



Appointment of Non-resident Companies as Tax Agents and the Application of Turnover Tax on Incomes of Non-resident Digital Companies in Nigeria

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Introduction

On 31 December 2021, President Muhammadu Buhari signed the Finance Act 2021 into law. The Finance Act 2021 amended the provisions of 13 tax or fiscal laws. It introduced several changes to the above laws. However, this newsletter focuses on the appointment of non-resident digital companies – such as Amazon and others – as tax agents for the Federal Inland Revenue Service (the “FIRS”) and the imposition of turnover tax on the incomes of non-resident digital companies. The Finance Act, 2020 first introduced the appointment and registration of non-resident persons as tax agents for the FIRS. The Finance Act 2021 merely reiterated this principle; but it goes further to introduce the imposition of turnover tax on the earnings of non-resident digital companies.

Appointment of non-resident digital companies as tax agents

It must be noted that prior to the enactment of the Finance Act 2021, the Finance Act 2020¹ first provided for the registration and appointment of non-resident persons as tax agents for the FIRS. The Finance Act 2021 further reinforced this principle by requiring that non-resident persons could be appointed tax agents of the FIRS. In particular, the Finance Act 2021 shifts the primary responsibility of deducting and remitting VAT to non-resident suppliers. This responsibility can only revert to a Nigerian recipient of supplied goods and service when a non-resident supplier fails to discharge its obligation

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¹ See section 43 of the Finance Act 2020.

or does not have an appointed local representative for that purpose.² Prior to the enactment of the Finance Act 2020, Nigerian companies who were recipients of goods and/or services supplied by non-resident suppliers (“NRS”) were required to deduct and remit Value Added Tax (“VAT”) to the FIRS from the fees of NRS. But with the enactment of the Finance Acts 2020 and 2021 respectively, there are now two categories of persons that could be appointed FIRS’ tax agent with the responsibility of deducting and remitting VAT to the revenue house. The two classes of persons are: Nigerian recipients of goods and services supplied by non-resident suppliers, or **any person** appointed by the FIRS³. The phrase “any person” could be a non-resident supplier of goods and services to Nigerian residents. Thus, the Finance Act 2021 amends the VAT Act to authorise and/or mandate an agent to deduct and remit collected VAT to the FIRS within the statutorily permitted period. The implication of this is that the appointee or agent is enured with the primary obligation of deducting and remitting VAT to the FIRS⁴. Where such appointment is made, the Nigerian recipient of the goods or services is relieved from the obligation of deducting and remitting the said VAT to the FIRS – except in a situation where the person appointed fails to discharge its/his/her obligation.

Recently, the Minister of Finance (the “Minister”) indicated that the FIRS will appoint non-resident digital companies supplying goods or services to Nigerians as tax agents mainly for the purpose of collecting VAT from their Nigerian customers and remitting same to the FIRS.⁵ The Minister reiterated that the FIRS would work with non-resident digital companies, such as Amazon, to agree to be registered as tax agents with the revenue authority. For example, where Amazon renders digital services to individual customers, it (Amazon) is obligated to deduct and remit the appropriate VAT to the FIRS.

The amendment was introduced to address situations where a non-resident person supplies goods and/or services to Nigerian recipients who are unable to self-account for VAT – especially for Business to Customer (“B2C”) transactions where customers are not registered with the FIRS.

Although the Minister’s speech refers specifically to non-resident digital companies, it is important to note that on the authority of the Finance Act 2021, the FIRS can appoint any non-resident supplier of goods and services, either digital or not, to act as its tax agent.

Imposition of Turnover Tax on the Incomes of Non-resident Digital Companies

The Finance Act 2021⁶ amends Section 30 of the Companies Income Tax Act (“CITA”) by extending the imposition of turnover tax on the incomes of non-resident digital

² See section 30 of the Finance Act, 2021 and the newly amended Section 10(1) – (5) of the Value Added Tax Act.

³ Section 10(3) of the Value Added Tax Act as amended by section 30 of the Finance Act 2021.

⁴ Section 10(4) of the Value Added Tax Act as amended by section 30 of the Finance Act 2021.

⁵ <https://www.thecable.ng/fg-amazon-aliexpress-to-pay-6-tax-on-profits-made-from-nigerian-customers>.

⁶ See Section 8 of the FA 2021.

companies. These are companies involved in digital services in Nigeria. Apart from rendering digital services in Nigeria's online space, they are expected to have Significant Economic Presence⁷ in Nigeria. The companies' incomes attributable to their activities in Nigeria's digital space are subject to turnover tax if such non-resident digital companies produce no assessable profits or assessable profits which in the opinion of the FIRS are less than might be expected to arise from the activities of the non-resident digital companies or where the FIRS is unable to determine the assessable profits of the companies.

Prior to its amendment, Section 30 of CITA only allowed the FIRS to charge turnover tax on the incomes of non-resident companies attributable to Nigeria – with no extension to non-resident digital companies. This is invoked only when the FIRS is unable to determine the assessable profits of a non-resident company or a non-resident company produces no assessable profits or the assessable profits are in the opinion of the FIRS less than might be expected to arise from the activities of the company. This method of assessment is popularly known as the Best of Judgment Assessment (BOJ) – ie presumptive assessment. However, the imposition of the tax is required to be on a fair and reasonable percentage of a non-resident company's turnover for the period in question.

In practice, the FIRS adopts 20% as the fair and reasonable percentage of a non-resident company's turnover as the profits of the company. It then subjects the 20% to income tax at the rate of 30%. This results in an effective tax rate of 6%. Interestingly, the Finance Act 2021 now extends this turnover tax to the incomes of non-resident digital companies attributable to their activities in Nigeria – especially when FIRS is unable to determine the assessable profits of a non-resident digital company; or a non-resident digital company produces no assessable profits; or the assessable profit of a non-resident digital company is in the opinion of the FIRS less than might be expected to arise from its (non-resident company's) activities in Nigeria's digital space.

It is important to note that the amendment does not introduce a new head of tax to the existing taxes payable by companies; rather, it extends the reach of an already existing turnover tax to the incomes of non-resident digital companies.

In the present case, the Best of Judgment rule is usually applied where a non-resident company fails to file its income tax returns for a relevant year; and the FIRS is unable to determine the company's assessable profits. In order to avoid the BOJ rule, a non-resident company is advised to file its income tax returns with an audited financial statement of its Nigerian operations, the portion of profit derived from Nigeria and relevant tax computation schedules. This will enable the FIRS determine the non-resident company's assessable profits.

⁷ For the thresholds for determining the SEP requirements, see the *Companies Income Tax (Significant Economic Presence) Order, 2020*.

Enforcement and Allied Problems to the Turnover Tax and the Appointment of Non-resident Digital Companies as Tax Agents

While the policy goals of the Federal Government in appointing non-resident digital companies as tax agents and the extension of the turnover tax regime to non-resident digital companies appear sound, there are enforcement bottlenecks and retaliatory fall outs that may arise from international politics – especially from the US' quarters.

First, there are several questions that agitate the minds of stakeholders and observers of the Federal Government's policy to appoint non-resident digital companies as tax agents of the FIRS and the extension of turnover tax regime to non-resident digital companies. These questions include, but are not limited to: (a) In the face of an uncooperative non-resident digital company, how will the FIRS compel such company to act as its agent for the purpose of VAT deductions and collections? (b) For the purpose of levying a turnover tax, how will FIRS track such company's incomes attributable to Nigeria? (c) How prepared is Nigeria to engage the US in retaliatory economic sanctions and other punitive measures for daring to tax US companies doing business in Nigeria's digital space?

These questions and more are what should concern the Federal Government or its tax agency – the FIRS. It is difficult to see how the FIRS will effectively compel non-resident digital companies to act as its agents without the cooperation of the companies. This means that the moment a non-resident digital company refuses to cooperate with the FIRS, the policy will suffer a serious setback that may not be remedied locally. It is also difficult to see how the FIRS will determine the incomes of non-resident digital companies attributable to Nigeria for the purpose of imposing the turnover tax. Perhaps, it may be easy to trace the movements of money if all payments made by Nigerian recipients of goods and services supplied by non-resident digital companies are paid through Nigeria's banking systems. For instance, all electronic payments made through Nigeria-authorized payment systems may be tracked and accounted for. It is not the same when Nigerian residents with foreign-issued credit or debit cards pay for goods and services delivered in Nigeria. In addition, payments made through other channels not controlled by the Nigerian authorities cannot be monitored or accounted for if a non-resident digital company becomes recalcitrant and uncooperative.

Though with the efforts of the Organisation for Economic Co-operation and Development ("OECD") on the exchange of information (both automatic and on request), it is expected that countries can easily share information to expose cross-border businesses that are involved in tax evasions and abusive tax avoidance. This is only possible where there is international cooperation. Considering that digital earnings has upset the extant international tax rules and there is no global consensus on how to go about taxing digital companies, especially in the face of US' opposition and threat to retaliate against any country that taxes its digital companies, it is difficult to see how Nigeria will effectively tax US' digital giants operating in Nigeria's digital space. These companies are bolstered by the US' policy against foreign countries imposing digital taxes on them. It is expected that

non-resident digital companies of US origin are likely to oppose the extant FIRS' policy. It is also not clear how Nigeria intends to respond to likely US retaliatory measures. These are legitimate concerns that should agitate the minds of the FIRS and Federal Government's policy makers. A peaceable and effective taxation of digital businesses lies on bilateral or multilateral agreements and cooperation between or amongst countries. This is a path Nigeria must pursue for seamless enforcements of its digital tax regimes – that is currently unilateral in approach.

Conclusion

Regardless of the criticisms against the policies examined above, the implication of the amendment and the minister's speech is that the FIRS will begin to appoint non-resident digital companies especially companies providing Business-to-Customer ("B2C") services such as Amazon, Netflix, Facebook, Aliexpress etc., who provide services to Nigerian customers to act as VAT collection agents on behalf of FIRS.

Section 10(5) VAT Act gives the FIRS powers to issue guidelines for the purpose of giving effect to filing of returns and payment of tax by persons appointed by the FIRS to act as tax collection agents. The FIRS on 11 October 2021 exercised this delegated power by issuing a circular titled "*Guidelines on Simplified Compliance Regime for Value Added Tax (VAT) for Non-Resident Suppliers*". The Guidelines applies to the supply of goods, services and intangibles made through digital means and other digital products by persons not physically present in Nigeria to businesses ("Business-to-Business" or "B2B") or to customer (ie, B2C) in Nigeria. With respect to the supply of services and intangibles, the Guidelines are expected to have come into effect on the 1st January 2022; while their applications to goods will commence on 1st January 2024.

Finally, the FIRS is now empowered to assess tax on the turnovers of non-resident companies.