax only on their profit derived from Nigeria. Where actual profits cannot be determined, 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.

A number of 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. Also, enterprises in the various free trade zones are exempt from taxes, levies and duties and foreign exchange restrictions.[9]

The provision granting tax holiday on dividends paid out (as distinct from income coming in) is arguably somewhat ambiguous. In practice, there are tax officials who decline to recognise the holiday on dividends. Some tax officials maintain that the tax liability for dividends paid out does not apply where the dividends are paid out of profits received which profits enjoy the holiday. The officials have argued that such dividends are by their nature 'excess dividends' and therefore subject to tax under the excess dividend rules. The rules are discussed under the subsection 'Domestic intercompany transactions' below.

A non-resident may also consider investing in Nigeria by way of debt rather than equity. There are three significant rules here. A foreign loan on arm's-length terms with a repayment period of seven years or more enjoys a 100 per cent income tax exemption.[10] Second, even where the Nigerian subsidiary pays interest on the loan, the interest, unlike dividends, will be deductible in the usual way in calculating the 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, but whose duration may well be extended before then. However, the exemption on bonds and notes with respect to personal (as distinct from companies) income tax is for an indefinite period.

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

Capitalisation requirements

There are no 'thin capitalisation' rules in Nigeria. Accordingly, there is no limit to the deductible interest expense from a company's taxable profit whether the same is in respect of a third party or a related party. The law only requires that every loan granted to a company must have been obtained on arm's-length terms and are used wholly, exclusively and necessarily for operations of the company.

8 CITA s. 23(k).

9 Section 18 of the NEPZA Act.

10 CITA, s. 11 and the Third Schedule.

The former controversy[11] on the deductibility of interest on related-party loans concerning upstream oil and gas companies has now been resolved. Interest on the intra-group loans of such companies will be tax deductible[12] 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 level of income tax if, in any year of assessment, it makes no profit or profit that is less than the applicable minimum tax.[13] Minimum tax is computed as the highest of:

a 0.5 per cent of gross profit;

b 0.5 per cent of net assets;

c 0.25 per cent of paid-up share capital; or

d 0.25 per cent of turnover up to 500,000 naira plus 0.125 per cent of turnover over 500,000 naira.

However, a company in the business of agriculture or with a minimum of 25 per cent foreign equity is exempt from minimum tax.

To be exempt from the minimum tax, most foreign parents will maintain up to 25 per cent equity in its Nigerian subsidiary or invest in agriculture for the subsidiary.

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, tax losses survive a change of ownership. Hence, a company in a group could merge with another to utilise the tax losses of the other for income tax purposes. The law ignores capital gains losses. Companies (excluding insurance companies) are permitted to carry losses indefinitely.

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

Domestic intercompany transactions

Companies in Nigeria are permitted to deduct even 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.

Further, 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, is regarded as franked investment income under Nigerian law.[14]

The tax exemption for franked investment income is inapplicable where the shareholder company has no taxable profit in the year dividend is paid or where the dividend is higher

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

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

13 CITA, s. 33.

14 CITA, s. 80 (3).

than the taxable profit. This arises from a controversial provision in the law,[15] popularly known as excess dividend tax. The court has affirmed the validity of excess dividend tax.[16] Therefore, for a dividend from subsidiary being redistributed by the parent shareholders to be exempted from tax, the parent must ensure that the dividend is not higher than its own total profit for the year in question.

International intercompany transactions

Nigerian law aims 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, the FIRS in 2012 promulgated the transfer pricing rules. The Revised TPR compels a connected person to declare its relationship with the other connected persons whether resident in or outside Nigeria. CbCR complements the Revised TPR in preventing profit shifting to low-tax jurisdictions. The way to manage the risk here is to ensure that the transaction is concluded on arm's-length terms. Careful selection of destination jurisdiction is also essential for tax planning.

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.

Sale of shares or assets for cash

Broadly speaking, share sales and exchanges are the most tax-efficient way of carrying out third-party transactions. 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.

Assets for cash transactions, on the other hand, attract capital gains tax, *ad valorem* stamp duty tax where the assets are not goods and, where the assets are goods, VAT. Deals made between companies that have 90 per cent common ownership, *ad valorem* stamp duty is not charged.[17] Further, 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 and capital gains tax is avoided where the consideration is not 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,

15 CITA. s. 19.

16 *Oando Plc v. Federal Board of Inland Revenue* – 1 (TLRN) 61, 81.

17 Stamp Duty Act, s. 105.

require the prior consent of the federal minister in charge of petroleum resources. Stamp duty and capital gains tax arise on such disposals in principle, but in practice negotiation with the FIRS of relief on such transactions is not unknown.

Tax-free or tax-deferred transaction

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 reorganisations amounting to spin-offs or demergers do not in themselves result in a tax-free transfer, but they will enjoy the relief available to transfers of shares or statutory mergers to the extent that they are structured as either transfers of shares or mergers in which the consideration is not cash and one of the participating entities gets dissolved.

International considerations

There is no special tax consideration to cross-border third-party transactions. There are no 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 subject to payment of tax in Nigeria by virtue of the residency rules. That is someone who stays in Nigeria for a total of more than 182 days in that same year.[18] Where the circumstances permit, transactions should be structured to let the disposing entity be a foreign one rather than a local one.

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 are obliged to deduct VAT on their incoming invoices and transactions with non-residents and remit the same to the FIRS.

VAT is chargeable for services rendered by a non-resident with no physical presence in Nigeria to a Nigerian recipient. Additionally, the states now charge and collect consumption taxes on hotels, restaurants and event centres. Whether they truly have the constitutional power to do so is unclear.

18 CGTA, s. 4.

Nigeria also levies customs duties on goods imported into Nigeria. The amount payable is based on the costs of the 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.

Some goods such as beers, wines, spirit, cigarettes, and tobacco manufactured and sold in Nigeria are liable to excise duties. Effective 4 June 2018, the government approved an increase in the excise rates on tobacco and alcoholic beverages.

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 (the Convention) and the Common Reporting Standard Multilateral Competent Authority Agreement (CRS MCAA).

Further to the signing of these multilateral instruments, the government introduced CbCR and the Revised TPR. The Revised TPR incorporates the 2017 updates to the OECD's TP Guidelines and the African Tax Administration Forum's Suggested Approach to drafting TP legislation. Following the Revised TPR, FIRS issued a Public Notice on Transfer Pricing and Guidelines on Transfer Pricing Documentation to give the public further clarification on transfer pricing and to facilitate stockholders' preparation of TP Documentation.

CbCR represents a significant step in implementing the OECD automatic exchange of information programme in Nigeria. Every multinational enterprise (MNE) in Nigeria with consolidated group revenue of at least 160 billion naira is obliged to prepare a CbCR to be submitted not later than 12 months after the last day of the MNE group's accounting year. Additionally, constituent entities in Nigeria are required to notify the FIRS of the body within the group responsible for preparing and filing the CbCR.

ii EU proposal on taxation of digital economy

Nigeria has not taken any legislative or policy action in response to the European Commission's proposal on the taxation of the digital economy. However, the current head of the FIRS (he is also the current chairman of the African Tax Administrative Forum) has emphasised the importance of coming up with digital taxation solutions that will work for both developed and developing countries.[19] How soon Nigeria will take legislative or policy action in this regard remains to be seen.

iii Tax treaties

Nigeria entered DTTs to attract foreign investment into the country by preventing double taxation. The power to enter an international treaty in Nigeria is shared between the executive and the legislative organs. A treaty between Nigeria and another state, in addition to ratification by the executive branch, must be enacted into law by the federal legislature

19 www.internationaltaxreview.com/Article/3844506/Nigeria-Archive/Nigerias-Tunde-Fowler-Digital-tax-solution-must-work-for-everyone.html?.

if it is to have the force of law,[20] but a regulator has the power to issue regulations that in effect have the same content as the treaty even where the treaty has not been enacted as primary legislation. The FIRS has in effect used this power widely, not least in relation to the Convention and the CRS MCAA.

Notable typical or model provisions

The OECD model forms the basis for Nigeria's DTTs. Accordingly, the current DTTs also tackle base-erosion and profit-shifting and other treaty-abusing devices adopted by 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, which pay a flat withholding tax rate of 10 per cent.

Recent change 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 Revised NTP identifies international and regional treaties as ways of attracting foreign direct investments to Nigeria and signifies the federal government's plans to expand its DTT networks further.

IV RECENT CASES

The failure of the government to constitute the statutory tax tribunals until late 2018 impacted on the resolution of tax disputes in Nigeria. The superior courts in the country, however, made critical pronouncements on contentious tax law issues. Two of such pronouncements relate to the jurisdiction of the tax tribunal itself. The jurisdiction of the tribunal has been doubtful since the formation in 2007 following the court's pronouncement annulling the previous tribunal with similar functions. The Court of Appeal has affirmed the legality of the tribunal as an administrative tribunal to serve as a condition precedent to suing at the Federal High Court.[21]

i Perceived abuses

Some of the judicial decisions have indeed prevented the abuse of the apparent mismatch in the legal positions in Nigeria and other countries. An example is on the payment of VAT on services provided to a Nigerian resident by a non-resident entity. Contrary to its earlier decision, the tax tribunal held that the Nigerian recipient of services rendered by a non-resident must charge and remit VAT to the government. The Federal High Court has

20 Constitution s. 12.

21 *FIRS v. TSKJ Construcoes Internacional Sociedade Unipersonal LDA* (Appeal No. CA/A/122/2014, TLRN, Vol. 23, 2017, Pp. 58–93.). See also *CNOOC & SAPETRO v. NNPC & FIRSA*. (Appeal No. CA/L/1144/2015.)

confirmed the tribunal's position in two recent decisions.[22] By these pronouncements, the decision to outsource services to be consumed in Nigeria solely for VAT considerations no longer makes sense.

Recently, promoters of educational institutions have been attempting to take the benefits of educational institutions' tax-exempt status in CITA while operating such institutions for profit. CAMA permits educational institutions to be established as CLG or incorporated trustees, but did not expressly prohibit them from being organised as CLSs. On a plain reading of CITA, CITA does not say that an educational institution will lose its tax-exempt status if it is organised as a CLS. The Court of Appeal has, however, pronounced that educational institutions organised as CLSs are liable to income tax, unlike those organised as incorporated trustees or CLG.[23]

The courts have also prevented companies from abusing the deductible expense provision where doing so will encourage environmentally undesirable conduct. In *FIRS v. Mobil Producing Nigeria Unlimited,*[24] the court held that gas-flaring penalties are not allowable deductions under the law.[25] Indeed, permitting companies to deduct gas-flaring penalties as expenses will amount to transferring the burden of the penalties back to the government.

ii Recent successful tax-efficient transactions

BUA cement spin-off

In this transaction, the client spinned off its 1.5 metric tons-daily cement plant to a wholly owned subsidiary valued at over 300 billion naira. The transfer of the asset to the subsidiary will ordinarily attract huge capital gains tax. The transaction was structured as a share subscription, in which the client subscribed for shares in the subsidiary with the asset as the consideration. This way, the client still capitalised the subsidiary using the asset without incurring capital gains tax.[26]

Luxury apartments

In this case, the client was developing a 25-storey, super-luxury, twin-tower residential building comprising 41 units. The units will be purchased by off-takers. The registration of the interest of the off-takers in the real estate development would ordinarily attract huge state land registration and stamping taxes as these are payable *ad valorem*. The transaction was structured so that the off-takers subscribed to shares in the developer company proportionate to their interests in the development. This way, the off-takers still own the property and the perfection taxes are avoided.[27]

22 *FIRS v. Vodacom Business Nig Ltd* (FHC/L/4A/2016) and *Gazprom Ltd v. FIRS* (Unreported) (Suit No. FHC/ABJ/TA/1/2015) Delivered by Justice A R Mohammed on Tuesday, 19 June 2018.

23 *BCIS Limited v. FIRS* http://blog.deloitte.com.ng/wp-content/uploads/2019/02/TaxTake-CoA-affirms-educational-institutions-CIT-obligation.pdf.

24 Suit No: FHC/L/3A/2017.

25 Petroleum Profits Tax Act, s. 10.

26 G Elias & Co acted in this case, advising the client.

27 G Elias & Co acted in this case, advising the client.

V OUTLOOK AND CONCLUSIONS

The five amendment tax bills and two orders the NTP Implementation Committee drafted last year are expected to receive legislative attention when the federal legislative resumes sitting after the February–March 2019 national election.

The government is likely to increase the VAT rate at least for luxury goods, if not across the board. At 5 per cent, Nigeria has one of the lowest VAT rates in the world. There will be an increase in enforcement drive by the tax authorities. Given the end of the grace period FIRS gave taxpayers for VAIDs and transfer pricing disclosures and the start of CbCR, transfer pricing will become a prominent tax issue in Nigeria.

With the reconstitution of the tax tribunal, it is expected that critical decisions will be handed out on tax matters. For instance, on questionable approach to secure tax compliance – freezing banks accounts, restriction of utilisation of WHT credit notes, reopening audits after six years.

The recent government's decision permitting companies to utilise tax credits to fund road construction on business activities in the country is also a welcome development. The impact of this initiative will soon be seen.

Appendix 1

ABOUT THE AUTHORS

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Stephen is an experienced senior lawyer with a demonstrated history of advising top multinational corporations in all areas of Nigerian law. He is proficient in corporate law (including foreign investment), commercial litigation and arbitration, and tax law. He also has excellent academic qualifications as he graduated with a first class honours from the Nigerian Law School, winning one of the overall best prizes. Stephen is a member of the Nigerian Bar Association, the Chartered Institute of Taxation of Nigeria, Lagos Court of International Arbitration and the Chartered Institute of Arbitration.

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