EIGHT UNANSWERED QUESTIONS ARISING FROM THE FINANCE ACT 2019

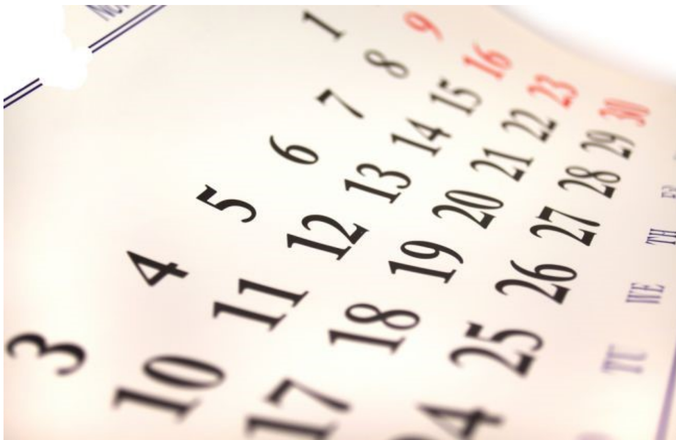
Background

The Finance Act, 2019 was enacted into law on 13th January, 2020 with the objectives of reforming Nigerian tax laws to align with global best practices, support small businesses in line with the ongoing ease of doing business reforms; and raise revenue for government amongst other laudable objectives. The Finance Act made sweeping changes to the provisions of the Companies Income Tax Act ("CITA"), Value Added Tax Act ("VAT Act"), Petroleum Profit Tax Act ("PPTA"), Stamp Duties Act, Personal Income Tax Act ("PITA"), Capital Gains Tax Act ("CGT Act") and Customs, Excise Tariff, Etc. (Consolidation) Act.

Within less than three (3) months of the Finance Act coming into effect, some issues have arisen, and unanswered questions have been thrown up with respect to the application of the provisions of the Finance Act in everyday business transactions. Some of these issues and unanswered questions will require clarification.

This article examines eight (8) critical issues that have been thrown up by the provisions of the Finance Act 2019 which should be noted by investors, tax professionals, analysts and the tax authorities.

1. Commencement Date: The Finance Act was published with a commencement date of Monday 13th January 2020 being the date it was signed into law by President Muhammadu Buhari. However, the Act was gazetted (i.e. a legal process of formalizing an enacted legal instrument) in February, 2020 and made publicly available in the same February 2020 meaning it is technically retroactive. On the other hand, there was a media publication where the Federal Minister of Finance gave a directive that the new Valued Added Tax ("VAT") rate of 7.5% will be effective from 1st February 2020. To the extent this ministerial directive was not gazetted, it does not override or amend the commencement date as published in the gazetted copy of the Finance Act. The question that then arises is what the tax treatment will be for transactions that took place between the 13th of January and February 2020. Will the Federal Inland Revenue Service ("FIRS") require that returns be filed using the new VAT rate of 7.5% from 13th January? What options are available to businesses that only charged VAT at 5% up until 1st February 2020? Will the doctrine of legitimate expectation which is a natural justice principle that protects the interest of persons when a public authority rescinds from a representation made to such persons avail these taxpayers that have acted in accordance with the ministerial directive and not in accordance with the Finance Act?



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2. Recovery of Input VAT: Manufacturers, wholesalers, retailers are required to pay VAT (otherwise called input VAT) on their purchases and charge VAT (otherwise called output VAT) when selling their goods. Where the output VAT is greater than the input VAT, they will be required to remit the difference to the FIRS. On the other hand, where the input VAT exceeds the output VAT, FIRS will refund the difference to these persons. However, the Finance Act has expanded the list of items and goods that are now VAT-exempt. The

implication of this is that manufacturers, wholesalers, retailers will no longer charge output VAT on their products while they may have incurred input VAT when purchasing these goods before they became VAT exempt. The critical questions here are what options are available to these businesses to recover the input VAT they have incurred considering that they can no longer charge output VAT on these items and make the necessary adjustments to their output and input VAT to recover their input VAT? Can they apply to the FIRS for a refund of the VAT or will they be allowed to expense the input VAT in their profits and loss account/financial statements? This is because section 17(2)(a) of the VAT Act provides that only input VAT incurred in the provision of services, as overheads and general administration of any business can be expensed through the profit and loss accounts.

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3. Recovery of Input VAT 2: Similar to 2 above, the Finance Act provides that businesses with a turnover that is less than N25,000,000 are not required to charge, collect, or remit VAT to the FIRS. However, these businesses are required to pay input VAT when purchasing goods. There is no indication as to how these businesses can reclaim the input VAT incurred for the purchases since they are not allowed to charge output VAT and make the necessary VAT adjustments.

4. Significant Economic Presence: Pursuant to the Finance Act, the provision of digital goods and services, management, technical or advisory services from an offshore location by a Non-Resident Company (NRC) to customers in Nigeria will trigger a taxable presence for such NRC in Nigeria where the NRC is deemed to have "significant economic presence" in Nigeria as determined by the Finance Minister. There is currently no indication of what will amount to significant economic presence. We suspect that the Finance Minister will set a threshold using a monetary sum in Naira or USD. This model of setting a monetary sum as a threshold has been suggested by the Organisation for Economic Co-operation and Development and, more recently, adopted by France albeit with a different threshold that was negotiated by other countries.

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5. Companies Income Tax (CIT) and Small Companies: A small company which is defined in the Finance Act as a company that earns gross turnover of N25,000,000 or less is now exempt from CIT. Given that they are not liable to pay CIT, it follows that their income will not be subject to withholding tax which is essentially not a different type of tax but rather an advance payment of CIT. In other words, contracting counterparties will not be required to withhold tax when dealing with small companies. However, the Finance Act does not provide any indication of what will suffice as proof to these contracting counterparties that the entities are indeed small companies. For instance, would a letter signed by the company declaring its status as a small company suffice for the benefit of the counterparty who did not withhold tax?

6. Application of VAT on Bonds and other Securities: Prior to the enactment of the Finance Act, there was the debate on whether the issuance of bonds and other types of securities were transactions that were liable to VAT given that such securities do not qualify as goods or services upon which VAT is payable under the VAT Act. In 2011, the VAT (Exemption of the Proceeds of the Disposal of Government and Corporate Securities) Order 2011 ("Exemption Order") was issued by the Finance Minister exempting such securities transactions from VAT. Some analysts queried the relevance of this Exemption Order as bonds and securities were not considered as "goods" or "services". Thus, in effect, the view that was held was that the Exemption Order did not operate to exempt bonds or securities from VAT as they were not considered to be goods or services.

However, this question on whether bonds and securities are liable to VAT has now been affirmatively answered by the Finance Act. The Finance Act defines "goods" to include intangible products, asset or property over which a person has ownership or rights, or from which he derives benefits, and which can be transferred from one person to another. By this definition, bonds and securities may now be categorized as "goods" - under the intangible products category.

There is the question of whether with the advent of the Finance Act and the expansion of the meaning of "goods" for which VAT is to be charged, the Exemption Order has been repealed such that VAT will be payable on such security transactions. To the extent that the Finance Act does not expressly contain any provision that repeals the Exemption Order, it will remain valid until its end date on 1st January 2022.

7. Stamp Duty: The Stamp Duties Act requires every instrument/document liable to stamp duty to be duly stamped within 30 or 40 days (as the case may be) upon its execution in Nigeria or after *it has been first received in Nigeria.* Also, the Finance Act has expanded the meaning of an instrument/document to include electronic instruments/documents. A couple of questions arise from this: (1) Do the tax authorities have the capacity to stamp electronic documents electronically? (2) Will the receipt by email of a document executed outside Nigeria amounts to receipt of an electronic document for the purpose of determining the 30-or-40 day timeline? (3) Will the timeline for stamping a document received by email start to count from the date the email was received or when the physical document is received in Nigeria?

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8. Payment of Excise Duty on Imports: Typically, excise duty is payable on goods manufactured within a country while customs/import duty is payable on goods imported into a country. However, the Finance Act has amended section 21 of the Customs, Excise Tariff, Etc. (Consolidation) Act such that all goods manufactured and imported into Nigeria will be subject to excise duty save for permitted exceptions. It would appear that the purpose of this amendment is to incentivize and encourage local manufacturing of products such that the products will be competitive in pricing when compared to the imported versions. However, considering that import and excise duties are similar type of taxes, wouldn't the payment of both taxes on the same imported product amount to double taxation? Will the government offer either a reduced import duty rate or reduced excise duty rate on items that have been subjected to both taxes and will a tax credit be given to persons that have incurred both taxes?

Conclusion

The Finance Act is indeed a commendable piece of legislation given the huge incentive it offers to the players in several sectors of the Nigerian economy like the insurance companies, small and medium-sized enterprises amongst others. It is expected that government and the tax authorities will take steps to address the issues highlighted above with a view to creating a fiscal regime that its clear, transparent and one that aids planning by investors. It is largely expected that the FIRS will issue guidelines in relation to the implementation of the provisions of the Finance Act. In the long run, we expect to see further amendments and introductions with the other versions of Finance Bills to be passed along with each Appropriation bill for each fiscal year.

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