AN OVERVIEW OF THE ROAD INFRASTRUCTURE AND REFURBISHMENT INVESTMENT TAX CREDIT SCHEME

JULY 2019

INTRODUCTION

The President of the Federal Republic of Nigeria, Muhammadu Buhari, recently signed an executive order titled: "Road Infrastructure Development and Refurbishment Investment Tax Credit Scheme Order 2019 No.: 007 of 2019" ("the Order").

The Order establishes a ten (10) year scheme known as the Road Infrastructure Development and Refurbishment Investment Tax Credit Scheme ("the Scheme") which seeks to encourage Public-Private Partnership intervention in the construction/refurbishment of road infrastructure projects in Nigeria.

The private participants of the Scheme provide the funds for the construction/refurbishment projects and in exchange, the participants are entitled to recoup the funds provided, as a credit against Companies Income Tax to be paid.

The credit to be issued in the Scheme has legal basis in section 23(2) of the Companies Income Tax Act 2011 ("CITA") as it grants the President the power to exempt any company or class of companies from all or any of the provisions of CITA or exempt all or any profits of any company or class of companies from tax, on any ground the President deems sufficient.

OVERVIEW OF THE SCHEME

The Scheme focuses on the development of roads by leveraging on private sector funding for the construction/ refurbishment of eligible road infrastructure projects in Nigeria.

The participants in the Scheme are guaranteed timely and full recovery of funds used for the construction/ refurbishment of eligible road infrastructure projects through a tax credit.

The roads eligible for the Scheme ("Eligible Roads") are to be approved by the President, on the recommendation of the Minister of Finance, and published in the official Gazette of the Federal Republic of Nigeria.

The following entities[1] may participate in the Scheme:

- A company or corporation, other than a corporation sole, established under the Companies and Allied Matters Act, Chapter C20, Laws of the Federation of Nigeria 2004 ("CAMA");

- A pool of companies operating through a special purpose vehicle (SPV) registered with the Securities and Exchange Commission ("the SEC") and set up solely for managing the funds received by the pool of companies for the construction or refurbishment of any Eligible Road. The SPV must be represented by a fund manager duly registered with the SEC; and

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- Institutional investors such as pension fund administrators, collective investment schemes and investment banks.

ADMINISTRATION OF THE SCHEME

The Order gives the responsibility of implementing and administering the Scheme to the Road Infrastructure Development and Refurbishment Investment Tax Credit Scheme Management Committee ("the Committee").[2]

The Committee is to be chaired by the Minister of Finance with the Minister for Works serving as Deputy Chairman. The Secretary to the Committee is the Permanent Secretary of the Federal Ministry of Finance.

Some of the functions of the Committee include:[3]

- Facilitating the publication of a list of Eligible Roads, as Gazetted by the Federal Ministry of Justice, within fourteen (14) days from the date on which the President approves inclusion of a road project as an Eligible Road pursuant to the Scheme; facilitating publication by the Ministry responsible for Works, the design and specification of Eligible Roads; facilitating the publication of a list of documentation to be submitted by an applicant to be registered as a participant in the Scheme, along with the Project Cost and Completion Timeline bid.

- Reviewing and evaluating applications submitted by any company, or pool of companies operating through a Fund Manager or representative and institutional investor to participate in the Scheme;

- Registration of participants in the Scheme pursuant to the execution of the appropriate Memorandum of Understanding executed between the relevant participants and the Minister of Finance.

[1] Paragraph 5 of the Order.
[2] Paragraph 1(4) of the Order.
[3] Paragraph 2(3) of the First Schedule to the Order.

THE ROAD INFRASTRUCTURE TAX CREDIT

The Scheme provides for the Road Infrastructure Tax Credit. The Road Infrastructure Tax Credit will be used to offset a company's income tax ("CIT").

It comprises the cost that is certified by the Committee as wholly, reasonably, exclusively, and necessarily incurred by a company for constructing or refurbishing an Eligible Road ("the Project Cost") and an amount that is equivalent to the prevailing Monetary Policy Rate ("MPR") of the Central Bank of Nigeria plus two percent (2%) of the Project Cost.[4]

The Road Infrastructure Tax Credit which can be claimed in any year of assessment is limited to fifty percent (50%) of the annual CIT liability. There is however no limit to the tax credit which can be claimed in respect of an Eligible Road in an 'Economically Disadvantaged Area.'

The President, on the advice of the Minister of Finance, is required to designate an area as economically disadvantaged having regard to the following:
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- the average income level of the inhabitants of the area;

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- the available infrastructure (water, electricity, sewage, etc.) in the area; and
- the volume and nature of the economic activity undertaken in the area.

The Road Infrastructure Tax Credit, which must be claimed in the annual tax returns of a participant, may be carried forward until fully utilised.

A participant will not be entitled to claim, in addition to the Road Infrastructure Tax Credit, any other tax credit, capital allowance, relief or incentive in respect of the Project Cost.

Notably, the Order permits a participant to appoint a company termed as beneficiary to utilise the whole or part of its Road Infrastructure Tax Credit.

This is however subject to informing the Committee of any such sale or transfer and obtaining the Committee's approval.
For the Road Infrastructure Tax Credit to be valid for use by the participant or beneficiary, the Federal Inland Revenue Service ("the FIRS") must issue a Road Infrastructure Tax Credit Certificate ("the Certificate") to a participant (or beneficiary) annually, upon approval by the Committee.

The Road Infrastructure Tax Credit becomes valid for use by a participant or a beneficiary once he receives the Certificate from the Committee.

[4] Paragraph 2(2) of the Order.

The whole or part of the Certificate may be registered as a tradable instrument on a Relevant Stock Exchange[5] with the approval of the Committee.

The Order provides that the Road Infrastructure Credit may qualify as an asset and thus, any gains or losses arising on the disposal of a Road Infrastructure Credit will be subjected to tax as prescribed by the applicable tax legislation.[6]

The applicable tax in this instance would be Capital Gains Tax as prescribed by the Capital Gains Tax Act, Chapter C1, Laws of the Federation of Nigeria, 2004.

Also, the President has the power to amend the Order from time to time as may be deemed necessary.

OUR THOUGHTS

The Scheme, if properly implemented, has the potential to improve Nigeria's road infrastructure. It may also allow the goverment to utilise public funds on other sectors of the economy apart than roads.

We note that the Order does not indicate the criteria for selecting Eligible Roads and participants that would construct or refurbish an Eligible Road. We also note that the Order does not provide a dispute resolution mechanism, especially in respect of determining Project Cost.

Furthermore, when compared to returns on other investments, it is doubtful whether the Monetary Policy Rate (MPR) – currently 13.5% – plus 2% is sufficient return on Project Cost, especially for companies for which an Eligible Road would not positively improve their operations and grow their businesses.

To ensure that the attractiveness of the Scheme is not diminished, it is imperative that the Scheme is constantly reviewed to address the grey provisions of the Order and address any stakeholder concern arising from the implementation of the Scheme.

[5] Paragraph 4(7)(9) of the Order.
[6] Paragraph 4(12) of the Order.

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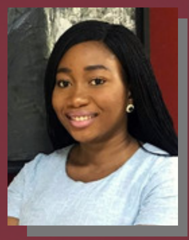
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