The Inward Investment and International Taxation Review

Eighth Edition

Editor
Tim Sanders

The Law Reviews

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THE Inward Investment and International Taxation Review

Eighth Edition

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This article was first published in February 2018
For further information please contact Nick.Barette@thelawreviews.co.uk

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
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Enquiries concerning reproduction should be sent to Law Business Research, at the address above.
Enquiries concerning editorial content should be directed
to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-912228-09-6

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

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ABOU JAOUDE & ASSOCIATES LAW FIRM

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ANDERSON MŌRI & TOMOTSUNE

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PREFACE

The drive towards greater tax transparency has continued in 2017. The trend is driven by pressure on tax authorities to raise more revenue and increasing public disquiet about the well-publicised practices of some large multinationals and wealthy individuals, who apparently pay a disproportionately small sum in tax compared to the man in the street. Measures focus on stricter financial reporting and more rigorous compliance standards, coupled with a variety of attacks on tax avoidance and offshore structures.

One consequence of this is that business management, particularly boards of multinational companies, will need to focus more on tax matters and accept that more resources will need to be devoted to compliance and providing information to tax authorities than in the past. Tax authorities and governments expect that their approach will result in more tax being collected and bring about a change in corporates' tax practices. At this stage, one cannot predict with any certainty how business will respond, in particular whether those based in high-tax jurisdictions with increasingly onerous compliance burdens, may seek to relocate to jurisdictions with lower tax rates and a less expensive and time-consuming compliance obligations.

A challenge for the tax adviser in the coming years will be to engage with general business management, who have traditionally delegated tax matters to specialist departments, to make them aware of the challenges the new environment throws up and their obligations.

It is hoped that this volume will prove to be a useful guide to these obligations as well as to the tax rules in the jurisdictions where clients conduct their businesses. Each chapter aims to provide topical and current insights from leading experts on the tax issues and opportunities in their respective jurisdictions. While specific tax advice is always essential, it is also necessary to have a broad understanding of the nature of the potential issues and advantages that lie ahead; this book provides a guide to these.

I should like to thank the contributors to this book for their time and efforts, and above all for their expertise. I would also like to thank the publisher and the team for their support and patience. I hope that you find the work useful, and any comments or suggestions for improvement that can be incorporated into any future editions will be gratefully received.

The views expressed in this book are those of the authors and not of their firms, the editor or the publishers. Every endeavour has been made to ensure that what you read is the latest intelligence.

Tim Sanders
London
December 2017

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Chapter 24

NIGERIA

Theophilus I Emuwa, Chinyerugo Ugoji, Adefolake Adewusi and Chioma Okonkwo[1]

I INTRODUCTION

Nigeria's population of over 182 million and its continuously expanding consumer market have made it an investment destination of interest to foreign investors for some time. Nigeria is the largest economy in Africa, with a GDP of US$481 billion as at December 2016. The comprehensive 2017 GDP statistics have not yet been released. The establishment of democratic structures during the past 18 years and the efforts of the government towards entrenching the rule of law may have improved the country's political risk profile. Some potential investors may see the country's relatively low corporate tax rates as a good incentive to do business in Nigeria, in spite of tremendous infrastructure deficits and the multiplicity of taxes at the different tiers of government, which can make running a business in Nigeria quite challenging.

The country is a federation of 36 states and 774 local government areas, each with power to impose tax on specified activities. Lagos State, one of the 36 states, is the fifth-largest economy in Africa.

II COMMON FORMS OF BUSINESS ORGANISATION AND THEIR TAX TREATMENT

i Corporate

The most common form of corporate business organisation is the private limited liability company. This may not have more than 50 shareholders and must restrict the transfer of its shares. There is also the public limited liability company (plc), which can have any number of shareholders starting from two. This is the required form for companies listed on the stock market. The unlimited liability company is also an available form, but is rarely used. Finally, there is the open-ended investment company, which is allowed to buy its own shares.

Most enterprises can only be carried on using a corporate vehicle. For instance, banking, and crude oil exploration and production, can only be carried out by registered companies. The company itself (not its owners), is taxed on its profits.

1 Theophilus I Emuwa and Chinyerugo Ugoji are partners and Adefolake Adewusi and Chioma Okonkwo are associates at ÆLEX.

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ii Non-corporate

Many small-scale businesses and petty traders carry on as unincorporated enterprises. Besides sole proprietorships, the most commonly used form of non-corporate business entity is the general partnership. Partnerships are not liable to tax – their profits are shared among the partners and taxed in the partners' hands.

III DIRECT TAXATION OF BUSINESSES

i Tax on profits

There are two corporate income taxes: companies' income tax (CIT) pursuant to the CIT Act (CITA) and petroleum profits tax (PPT) pursuant to the PPT Act.

Determination of taxable profit

CIT is chargeable on the profits of all companies apart from those engaged in oil exploration and production. Expenses are deductible if they are 'wholly, exclusively, necessarily and reasonably' incurred in the making of profits. Donations to charities and educational institutions are deductible up to a prescribed limit. Instead of depreciation, capital allowance is allowed annually at specified rates that can be as high as 95 per cent in the first year.

PPT is chargeable on the profits of any company engaged in the exploration and production of petroleum (or crude oil). Under the PPT Act, expenses are deductible if they are 'wholly, exclusively and necessarily' incurred in the making of the profits. The test for deductibility does not include reasonableness as is the case with companies in other sectors. In addition, instead of depreciation, capital allowance is allowed annually at specified rates. For the purposes of both CIT and PPT, taxable profits are arrived at by aggregating all trading income and then deducting exempt income, allowable expenses, capital allowance and carried-forward losses.

For the purposes of CIT, profits are taxed on an accruals basis. The tax is paid after the tax year (that is, on a preceding-year basis). PPT, however, is paid in advance, in monthly instalments based on forecasts of year-end profits and tax; in other words, PPT is paid on a current-year basis with reconciliation made at the end of the tax year to reflect actual profits made in that year. Profits of a Nigerian company are deemed to accrue in Nigeria regardless of where they arise. Nigerian companies are therefore subject to CIT on worldwide profits. Profits of a non-Nigerian company are taxable in Nigeria to the extent that they arise (or are deemed to arise) in Nigeria – the CITA prescribes various tests for determining this (see Section IV).

The CITA also sets out rules for taxation of a company at commencement of business, change of accounting date and cessation. The commencement rules and change of accounting date may lead to double taxation on a company.

Capital and income

Taxable profits consist solely of income or trading profits – these are profits that arise from business or trade. Profits that arise from the disposal of a capital asset are not included in income tax computations but are chargeable to tax under the Capital Gains Tax Act (CGT Act).

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Losses

A company that makes trading losses is entitled to treat them as tax-deductible and to carry forward unrecovered losses indefinitely, even if the ownership of the company changes. Losses cannot, however, be carried back or offset against capital gains.

Rates

The CIT rate is 30 per cent of profits. Companies engaged in crude oil exploration and production are subject to PPT at rates that vary between 50 and 85 per cent depending on the nature of the taxpayer's operations. The CGT rate is 10 per cent.

Administration

Corporate taxes are administered by a single tax authority, the Federal Inland Revenue Service (FIRS). Every company is required to file a self-assessment return with the tax authority at least once a year. The filed return must contain the company's audited accounts, tax and capital allowances computation, and a duly completed self-assessment form. The company may pay the tax due and forward evidence of payment along with its return. For PPT purposes, at least two returns must be filed. The first is filed early in the tax year and is based on forecasts of profit and tax. The second is filed after the end of the tax year and reflects actual profits and tax. If forecasts change during the year, a company may amend the first returns from time to time.

Education tax of 2 per cent of assessable profits is imposed on all companies incorporated in Nigeria. Assessment and payment of education tax are done together with the assessment and collection of the CIT or PPT, whichever is applicable.

The Industrial Training Fund Act requires every employer with a staff strength of 25 or more to contribute 1 per cent of its annual payroll to the fund established by the Act. An employer may be refunded up to 60 per cent of the amount contributed if the Industrial Training Fund Governing Council is satisfied that the employer's training programme is adequate.

The Employees' Compensation Act directs every employer covered by the Act to make a minimum monthly contribution of 1 per cent of its monthly payroll. The scope of the Act extends to both the public and private sectors with the exception of members of the armed forces; however, staff of the armed forces employed in a civilian capacity are covered by the Act.

The Niger Delta Development Commission (Establishment) Act mandates every oil or gas company to pay 3 per cent of its annual budget to the Commission for tackling ecological problems in the Niger Delta, where most of Nigeria's oil is produced.

The National Information Technology Development Agency (NITDA) Act mandates telecommunications companies, cyber-related companies, pension-related companies, banks and other financial institutions with an annual turnover of 100 million naira or more to pay a levy of 1 per cent of their profits before tax to the NITDA Fund. In addition, the Nigerian Maritime Administration and Safety Agency imposes a 3 per cent levy on all inbound and outbound cargo from ships or shipping companies operating in Nigeria.

The FIRS has introduced an integrated tax administration system to enhance tax administration. Thus, taxpayers are now able to file tax returns and pay their taxes electronically. This has significantly reduced the complexity, time and cost of paying taxes.

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Tax grouping

Nigerian law makes no provision for the tax treatment of a group of companies as one entity. Each company within a group is therefore taxable in Nigeria on an individual basis. Consequently, losses suffered by one member of a group of companies cannot be utilised to reduce the tax liability of another company within the group, but must be carried forward and set off against the future profits of the company that incurred them.

ii Other relevant taxes

In addition to income taxes, Nigerian businesses are also subject to other taxes such as VAT under the Value Added Tax Act (VAT Act), CGT under the CGT Act and stamp duties under the Stamp Duties Act.

VAT is levied on the supply of all goods and services with a few exceptions. The rate of VAT is 5 per cent, and it is collected by the supplier and remitted to the FIRS, except where the supplier is a foreign company, in which case the purchaser withholds the VAT and remits it to the FIRS. A taxpayer is allowed to recover VAT incurred in acquiring stock-in-trade or inventory, but not VAT incurred on overheads and administration or on capital assets. It remains unclear whether VAT arises on the sale of choses in action (or intangible contractual rights). Lagos State has also introduced a 5 per cent consumption tax on hotels, restaurants and event centres.

CGT is charged on the gains arising on the disposal of an asset at a rate of 10 per cent. Gains that are applied towards replacing business assets are exempted from CGT, as are gains arising from the disposal of stocks and shares, and those arising from the merger of two companies provided that no cash payment is made. On the other hand, gains arising from a demerger or spin-off are not exempted even where assets have been moved to entities under the same control and ownership as the transferor.

The Stamp Duties Act provides for stamp duty to be paid on instruments. The rates are as contained in the Act, and can be as high as 6 per cent of the value of the underlying transaction.

IV TAX RESIDENCE AND FISCAL DOMICILE

i Corporate residence

The profits of a Nigerian company are deemed to accrue in Nigeria regardless of where they arise. Nigerian companies are therefore subject to CIT on worldwide profits. The profits of a non-Nigerian company are taxable in Nigeria to the following extent:

a the company has a 'fixed base' in Nigeria to the extent attributable to such base;

b the company habitually operates in Nigeria through a dependent agent who conducts business on its behalf, or who delivers goods or merchandise on its behalf from stock maintained in Nigeria, to the extent attributable to such activities;

c all the profit where the company executes a turnkey contract in Nigeria, that is, a single contract for surveys, deliveries, installation or construction; and

d the adjustment made by the FIRS where the foreign company does business with a connected Nigerian company, and the FIRS considers the terms to be artificial or fictitious.

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ii Branch or permanent establishment

In determining the fiscal residence of a non-Nigerian company incorporated in a country that has a double taxation treaty with Nigeria, the applicable concept is that of 'permanent establishment', which Nigeria's treaties define as a fixed place of business through which the business of an enterprise is carried on. However, a permanent establishment will not include facilities used solely for the purpose of carrying on an activity of a preparatory or auxiliary nature, or for the storage, delivery or display of goods or merchandise of a non-resident company. The FIRS directed that all non-resident companies are to file income tax returns taking effect from tax year 2015.

V TAX INCENTIVES, SPECIAL REGIMES AND RELIEF THAT MAY ENCOURAGE INWARD INVESTMENT

The drive to encourage foreign direct investments in Nigeria has led to the enactment of various pieces of legislation, including the Industrial Development (Income Tax Relief) Act. This Act encourages investment in sectors of the economy that are necessary for the economic development of the country by granting tax relief to businesses. For a business to enjoy relief from corporate income tax under this Act, it must be engaged in one of the industries listed in the Act, or would have to apply and obtain a designation of its activity as a pioneer industry. Relief under this Act is for an initial period of three years extendable up to a maximum period of two years. Dividends are not subject to tax in the hands of the shareholders of the company enjoying the relief. Capital allowances can be carried forward and utilised at the end of the tax relief period. This incentive regime was reviewed in 2017 by the Application Guidelines for Pioneer Status Incentive. It has also replaced the erstwhile 'service charge' of 2 per cent of estimated tax savings with a new annual service charge of 1 per cent of actual pioneer profits.

The Venture Capital (Incentives) Act provides tax incentives to venture capital companies that invest in venture capital projects and provide at least 25 per cent of the total project cost. The incentives include a 50 per cent reduction of the withholding tax payable on dividends distributed by project companies, allowing equity investments in venture project companies to be treated as qualifying capital expenditure, and exempting capital gains on the disposal of such equity from tax.

The Nigerian Export Processing Zones Act also contains certain fiscal incentives for businesses. It provides in Section 8 that approved enterprises within a zone would be exempted from all federal, state and local government taxes, levies and rates. It also provides in Section 18 that such enterprises may repatriate capital, profits and dividends at any time. The Oil and Gas Export Free Zone Act grants similar incentives to approved enterprises operating within the zone.

Capital allowances are another form of tax incentive. Capital allowances are granted on the acquisition of qualifying capital expenditure that is used solely for the purpose of the business. Capital allowances serve to reduce the profits of a company, and ultimately reduce tax liability. Under the CITA, there are initial and annual allowances. The initial allowance can be claimed only in the year in which the asset was acquired, while the annual allowance, based on the remainder after deducting the initial allowance from the cost of the asset, is spread over the tax life (including the first year) of the asset until the cost of the asset is reduced to a book value of 10 naira.

Under the PPT Act, a petroleum investment allowance (PIA), which allows an uplift of up to 20 per cent on qualifying capital expenditure, is available as an incentive to encourage

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investment in offshore exploration. In addition to the PIA and capital allowances, companies operating production-sharing contracts (PSCs) in Nigeria's deep offshore and inland basin regions are entitled to either an investment tax credit (ITC) or an investment tax allowance (ITA), depending on when the PSC was signed, which is equal to 50 per cent of annual qualifying expenditure. The ITC operates as a full tax credit, while the ITA is deductible from profits before the calculation of tax. The ITC does not result in a deduction from qualifying capital expenditure for the purposes of calculating capital allowances. There are also special incentives available to oil companies to encourage gas utilisation or the development of gas delivery infrastructure. Most significantly, such companies can offset their gas-related capital allowance against their oil production profits. Given the difference in tax rates between gas production and oil production (30 per cent versus 85 per cent), this incentive has led to considerable investment in gas utilisation projects.

To stimulate the financial markets, the federal government has in 2012 amended relevant laws to exempt from taxation, income earned from debt instruments. Consequently, income from bonds issued by sovereign or sub-sovereign entities and those of corporate bodies are exempted from tax in the hands of the bond holder. Proceeds from the disposal of government or corporate bonds are exempt from VAT. These exemptions for corporate bonds are only for a period of 10 years and will lapse in 2022. In addition, the government has increased the tax relief available to companies that incur expenditure on infrastructure or facilities of a public nature. Such companies will now enjoy a 30 per cent uplift in basis for deductibility of the relevant expenditure.

i Holding company regimes

Nigeria does not have any special holding company regimes.

ii IP regimes

Nigeria does not have any special IP regimes.

iii State aid

No state aid is available.

iv General

See Section 1.

VI WITHHOLDING AND TAXATION OF NON-LOCAL SOURCE INCOME STREAMS

i Withholding on outward-bound payments (domestic law)

By law, where any amount is payable by one company to another company or person as interest, royalty, rent or dividend, the company making the payment shall first deduct tax at a rate of 10 per cent and pay it to the tax authority. This withholding tax is treated as the final tax when the payment is due to a non-Nigerian company. Where a dividend is paid to a Nigerian company, the amount deducted as withholding tax is treated as franked investment income and is not subject to further tax in the hands of the recipient. In all other cases, such withholding tax qualifies as a credit against CIT liability.

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ii Domestic law exclusions or exemptions from withholding on outward-bound payments

Withholding tax exemptions are available on outward-bound payments where:

a the payment of a dividend is satisfied by an issue of shares of the company paying the dividend;
b dividend is paid by a company exempted from tax under the Industrial Development (Income Tax Relief) Act;
c dividend is paid out of profits that have been subjected to PPT;
d dividend is paid by an enterprise operating within a free zone; or
e interest is paid by a Nigerian company on a foreign loan with a tenor of at least seven years.

In all other cases of outbound remittance of payments, tax withheld at source by the company making the payment will be the final tax.

iii Double tax treaties

Nigeria has signed a number of double taxation treaties with countries. Residents of these countries enjoy a preferential withholding tax rate of 7.5 per cent on payments of interest, rent, royalties and dividends. While Nigeria's double taxation treaties mostly employ the credit method for the elimination of double taxation, a few treaties also employ the exemption method.

iv Taxation on receipt

As a general rule, dividends, interest, rent and royalties brought into or received in Nigeria by a Nigerian company do not qualify for a credit against Nigerian CIT in respect of foreign tax or withholding already suffered. Exceptions include when the income in question is liable to Commonwealth income tax or when the income is brought in from a country with a double taxation agreement with Nigeria that allows for such a credit. In an instance where a credit is not allowed, the ordinary treatment for these types of profits is to aggregate them with business profits subject to tax at the applicable rate of CIT (i.e., 30 per cent); however, such profits will be exempt from CIT if they are brought into Nigeria through a commercial bank.

VII TAXATION OF FUNDING STRUCTURES

Small and medium-sized businesses are predominantly funded by equity, as most businesses of this size do not have access to long-term debt. On the other hand, most large businesses, including foreign-owned companies, are predominantly funded by debt.

i Thin capitalisation

Nigeria does not have thin capitalisation rules. There are no restrictions on debt-to-equity ratios, although minimum equity capital requirements exist, mainly in the financial services sector. There are, however, anti-avoidance provisions under which the FIRS may disallow the deduction of interest and other financing costs that it deems not to be at arm's length.

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ii Deduction of finance costs

Generally, finance costs may be deducted, provided that the relevant test for deductibility of expenses is satisfied. However, as group relief or consolidation is not available, it will be difficult to push acquisition debt down to the target except by, for example, the acquisition financiers directly refinancing target company debt or a mechanism such as post-completion merger.

iii Restrictions on payments

A Nigerian company can only pay dividends out of distributable profits, namely, trading profits, revenue reserves and capital gains. A company shall not declare or pay dividends if its directors are of the opinion that doing so will leave the company in a position where it is unable to meet its liabilities as they fall due.

iv Return of capital

A company may cancel paid-up shares that it considers to represent excess capital and return such capital to its shareholders. A resolution for the cancellation of shares for purposes of returning capital, like all other procedures that reduce share capital, must, however, first receive court sanction. At the discretion of the court considering an application for reduction of capital, creditors of the company making the application may object to the reduction. Before making an order confirming a reduction of capital, the court must be satisfied that the consent of every creditor entitled to object to the reduction has been obtained, or that the debt owed to them has been discharged, determined or secured, and that the company's authorised share capital has not, by reason of the reduction, fallen below the statutory minimum.

A court order confirming reduction of capital must be registered with the Corporate Affairs Commission before it can take effect and repayment can be made. The return of capital using this procedure is tax neutral, because proceeds from a disposal of shares are not subject to either CIT or CGT.

VIII ACQUISITION STRUCTURES, RESTRUCTURING AND EXIT CHARGES

i Acquisition

Foreign companies acquiring interests in local businesses usually avoid doing so through a local vehicle, unless the circumstances demand it. Instead, most foreign investors prefer to use an investment vehicle located offshore, usually in a low tax or double taxation treaty country.

It is quite common for acquisitions of this type to be funded by debt or by portfolio investments. Consideration payable to local sellers is usually structured as a cash payment for shares in the local entity. This structure is tax neutral.

ii Reorganisation

Mergers and other corporate reorganisations that involve the exchange of shares or cash payment for shares are tax neutral. CGT may be payable where a reorganisation involves the payment of cash for assets.

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iii Exit

A foreign investor wishing to liquidate an investment in a Nigerian company may do so by winding up the business or selling its shares in the business. Capital returned in the process of winding up and proceeds from the sale of shares will not be subject to tax in Nigeria.

IX ANTI-AVOIDANCE AND OTHER RELEVANT LEGISLATION

i General anti-avoidance

Various tax laws contain general anti-avoidance provisions. These provisions allow the FIRS to make necessary adjustments to counteract the reduction in tax that would result from transactions it considers artificial. The FIRS may deem any transaction to be artificial if it finds that its terms have in fact not been effected or, where it is a transaction between related parties, if its terms do not reflect arm's-length dealings.

ii Controlled foreign corporations (CFCs)

There are no rules relating to controlled foreign corporations. There is legislation that empowers the tax authorities to tax undistributed profits of a company where the company is controlled by five persons or fewer.

iii Transfer pricing

The Income Tax (Transfer Pricing) Regulations provide guidance in the application of the arm's-length principle in related-party transactions. The Regulations allow related parties to adopt any of a number of listed methods as a basis for pricing of controlled transactions. The methods are:

a the comparable uncontrolled price method;
b the resale price method;
c the cost-plus method;
d the transactional profit split method; and
e the transactional net margin method.

With the approval of the FIRS, a method outside of those listed above may be used. The Regulations also allow for advance pricing agreements with the FIRS. The Regulations are to be applied in a manner consistent with the OECD guidelines and the UN manual on transfer pricing.

Companies are obliged to prepare documentation to verify the pricing of every related-party transaction, which may be requested by the FIRS. A transfer pricing declaration form must also be appended to annual tax returns.

iv Tax clearances and rulings

There are no provisions authorising the FIRS to give tax rulings. In practice, the FIRS does issue circulars and opinions regarding the tax treatment of contentious issues. However, such circulars and opinions have been held to be non-binding.

It is also not possible to obtain an advance ruling from the courts. In Nigeria, the courts will refuse to hear an action based on hypothetical or academic issues. Consequently, the only means of ascertaining the position of the law is to institute an action when a dispute arises between a company and the tax authority.

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The parties to a merger, takeover, or other corporate reorganisation involving the transfer of business undertakings or assets must obtain directions from the FIRS as to the value at which assets will be transferred. The parties must also obtain clearance from the FIRS in respect of any CGT resulting from the transaction.

X YEAR IN REVIEW

Owing to the dwindling revenue from oil, the tiers of government have increased focus on raising revenue through taxes. In 2015, the withholding tax rate for building and construction was reduced from 5 to 2.5 per cent in respect of companies by the then minister of Finance. In 2016, her successor revoked this reduction, and reversed the withholding tax rate for building and construction to 5 per cent. This reversal was gazetted on 23 November 2016 with an effective date of 9 November 2016. This revocation was a result of the increased drive for revenue from non-oil sources.

In February 2017, the Nigerian Federal Executive Council (FEC) approved the National Tax Policy, which among others things, prescribed the following recommendations regarding taxation in Nigeria:

a promoting tax culture;
b improving tax compliance;
c curbing tax evasion; and
d widening the tax net as well as improving the tax to Gross Domestic Product (GDP) ratio as core objectives.

In furtherance of the foregoing, the presidency issued an executive order in June 2017 ordering the Federal Ministry of Finance to set up the Voluntary Assets and Income Declaration Scheme (the Scheme). The Scheme is primarily targeted at persons and entities that have been defaulting in the payment of their taxes, and seeks to bring them within the tax net. The scheme provides a time frame of nine months for persons who have defaulted in paying their taxes to declare their assets and income derived from sources both within and outside Nigeria for the preceding six years. For the declaration of assets and income to be valid, it has to be voluntary, complete and verifiable. The Scheme is accessible to persons and entities who are registered taxpayers but have hitherto failed to make full disclosure of their income to the tax authorities or are registered but have not been filing their tax returns. The Scheme is also applicable to persons and entities who have been underpaying or under-remitting their taxes; persons who are under a process of tax audit or investigation with the relevant tax authority as well as persons and entities currently engaged in tax disputes with the tax authorities and are prepared to settle. The Scheme covers all taxes administered by the FIRS as well as those administered by all state boards of internal revenue. These taxes include companies' income tax, personal income tax, petroleum profits tax, capital gains tax, value added tax, tertiary education tax and NITDA levy.

In its bid to increase foreign direct investment into Nigeria, the FEC, in August 2017, lifted the suspension placed on the processing of pioneer status applications and recommended the addition of 27 industries to the existing pioneer status list, and recommended the removal two industries – mineral oil prospecting and the manufacture of cement – from the list. In the same month, August 2017, the Federal Ministry of Industry, Trade and Investment issued new Application Guidelines for Pioneer Status Incentive (the Guidelines). The Guidelines highlight the considerations for the issuance of Pioneer Status Incentive (PSI) to applicant

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companies as well as the modes of applying for a new PSI or extension certificate. It also outlines the time frames for processing such applications and the obligations of beneficiary companies. PSI exempts qualifying industries from the payment of income tax for an initial period that may be renewed for a maximum additional term of two years.

The federal government of Nigeria also took further steps in pursuance of its objective to curb tax evasion, widen the tax net and improve the tax to GDP ratio when in August 2017, it signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) and the Common Reporting Standard Multilateral Competent Authority Agreement (CRS MCAA). The aim of the CRS MCAA is to implement the automatic exchange of financial account information pursuant to the OECD/G20 Common Reporting Standard (CRS), which would drive delivery of the automatic exchange of information between 101 jurisdictions by 2018. The MLI allows the signatory jurisdictions to use results from the OECD/G20 BEPS Project, including minimum standards, to implement tax treaties in a manner that prevents treaty abuse and treaty shopping, into the jurisdiction's existing networks of bilateral tax treaties in a quick and efficient manner.

Again, the FIRS has integrated an online stamp duties collection portal into the online company registration portal to enhance tax administration. In addition, a tax identification number (TIN) is automatically generated electronically upon completion of the online company registration process.

Furthermore, the Stamp Duties Act (Amendment) Bill, 2017 was recently introduced to the House of Representatives and is undergoing legislative process. The Bill seeks to expand the scope of the extant Stamp Duties Act and address the current ambiguities in the law. The Bill will also legalise the payment of stamp duties on every deposit, whether by bank teller or electronically, above the stated threshold.

The Lagos State government has recently introduced a number of public notices to reiterate the inclusion within the tax net of certain employment-related and other personal income that had hitherto been regarded as being non-taxable by the populace.

The ongoing attempt by the legislature to pass the Petroleum Industry Bill (PIB) continues to be watched closely. The PIB has been under debate for several years, with most international oil companies being apprehensive about what effect it will have when passed. Ahead of the passage of the PIB, the FEC in July 2017 approved a national petroleum policy that, *inter alia*, outlines the fiscal initiatives of the government in the petroleum industry. The policy highlights that the current Associated Gas Framework Agreement (codified in Sections 11 and 12 of the Petroleum Profits Tax Act) allows associated gas and non-associated gas costs to be recovered from oil income, which has led to a number of distortions including discrimination against non-oil investors; incentivising oil companies to build gas infrastructure for fiscal reasons and discouraging infrastructural development in the gas sphere. Consequently, a new fiscal policy and framework is proposed for the Nigerian petroleum sector that will be shaped by the fiscal rules of general application. Under this framework, gas will be developed based on its own economics and will not be dependent on, or consolidated against, oil taxation.

The VAT Act imposes VAT on the supply of all goods and services other than those goods and services expressly stated to be exempt in the Act. The Act also requires the supplier to register with the FIRS before it can charge or collect VAT, which will be remitted to the FIRS. Where a non-resident supplier 'carries on business in Nigeria', the Act requires the supplier to register for VAT and charge VAT on its invoice, while placing the obligation of

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remitting the tax on its Nigerian customer. The Tax Appeal Tribunal (TAT) attempted to provide some clarification on this question. However, the point appears to remain unsettled, as the position taken by two different panels of the TAT on the issue seems to have created a conflict. In one case, the TAT decided that since a non-resident supplier contracting with a Nigerian company is not necessarily carrying on business in Nigeria, such company is not obliged to register for or charge VAT, and the Nigerian customer is not obliged to remit VAT to the FIRS where the supplier does not issue a tax invoice. In another case, a different panel of the TAT took the view on the basis of the 'destination principle' that, since the service in question – the supply of bandwidth capacities – was consumed in Nigeria, its supply was subject to VAT in Nigeria, notwithstanding that it was supplied outside Nigeria by a foreign supplier.

Also worth noting in relation to the VAT Act is that it exempts exported goods and services from the imposition of VAT. 'Exported service' is defined in the VAT Act to mean a 'service performed by a Nigerian resident or a Nigerian company to a person outside Nigeria'. The FIRS, however, holds the view that an exported service means a service performed by some person or company residing in Nigeria to a person outside Nigeria. Thus, the service supplier must be resident in Nigeria, while the service consumer must be outside Nigeria. Consequently, the FIRS' position is that services performed and consumed in Nigeria on the order of non-resident persons do not qualify as exported services. Until this view is tested judicially, it remains unclear what the correct position is.

Other unresolved issues with regard to the implementation of existing legislation include the following:

a the CITA sets out rules for taxation of a new trade or business that can result in double taxation of a company's profits in its first three accounting years;

b to be deductible, management fees or expenses relating thereto must be approved by the Minister of Finance, while any expenses incurred outside Nigeria are deductible only to the extent allowed by the FIRS;

c demergers or reorganisations are not tax-neutral, so there is a disincentive for companies within a group to transfer assets between each other;

d tax authorities have taken the view that losses from one line of business cannot be offset against profits from other lines of business of the same company; and

e VAT is expected to be paid even when the taxpayer has not received payment for goods or services supplied, resulting in a cash flow challenge. A solution is for the tax authorities to collect these taxes on a cash basis instead of on an accrual basis.

Where a Nigerian parent or holding company redistributes dividends that it has received from a subsidiary, or where any company distributes profits from previous years, the distribution may be subject to further CIT even though such distribution arises from profits from which CIT had already been deducted. The TAT has upheld this interpretation of the law, although it is noteworthy that the lack of evidence by the Nigerian company to reflect that the dividends were paid from retained earnings that had already been subjected to tax was responsible for the decision taken by the TAT in that case.

There are penalties and interest for failing to file a return on time or at the end of an extension. For purposes of 2017 taxes, the FIRS announced that the interest rate on unpaid taxes is 5 per cent over the Central Bank of Nigeria's monetary policy rate (MPR). The Central Bank of Nigeria's MPR is currently at 14 per cent, and the penalty rate remains 10 per cent.

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XI OUTLOOK AND CONCLUSIONS

Although Nigeria has been described as a gas state with proven reserves of 188 trillion cubic feet of gas and an enviable position as the ninth-largest gas reserves holder in the world, minimal efforts had hitherto been made by the federal government to give priority consideration to the exploitation of gas and the development of critical gas infrastructure. In June 2017, however, the federal government approved the new national gas policy, which articulates the policy goals, strategies and implementation plan of the federal government of Nigeria to transition Nigeria from a crude oil export-based economy to a gas-based industrial economy.

The implementation of the CRS MCAA by Nigeria, which would enable the automatic exchange of financial account information, would significantly aid in curbing tax evasion and unintended non-taxation,

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Appendix 1

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Theophilus I Emuwa is a partner at ÆLEX and head of the firm's tax practice. He studied engineering at Imperial College London before qualifying as a barrister in England and then qualifying to practise in Nigeria and in Ghana. He has more than 25 years of corporate and commercial law experience, and is widely recognised as one of Nigeria's leading tax practitioners. His practice extends to advising on direct as well as indirect taxes, including personal income tax, companies' income tax and petroleum profits tax issues as well as VAT, capital gains tax, customs duty and stamp duty. His practice also covers tax appeals.

He is currently the chair of the tax committee of the Section on Business Law of the Nigerian Bar Association, and a fellow of the Chartered Institute of Taxation of Nigeria (CITN). Mr Emuwa served as the vice chair of the Tax Law Review Committee of the Institute. He contributed the chapter on international taxation in the CITN *Nigerian Tax Guide and Statutes*. He was formerly the deputy editor of *Nigerian Tax Notes*.

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ISBN 978-1-912228-09-6

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