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A PRIMER OF KEY CHANGES INTRODUCED BY THE FINANCE ACT 2021

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On 31 December 2021, President Muhammadu Buhari signed the 2021 Finance Bill (now Finance Act 2021) into law. With a commencement date of 1 January 2022, the Finance Act 2021 (**"FA 2021"**) introduces significant changes to Nigeria's tax and regulatory landscape.

The FA 2021 amends several provisions of Nigeria's key tax legislations including the **Capital Gains Tax Act**, **Companies Income Tax Act**, **Personal Income Tax Act**, **Tertiary Education Trust Fund Act**, **Customs & Excise Tariff (Consolidation) Act**, **Value Added Tax Act, Federal Inland Revenue Service (Establishment) Act**, **Tertiary Education Trust Fund (Establishment) Act**, and **Nigeria Police Trust (Establishment) Act**. It also amends some other non-tax legislations such as **Fiscal Responsibility Act**, **Finance (Control and Management) Act**, and the **National Agency of Science and Engineering Infrastructure Act** bringing them in line with prevailing economic realities.

We have highlighted the key changes introduced by the FA 2021 below.

A. FIRS May Assess Non-Resident Digital Companies to Companies Income Tax based on in-country Turnover

The Federal Inland Revenue Service (FIRS) may assess Companies Income Tax (CIT) on the turnover of a non-resident digital service company involved in transmitting, emitting, or receiving signals, sounds, messages, images, or data of any form, including e-commerce, app stores, and online adverts. Income tax assessed on this basis would be on a "fair and reasonable percentage" of the company's turnover derived from or attributable to its economic presence in Nigeria.[1]

[1] Section 4 of the FA 2021

Generally, where a Nigerian or non-resident company declares (i) no assessable profits or (ii) a lower-than-expected assessable profits in a tax year, the tax authority is empowered to charge the company to CIT based on a percentage of its turnover. This method of taxation is typically referred to as the Best-of-Judgment Assessment (BoJ). Prior to the FA 2021, only non-resident companies which have created a tax presence in Nigeria by reason of having a fixed base, a dependent agent, or a taxable single contract to which profits are derived and attributable in Nigeria may be subject to a BOJ assessment[2]. By the amendment contained in the FA 2021, companies which provide digital services and have a Significant Economic Presence (SEP) in Nigeria have now been included within the categories of non-resident companies which may be subject to the BoJ assessment – should they trigger the above-mentioned conditions.

B. Reduction of Minimum Tax Rate applies between Jan 2019 – Dec 2021

In a bid to cushion taxpayers from the dismal effects of the COVID-19 pandemic on their businesses, the Finance Act 2020 was enacted to provide a time-bound reduction of the rate of minimum tax from 0.5% to 0.25% of gross turnover (less franked investment income). The reduced minimum tax rate applied to the January 1, 2020 –December 31, 2021 years of assessment only.

However, some controversy arose over the implementation of the Finance Act 2020 incentive as to whether companies which had filed their tax returns before the effective date could take benefit of the incentive. The FA 2021 clarifies this issue in providing that the incentive is applicable to any two accounting periods between 1 Jan 2019 and 31 Dec 2021, as may be preferred by the taxpayer.[3] Notwithstanding this clarification, the treatment applicable to taxpayers who may have remitted taxes based on the 0.5% rate for the relevant period remains unclear. Will tax refunds or credits be available to such taxpayer? We expect that the tax authority may issue guidelines subsequently to clarify this position.

C. Upstream, Midstream or Downstream Companies can no longer enjoy Tax Exemption on Export Proceeds

Prior to the enactment of the FA 2021, profits of Nigerian companies derived from products exported from Nigeria were eligible for exemption from CIT where the export proceeds are used to purchase raw materials, plant, equipment or spare parts while unutilized portions will be subject to CIT. Under the FA 2021, companies engaged in upstream, midstream, or downstream petroleum operations have now been excluded from enjoying this incentive.[4]

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[2] In practice, the FIRS computes the derived tax by deeming a 20% profit rate on the company's turnover and subjecting the resulting amount to CIT at 30%. This results in an effective company income tax rate of 6%.

[3] Section 10 (c) of the FA 2021
[4] Section 7 (1) (a) of the FA 2021

D. Gas Utilization Incentive ("GUI") Eligibility for Companies

The FA 2021 provides that GUI is not claimable more than once by the same company. Also, companies that emerge, as a result of reorganization, restructuring, buy-back or other similar schemes, out of a company that has already enjoyed the GUI are precluded from enjoying the incentive.[5] This development comes on the back of the Finance Act 2019 which prohibits companies who have enjoyed the Pioneer Status incentive from also claiming the GUI.

E. Capital Gains Tax now chargeable on Gains from the Disposal of Shares in excess of N100m

Capital Gains Tax at the rate of **10%** are now payable on gains from the disposal of shares in any Nigerian company when the gross proceeds from such sales exceed ₦100 million.[6]

CGT is however exempted in relation to proceeds;

i. that are reinvested in shares of the same entity or other Nigerian companies within the same assessment year,

ii. from the transfer of shares in a regulated securities-lending transaction as defined in the Companies Income Tax Act, and

iii. from the disposal of Nigerian government securities.

This provision is bound to be a key consideration in on-going and future share structuring transactions; parties would need to review their positions to assess the most tax-efficient solutions available to their specific situations.

F. Increase in Tertiary Education Tax (EDT) Rate and Reduction of Timelines for EDT Payment

Tertiary Education Tax chargeable on the profit of all Nigerian companies (excluding small companies) has been increased from 2.0% to 2.5% thereby increasing the eventual tax liability of most Nigerian companies.[7] In addition, the period within which EDT is to be paid is reduced from 60 days from the service of FIRS' notice of assessment to 30 days after the service of the notice of assessment.[8]

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[5] Section 11 of the FA 2021
[6] Section 2 of the FA 2021
[7] Section 28 of the FA 2021
[8] Section 29 of the FA 2021

G. Duty of Confidentiality Imposed on Tax Officials in relation to Taxpayer Information

The FA 2021 has created an additional obligation of confidentiality and data protection for every tax official who is employed for the administration of the Federal Inland Revenue Service (Establishment) Act and who has access to taxpayer information. By this provision, tax officials must protect all data and information received from taxpayers in the course of performing their duties; and by implication, may be held liable for any breach of the statutory duty.[9]

H. Non-resident Companies may be appointed as Tax Agents for VAT Collection

The iterations of amendments of the Value Added Tax (VAT) Act through the Finance Acts of 2019 and 2020 have consistently shown that the government intends to ensure that non-resident supplies are appropriately captured and taxed in Nigeria. To this end, the Finance Act 2021 provides that FIRS may appoint any person (including a non-resident persons) as tax agents of the FIRS for the purpose of collecting and remitting VAT. Typically, where a non-resident makes a taxable supply, the taxable person to whom the supply is made in Nigeria is required to withhold the tax and remit to the tax authority. With the enactment of the FA 2021, where the FIRS appoints the non-resident supplier as a tax agent, the non-resident will have the obligation to collect the VAT and remit to the authority. However, the obligation to collect/withhold tax will fall back on the Nigerian recipient of the supply where the non-resident supplier agent fails to collect the tax. Finally, a non-resident who is appointed as tax agent may appoint a representative in Nigeria for the purpose of fulfilling its tax obligations.

I. Introduction of “Sugar Tax” in Nigeria

The FA 2021 amends the Customs, Excise Tariffs, Etc (Consolidation) Act by introducing an excise duty on non-alcoholic, carbonated, and sweetened beverages at the rate of N10 per litre.[10] Although, the *Sugar Tax* will undoubtedly lead to an increase in retail costs of such beverages, it may be a health-driven effort by the government to reduce general consumption of sugary beverages.

J. Re-introduction of Nigeria Police Trust Fund Levy and National Agency for Science and Engineering Infrastructure Levy

The FA 2021 vests the FIRS with the power to assess, collect, account, and enforce the payment of the Nigeria Police Trust Fund Levy (NPTF Levy). The NPTF Levy was originally created by the Nigeria Police Trust Fund Establishment Act which imposes a 0.005% levy on the profits of companies carrying on business in Nigeria. With the FA 2021, the applicable enforcement provisions for the NPTF Levy are those contained in the FIRS Act and the Companies Income Tax Act.[11]

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[9] Section 21
[10] Section 17 of the FA 2021
[11] Section 36 of the FA 2021

The FA 2021 also requires commercial companies operating in the banking, mobile telecommunication, ICT, aviation, maritime and oil and gas sectors with a turnover of N100million and above to pay a levy of 0.25% of their turnover annually to the National Agency for Science and Engineering Infrastructure ("**NASENI**") Fund. While the NASENI Levy was also originally created by the NASENI Act, the FA 2021 specifies the sectors to which the levy applies and other enforcement requirements.

Conclusion

With the changes introduced into the fiscal landscape by the Finance Act 2021, it is imperative that both corporate and non-corporate taxpayers operating in different sectors of the economy note the impact(s) of the new provisions on their operations.

While the FA 2021 makes some useful changes to the tax laws, we note that the introduction of new taxes, the increment of existing taxes, as well as the creation of additional tax compliance obligations will create additional tax liabilities for taxpayers, and possibly increase enforcement challenges, for affected persons. It is expected, though, that the FIRS and state tax authorities (where necessary) will issue guidelines and information circulars to clarify the provisions of the FA 2021.

As always, taxpayers are enjoined to seek professional guidance to ensure compliance with the provisions of tax laws.