Analysing the Impact of the Finance Act 2023 and the Finance Act (Effective Date Variation) Order, 2023

Since 2019, the Nigerian Federal Government ("FG") has annually enacted Finance Acts into law to support the annual budgets for the respective fiscal years, drive the macroeconomic policy reforms of the Federal Government and bring the tax laws in sync with modern realities amongst other objectives.

In this regard, the Finance Act 2023 ("the Act") was signed into law by Nigeria's former President, Muhammadu Buhari, on 28th May 2023 before exiting office on 29th May, 2023. The Act amends the Capital Gains Tax ("CGT") Act; Companies Income Tax ("CIT") Act; Customs Excise Tariff Etc. (Consolidation) Act; Personal Income Tax ("PIT") Act; Petroleum Profits Tax Act ("PPTA); Value Added Tax ("VAT") Act; Stamp Duties Act; Tertiary Education Trust Fund (Establishment Etc.) Act; Ministry of Finance (Incorporated) Act, Corrupt Practices and other Related Offences Act, Public Procurement Act and the Ministry of Finance (Incorporated) Act.

However, President Bola Tinubu on 6th July, 2023 signed four different Executive Orders, including the Finance Act (Effective Date Variation) Order (the "Executive Order) which suspends the Finance Act 2023 by deferring the date of its commencement from 28th May 2023 to 1st September, 2023.

This article examines the key amendments introduced by the Finance Act 2023 as well as the legal effect of the Executive Order on the Act.

KEY HIGHLIGHTS OF THE FINANCE ACT 2023

Capital Gains Tax Act

1. The Finance Act 2023 expands the provision of chargeable assets under the CGT Act to include digital assets. Thus, digital assets such as cryptocurrency and non-fungible tokens ("NFT") are now clearly included as assets liable to CGT in Nigeria.

2. Section 5 of the CGT Act is amended to enable taxpayers to deduct capital loss from their chargeable gains from the disposal of other assets within the same asset class. Capital losses can also be carried over yearly to be deducted from future chargeable gains on disposed assets within the same asset class. However, such losses can only be carried forward for a maximum of five years from the year the capital loss was incurred.

3. Section 4 of the Act amends the provisions of the Finance Act 2021 by expanding the qualifying assets for roll-over relief to include shares and stocks. However, the proceeds must be reinvested within the same year of assessment.

Companies Income Tax Act

1. There is now a requirement for international shipping and air transport companies to submit a comprehensive gross revenue statement of their Nigerian operations if they had failed to provide audited financial statements when making companies income tax returns. The gross revenue statement is required to be endorsed by a director and an external auditor.

2. Regulatory agencies for the shipping, air transport and other relevant sectors are now mandated to request from businesses within these sectors, evidence of income tax filing for the preceding year and tax clearance certificates showing income tax payments for three preceding tax years. Providing these documents are now prerequisites for carrying on business in Nigeria and obtaining relevant approvals and permits from the agencies.

3. Repeal of the Reconstruction Investment Allowance previously granted to companies that incurred capital expenditure on plant and equipment. Nonetheless, the allowance remains applicable to capital expenditure incurred before the effective date of the Act as those companies qualified for the benefit before the repeal.

4. The Act under Section 7 repeals the Rural Investment Allowance previously granted to companies that incurred capital expenditure on the provision of electricity, water, or tarred road for the purpose of a trade or business which is located at least 20 kilometres away from such facilities provided by the government. However, the allowance remains applicable to such capital expenditure incurred prior to the effective date of the repeal.

5. The Act repeals the 25% tax exemption on income in convertible/foreign currencies generated by hotels from tourists which are put in reverse funds for expansion purposes within 5 years of creating the reverse funds. However, the exemption remains in force for such reserve funds already set aside until the funds

are fully utilized or the 5 years period lapses.

6. The Act amends the restriction imposed on companies (with the exception of agricultural and manufacturing companies) that prevents them from claiming capital allowance in an amount that exceed two-third of their assessable profits. With the amendment, upstream and midstream oil and gas companies have been included in the category of agricultural and manufacturing companies that claim 100% capital allowance in any year of assessment.

Customs, Excise, Tariff etc (Consolidation) Act

1. The introduction of a 0.5% levy on goods imported from outside Africa to finance the Federal Government's contribution to multilateral organisations such as the African Union, African Development Bank, African Export-Import Bank and the United Nations.

2. Excise duties to be paid on all services including telecommunication services provided in Nigeria, at the rate to be set by the President in accordance with provisions of the Customs, Excise, Tariff Etc. (Consolidation) Act.

Personal Income Tax Act

1. Insurance premium paid by an individual on his life or the life of his spouse, or contract for a deferred annuity on his life or the life of his spouse are allowable deductions for PIT purposes provided that any portion of the deferred annuity withdrawn before the end of 5 years will be liable to tax.

Petroleum Profits Tax Act

1. Amendment to the interpretation section of the PPTA by including the definition of the "Commission" (i.e. the Nigerian Upstream Petroleum Regulatory Commission) as a regulator, to align it with the definition provided under the Petroleum Industry Act 2021.

2. Section 23 of the PPTA which provides for the circumstances when additional tax will be payable by a petroleum company has been amended to appropriately align the PPTA with relevant provisions of the Petroleum Industry Act, 2021.

3. Tax deduction for decommissioning and abandonment expenses approved by the Nigerian Upstream Petroleum Regulatory Commission.

4. Introduction of fines for non-compliance with regard to the delivery of accounts and particulars to Federal Inland Revenue Service (FIRS) by upstream companies. Based on the new provision, a penalty of N10,000,000 will be payable by a defaulting company on the first day the failure to make the filings occurs and N2,000,000 for each subsequent day the failure continues, or any other sum as may be prescribed by the Minister of Finance.

5. The Act increases the penalty payable by a person for non-compliance with the provisions of the PPTA where no other penalty is specifically provided for as follows: N10,000,000 administrative penalty payable in the first instance and a further administrative penalty of N2,000,000 for each subsequent day the default continues, and any other sum as may be prescribed by the Minister of Finance.

Furthermore, where such a person is tried in court and convicted, he/she will be liable to a fine of N20,000,000 or to such other sum as may be prescribed by the Minister of Finance through an order; or to imprisonment for 6 months; or to both fine and imprisonment.

6. Increase in penalty for making, without reasonable excuse, incorrect accounts, preparation of incorrect schedule or statement, or giving false or misleading information on matters affecting tax liability to a N15,000,000 administrative penalty or 1% of the tax amount undercharged, whichever is higher.

7. Increase in penalty for knowingly making any false statement or representation or aiding or inciting another to do so to gain a tax advantage is a N15,000,000 penalty or 1% of the liable tax amount, whichever is higher.

Stamp Duties Act

1. Allocation of 35% share of the Electronic Money Transfer Levy receipts to the Local Governments, 50% share to State Governments, and 15% to the Federal Government and the Federal Capital Territory, Abuja.

Value Added Tax Act

1. The Act empowers the FIRS to adjust any transaction which in its opinion is artificial or fictitious so as to counteract the reduction of the liability of the transaction to VAT as effected by the parties.

2. Persons appointed by the FIRS to withhold and collect VAT from counterparty transactions will now be required to account and remit the VAT on or before the 14th day of the following month and no longer the 21st day.

3. Taxable goods purchased from an electronic/online platform operated by a non-resident supplier that has been appointed by FIRS as its collection agent and imported into Nigeria will not be subject to further VAT upon the clearance of such goods provided that the evidence of the registration or appointment of the non-resident supplier and such other documents as may be required by the FIRS are shown at the point of clearing the goods.

Tertiary Education Trust Fund (Establishment Etc.) Act

1. The tax rate of the tertiary education tax has been increased from 2.5% to 3% of the assessable profits of Nigerian companies, other than small companies as defined under the Companies Income Tax Act.

COMMENTARIES AND MATTERS ARISING

The Executive Order

With regard to the Executive Order issued by President Bola Tinubu suspending the commencement of the Finance Act to a later date, it should be noted that Nigeria operates a constitutional democracy with the doctrine of separation of powers amongst the three arms of government (i.e. the Legislature, the Executive and the Judiciary) rigidly enshrined respectively in sections 4, 5 and 6 of the 1999 Constitution of the Federal Republic of Nigeria, 1999 as amended (the "Constitution"). Section 4 of the Constitution confers on the Legislature (i.e. the National Assembly), the power to make laws for the peace, order and good government of the Federation while the Executive arm of the government headed by the President is conferred with the power to implement the law so enacted by the National Assembly. The involvement of the Executive arm in the legislative process is limited to the President assenting to the Bills duly passed by the National Assembly and enacting subsidiary legislation where so empowered by an Act of the National Assembly. Therefore, any amendment of any provision of the Finance Act by the President through an Executive Order

without an express provision in the law permitting such is ultra vires the powers of the President.

Be that as it may and irrespective of the constitutionality or otherwise of the Executive Order, the Executive Order embodies great provisions that will go a long way to ease some of the tax burdens on businesses and individuals currently gasping for survival due to the economic downturns. Also, we understand that the action of the President was taken in a bid to address concerns raised by stakeholders regarding recent tax changes and a response to the need for clarity in the tax law and to ensure compliance with the minimum of 90 days advance notice for tax changes as contained in the 2017 National Tax Policy.

Other Matters

While the government continues to push different policies to achieve the development of the rural communities in Nigeria such as the rural electrification agenda of the Rural Electrification Agency and financial inclusion policy of the Central Bank of Nigeria ("CBN"), the removal of the Rural Investment Allowance previously granted to companies that incurred capital expenditure on the provision of electricity, water, or tarred road on areas where these essentially amenities are lacking within 20 kilometres away from such amenities may discourage investors (particularly isolated mini-grid developers) from investing in rural areas going forward.

The deduction for decommissioning and abandonment expenses will have a positive impact on the oil and gas industry, specifically the upstream companies. This incentive will enable companies to recover their expenses for decommissioning projects and aligns the PPTA with the PIA treatment of decommissioning and abandonment fund.

Furthermore, while the addition of a 0.5% customs levy on goods imported from outside Africa should lead to an increase in government revenue, the levy is expected to increase the cost of products from the affected countries and which may create an inflationary trend where the products are considered necessities. On the other hand, this action of the FG may also benefit locally produced competing products that can take advantage of the high cost of the foreign counterparts.

Similarly, the extension of the excise duty to “all services” would definitely increase the cost of provision of services and doing business in Nigeria. This has the potential of making Nigerian services non-competitive in the international scene. However, we observe that the extent of the impact depends on the excise duty rate set by the President.

In addition, the imposition of CGT on digital assets (specifically cryptocurrency) seems to codify the position of the law as obtainable in many countries to the effect that a person’s taxable income will generally be subject to the same tax rules regardless of whether they are obtained or earned legally or illegally. This is considering the prohibition placed by CBN on the facilitation of trade or transmission of cryptocurrencies through the Nigerian financial system.

CONCLUSION

In conclusion, the Act makes a number of critical amendments set to significantly change the landscape of tax laws in Nigeria and with mixed effects on the different sectors of the Nigerian economy. For instance, while upstream petroleum companies are conferred with some tax incentives, investors in cryptocurrency will see their tax exposure go up.

Overall, the provisions of the Act appear to be in line with satisfying its policy drivers of achieving tax equity, tackling climate change, facilitating economic growth, reforming tax incentives, and generating revenue.

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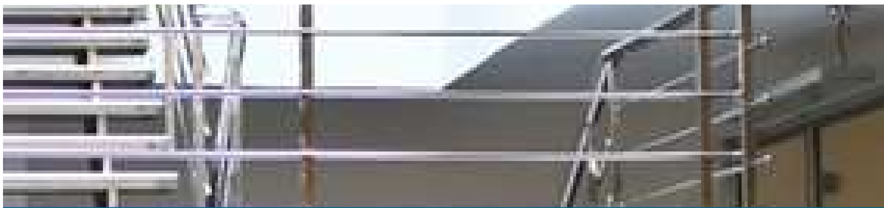

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