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Reimagining Legal and Policy Frameworks For Taxation Of Digital Economy In Nigeria

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ABSTRACT

Does Nigeria have the laws and policies required for optimizing tax revenue from the digital economy? Answering this question is the primary objective of this paper. The pervasive and global nature of the digital economy is such that nations cannot opt out of its impact on economic activities in their jurisdiction. Nigeria has also changed its legal and policy framework to plug holes and improve revenue from intangible business transactions with non-resident companies. Given the dynamic nature of the digital economy, Nigerian tax laws must also be responsive, adapting promptly to their changing nature. This paper adopts a doctrinal legal research design with data drawn from primary and secondary sources of law. The primary sources include case laws and statutes, and the secondary sources include book chapters, journal articles, and other internet-sourced materials. It concludes that the rapidity of amendment of tax laws via the Finance Act 2019 and Finance Act 2021, as well as the regularity of administrative clarifications and subsidiary regulations by the FIRS, is commendable and vital if Nigerian tax laws will remain robust enough to address the fiscal issues associated with the digital economy. The paper recommends a continuous review of their overall impact on the economy and their reconcilability with the country's overall objective of growing its digital economy. This will ensure that the taxes have minimal unintended outcomes like exacerbating the digital divide and undermining the economic activities of young, underemployed youths who depend on the digital economy.

KEYWORDS: digital economy, Non-Resident Companies, taxation,

1. INTRODUCTION

Governments engage in taxation for a variety of reasons. Fiscal policy enables governments to correct market imbalances and achieve income redistribution. Also, tax revenue constitutes a significant source of finance for public administration and the provision of economic and social services. Furthermore, the excessive rent generated by digital companies has sparked calls for states to deal with the market distortions that prevent governments from capturing enough taxes from multinational digital companies like Facebook, Amazon, Google, etc.[1] For the states, fiscal policy becomes a tool in policymakers' hands to minimize public revenue loss.[2] More so for a country like Nigeria, where company income tax contributes the highest quota (46%) followed by value-added tax (VAT)(14%).[3] Also, available data show

[1] Network externalities arising from network effects associated with digital platforms tend to create monopolies without appropriate government intervention. Unchecked, these network effects give digital companies massive control over large amounts of personal data of users. See Itai Grinberg, 'User Participation in Value Creation.' 2018 *Georgetown Law Faculty Publications and Other Works*. 21

[2] Aslam and Shah argue that where markets tend to monopoly, that regulation, rather than taxation, is the appropriate policy option. However in the case of Nigeria, it can be argued that the primary consideration is rent collection from economic activity taking place within her jurisdiction.

[3] OECD, *Revenue Statistics in Africa 2022*, https://www.oecd.org/dev/revenue-statistics-in-africa-2617653x.htm accessed 29 November 2022.

considerable room for improvement in the nation's tax receipts, with a tax-to-GDP ratio of 7%, below the 16% average of other countries in sub-Saharan Africa. More worryingly, while other countries are experiencing improving tax-to-GDP ratios, Nigeria's is decreasing.

There is general agreement that current international tax frameworks must catch up to technological evolution and the digital economy.[4] Difficulties exist in determining the appropriate means of addressing the challenge. Different countries have adopted diverse approaches to fill the gap. Some have enacted or proposed new legislation that will impose digital sales tax. Others have chosen to work within the framework of the OECD or other regional or international arrangements. Rather than enacting a new, distinct digital service tax law, Nigeria has opted to improve its corporate income tax (CIT) and value-added tax (VAT) laws to address the issues.

This paper analyses Nigeria's CIT and VAT law relating to the digital economy. Section two provides a background definition of the digital economy and taxation. Section three evaluates the nation's CIT regime, while section four assesses the VAT regime. Section five provides the recommendation and conclusion.

2. DEFINITION OF DIGITAL ECONOMY

Coming up with a generally accepted definition of the digital economy has proven challenging.[5] This challenge emanates from the dynamic nature of technological evolution and the ever-increasing diffusion of the digital economy within the broader economy. Traditional businesses have digitalized their operations to remain relevant in the increasingly digital world.[6] Thus, the line between the traditional and digital economies is progressively blurred as the digital economy becomes the economy itself.[7] Similarly, the definition of digital economy has evolved with technological innovation and its impact on commerce.

Tapscott, regarded as the first to coin the expression 'digital economy,' did not provide a definition but merely described it as the "Age of Networked Intelligence," where it is "not only about the networking of technology... smart machines... but about the networking of humans through technology that combines intelligence, knowledge, and creativity for breakthroughs in the creation of wealth and social development".[8] This definition emphasizes the digital economy's technological and human aspects and potential economic and social impact. Burkht and Heeks[9] provide a critical and extensive analysis of the various definitions of the digital economy.

From Nigeria's perspective, the digital economy "revolves around the utilization of digital transformation, knowledge, and technology to deliver goods and services, an economy that drives on the Fourth Industrial Revolution, (4IR), convergence of all sets of digital innovation that drives social, economic development and economic output created from digital technologies and innovations." The National Digital Economic Policy and Strategy (NDEPS) offers a broad definition of digital economy as 'any aspect of the economy that is based on or driven by technologies'[10]

The OECD[11] sums up the various definitions into three different approaches:

a. Bottom-up Approach: This approach to defining the digital economy focuses on the production

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[4] UNCTAD, *'Digital Economy Report 2021: Cross-border Data Flows and Development – For Whom the Data Flow'* <https://unctad.org/system/files/official-document/der2021_en.pdf> accessed 21 May 2022

[5] Nadim Ahmad & Jennifer Ribarsky, 'Towards a Framework for Measuring the Digital Economy' (Paper prepared for the 16th Conference of IAOS/OECD Headquarters, Paris, Fraance) <https://www.oecd.org/iaos2018/programme/IAOS-OECD2018_Ahmad-Ribarsky.pdf> accessed 21 May, 2021.

[6] UNCTAD, *Digital Economy Report 2019 - Value Creation and Capture: Implications for Developing Countries* (United Nations Publications, New York 2019)3.

[7] See OECD (2015), *Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project* (Paris: OECD Publishing) 12.

[8] Tapscott Tapscott 1997: *The Digital Economy: Promise and Peril in the Age of Networked Intelligence*, (New York, McGraw-Hill Publishers, 1997).

[9] Rumana Bukht & Richard Heeks, 'Defining, Conceptualising and Measuring the Digital Economy', *International Organisations Research Journal 13(2):143-172*

[10] FMoCDE, *National Digital Economy Policy and Strategy (2020-2030) (FMoCDE:* Abuja, 2020) 2.

[11] OECD (2020). (n. 82)

processes and/or output of industries and organisations to determine whether it is part of the digital economy. From this perspective, the digital economy is the sum of industries producing digital output or heavily reliant on digital input. This narrowly defined approach will only accommodate economic outputs of the ICT sector and e-commerce market in terms of online sales of goods and consumer spending on digital equipment.[12]

b. Top-Down or Trend-Based Approach: This approach aggregates the collective effect of the value created by digital transformation and its impact on the economy. It evaluates fundamental trends driving the digital transformation and then examines how these are reflected in the real economy. This approach goes "beyond the conventional metrics to capture how the benefits of digital investments can spill over from one company to the next, multiplying their final impact. In doing so, it reveals that the digital economy is much larger and more widely spread than previously thought, and this casts a new light on how to make plans for the future".[13]

c. Flexible or Tiered Approach: This approach to defining the digital economy breaks it into core and non-core components. Thus, the digital economy is made up of all segments of the economy that make extensive use of digital technologies (i.e. for which existence depends on digital technologies), as opposed to sectors that make intensive use of digital technologies (i.e., only applying digital technology to enhance their productivity).[14] This is also the approach Bukht and Heeks adopted regarding the digital economy as the share of output that "is derived solely or primarily from digital technologies with a business model based on digital goods or services.[15]

These definitions reveal that the digital economy can be described as the famed elephant described by three blind men. As the world is only at the cusp of digitalization, the evolving digital economy and other related economic terms lack widely accepted definitions. This is because of the novelty and the lack of sufficient understanding or clarity regarding this phenomenon. It may also reflect the high speed of technological progress. The time required for agreeing on standard definitions often lags behind the velocity of technological change. In this context, balancing between avoiding straitjacketing definitions, which may block progress, and reaching a common understanding of relevant concepts is necessary.[16]

In this regard, the opinion of the United Nations Commission on Trade and Development (UNCTAD) proves prescient:

> As the world is only at the early stages of digitalization, the evolving digital economy and several other related economic terms lack widely accepted definitions. There may be many interpretations of the same term in the relevant literature and analyses and in different forums. This is because of the novelty and the lack of sufficient understanding or clarity regarding this phenomenon. It may also reflect the high speed of technological progress. The time required for agreeing on standard definitions often lags behind the velocity of technological change. In this context, balancing between avoiding straitjacketing definitions, which may block progress, and reaching a common understanding of relevant concepts is necessary.[17]

3. DIGITAL ECONOMY TAXATION UNDER THE COMPANIES' INCOME TAX

The principal law regulating the payment of company income tax in Nigeria is the Companies Income Tax Act (CITA).[18] It imposes a tax on the profits of any company accruing in, derived from, brought into,

[12] See Jurica Novak, Marcin Purta and ors, 'The Rise of Digital Challengers: How Digitization Can Become the Next Growth Engine for Central and Eastern Europe', <https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Europe/Central%20and%20Eastern%20Europe%20needs%20a%20new%20engine%20for%20growth/The-rise-of-Digital-Challengers.ashx> accessed 18 October 2022.

[13] Oxford Economics, 'Digital Spillover - Measuring the True Impact of the Digital Economy', https://www.huawei.com/minisite/gci/en/digital-spillover/files/gci_digital_spillover.pdf accessed 14 November 2021.

[14] *Ibid.*

[15] Bukht & Heeks, *ibid.*, (n. 4)

[16] UNCTAD (n 66).

[17] UNCTAD (n 66).

[18] Companies Income Tax Act (CITA) Cap C21, LFN 2004(as amended).

or received in Nigeria.[19] Companies have artificial personality and derive their existence from the law.[20] CITA defines a company as "any company or corporation (other than corporation sole) established by or under any law in force in Nigeria or elsewhere." In contrast, a Non-Resident Company (NRC) or "Foreign company"[21] is "any company or corporation (other than a corporation sole) established by or under any law in force in any territory or country outside Nigeria."[22] The distinction made by CITA between a company and a foreign company is vital. Without that distinction, it will imply that the provisions of CITA apply to foreign or NRCs that carry on economic activities in Nigeria, so long as they are registered somewhere. However, with the distinction made, the application of the Act will, in some cases, differ depending on a company's place of registration.

CITA defines "Nigerian company" as "any company incorporated under the Companies and Allied Matters Act or any enactment replaced by that Act."[23] For Nigerian companies, that is, companies registered in Nigeria, all their profits arising from any trade accruing in, derived from, brought into, or received in Nigeria are subject to CITA.[24] A Nigerian company's profits are deemed to accrue in Nigeria regardless of where they arise or whether they are brought into or received in Nigeria.[25] CITA imposes a 30% tax on the profits of every company apart from those specifically exempted under the Act.[26] It also prescribes penalties for violation.

It is important to note that the Companies and Allied Matters Act (CAMA) does not recognize the right of a company incorporated outside Nigeria to carry on business in Nigeria or exercise any of the powers of a registered company until it is incorporated in Nigeria.[27] It imposes a penalty for any violation of this requirement of incorporation.[28] CITA recognizes that such companies may carry on economic activity and, therefore, be liable to tax in Nigeria. Thus, there is an apparent difference in the position of these critical legislations, which are for the regulation of the incorporation, control, and management of companies, on the one hand, and for the taxation of companies' profits, on the other hand,[29]. Adopting the position of CAMA will generally lead to a loss of revenue for the state and truncate the government's effort to tax foreign companies in the digital economy.

For a foreign company to be subject to tax in any jurisdiction, there must be a basis or nexus between the foreign company and the host country. Since the Act distinguishes a 'foreign company' from a 'company", it is critical to define the way and way their profits will be subject to tax in Nigeria. The tax exposure of an NRC in Nigeria is limited to situations where it can be proven that it has a *commercial presence*/business interest in the country and has made a profit that is or could be attributable to its presence in the host state. Under the principle of permanent establishment (PE), a fixed place of business in Nigeria is generally regarded as giving rise to income or value-added tax liability.

3.1 Companies Income Tax - Pre-Finance Act 2019

Traditionally, income taxes are premised on a structure, and their imposition is limited to the geographical location of a taxable entity with the primary considerations of the source of income and/or fixed base. Income taxation of either individuals or corporate entities is typically based on some form of connecting factor, determining whether the entity will be liable to tax within a particular jurisdiction. Before 2019,

[19]The Act excludes the profits of any company accruing in, derived from, brought into, or received in, that are subject to tax under the Capital Gains Tax Act, Petroleum Profits Tax Act and Personal Income Tax Act. See s.. 9 CITA

[20] See *Salomon v. Salomon* (1897) AC 22. See also *Gani Fawehinmi v Nigeria Bar Association* (No.2) [1989] 2 NWLR (PT.105) 588

[21] CITA refers to "foreign company" which is synonymous with a non-resident company (NRC). For that purpose, both terms will be used interchangeably in this work.

[22] s. 105, CITA. This meaning is slightly modified as "any company formed or incorporated under any law in Nigeria;" in the provisions of Finance Act 2021.

[23] *Ibid*

[24] s. 9, CITA

[25] s. 13(1) CITA

[26] s. 40(1) CITA

[27] Companies and Allied Matters Act (CAMA) CAP 20, LFN, 2004, s. 54(1)

[28] s. 55, CAMA

[29] See DC John, 'Corporate Taxation Laws in Nigeria: A Review', *International Journal of Advanced Legal Studies and Governance*, Vol. 2, No. 1, April 2011 236 – 256, p. 238

only NRCs under s 13(2) CITA were liable to pay CIT; digital companies were exempted from paying CIT and had minimal tax liability. The extent of their tax liability was limited to withholding tax where such companies entered into a contract with a Nigerian company or individual.[30] Section 9 of CITA elaborates on this by subjecting all profits of any Nigerian company arising from any trade accruing in, derived from, brought into, or received in Nigeria to Companies Income Tax. This above assertion covers more of the non-digital economy.

Section 13(1) of the CITA states that a Nigerian company's profits are deemed to accrue in Nigeria regardless of where they arise or whether they are brought into or received in Nigeria. As a result, as long as a business is based in Nigeria, it must pay tax on its earnings. An NRC is only taxable in Nigeria if it can be proven that it has a commercial presence/business interest in the country and has the ascertainable profit that is or could be attributable to its presence therein, or dependent agent or engages in turnkey projects or has controlling interest over business in Nigeria.[31]

This tax regime did not contemplate the taxation of income derived by NRCs from digital services or products offered to persons resident in Nigeria. The parameters designed for the traditional economy are ineffective for the digital economy since they have no fixed business base and do not operate through agents under the control of the MNE in Nigeria. Also, the nature of products anticipated by the Act are physical "stock of goods or merchandise," not digital goods and services. In addition, these companies do not execute turnkey projects and have no related party acting for them. Accordingly, profits from their economic activities in Nigeria cannot be subject to tax under the CITA. Retaining the law in this manner would have constituted a significant loss of revenue for Nigeria from transactions in the digital economy.

The implication of s. 13 of CITA is that foreign companies are required to have a "fixed base" in Nigeria. However, this is not like companies within the digital economy, which tend to structure their businesses in a way that enables them to avoid being caught by the definition of "fixed base" under Nigerian law. The resultant effect of this is that the tax authorities are unable to collect any form of taxes from these companies. It should also be noted that while the traditional income tax regime fails to tax companies in the digital economy, the regime for taxing goods is equally inefficient.

3.2 Taxation of Nigeria's Digital Economy Under the Finance Act 2019

The Finance Act 2019 (2019 Act/FA 2019)[32] amends the tax laws to accommodate changes that will enhance better taxation of NRCs operating in the country by the introduction of the concept of Significant Economic Presence (SEP). By so doing, the 2019 Act tackled the cardinal issues of nexus and allocation of profit that states face in taxing the digital economy.

Under the 2019 Act, digital platforms are regarded as non-resident companies, and their profit deemed to be derived in Nigeria if they meet the SEP requirements. Of particular importance is the 2019 Act's amendment of s. 13(2) (CITA) that the profits of a company other than a Nigerian company from any trade or business shall be deemed to be derived from Nigeria if it transmits, emits, or receives signals, sounds, messages, images or data of any kind by cable, radio, electromagnetic systems or any other electronic or wireless apparatus to Nigeria in respect of any activity, including electronic commerce, application store, high-frequency trading, electronic data storage, online adverts, participative network platform, online payments and so on, to the extent that the company has significant economic presence in Nigeria and profit can be attributable to such activity. Furthermore, if the trade or business of a company comprises the furnishing of technical, management, consultancy, or professional services outside of Nigeria to a person resident in Nigeria, to the extent that the company has a significant economic presence in Nigeria.[33]

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[30] 'Further Explanatory Comments On Withholding Tax Principle And Operation', Federal Inland Revenue Service Information Circular,[2006], <https://taxaide.com.ng/files/FURTHER- EXPLANATORY-COMMENTS-ON-WITHHOLDING-TAX-200602%20(1).pdf> accessed 4 March 2022.

[31] Section 13(2) of CITA. 88 Section 13(2 a – d) of CITA.

[32] Finance Act 2019, available at https://www.firs.gov.ng/wp-content/uploads/2021/02/finance-act-2019-official-gazette-1.pdf accessed 4 May 2021

[33] S. 4(b) FA 2019/s. 13(2)(e) CITA

The effect of the provision is that SEP becomes the nexus rule for NRCs in Nigeria. It dematerializes the requirement of fixed base under the CITA. However, the 2019 Act does not define SEP. However, it empowers the Minister of Finance to determine what constitutes SEP by a Ministerial Order.[34] Pursuant to this, the Minister issued the Companies Income Tax (Significant Economic Presence) Order, 2020 (the Order)[35] which provides two basic standpoints for determining SEP depending on the type of business in focus. By the provisions of the Order, a foreign entity involved in digital transactions will be deemed to have created SEP in Nigeria and, therefore, liable to tax if it:

a. drives income of N25m or equivalent in other currencies from Nigeria in a year from any of the following activities
   (I) Streaming or downloading digital content
   (II) Transmission of data collected about users in Nigeria
   (III) Provision of goods or services directly or through a digital platform
   (IV) Intermediation services that link suppliers and customers in Nigeria or;
   (V) uses Nigerian domain name (.ng) or registers a website address in Nigeria or;
b. has a purposeful and sustained interactions with persons in Nigeria by customizing its digital platform to target persons in Nigeria e.g., by stating the prices of its products or services in Naira.

In determining whether the revenue of an NRC has met the N 25M threshold, activities carried out by connected persons are aggregated, where applicable. A typical scenario would be where different companies belong to the same group, such as Facebook, WhatsApp, and Instagram, which are all subsidiaries of Meta. On the face of it, the threshold makes it relatively easier to determine whether a digital MNE has SEP in Nigeria once that threshold is reached.

The second parameter covers situations where the NRC creates a domain name or web address in Nigeria. Such a step indicates a clear intention to carry on economic activities targeted at Nigerians. The same will be reasonably inferred from the other condition, in which a digital platform customizes its interface for the Nigerian market by denominating prices in the local currency.

3.3 Taxation of Nigeria's Digital Economy Under the Finance Act 2021

s. 4 of the Finance Act 2021 (2021 Act)[36] sought to clarify the state of the law on what constitutes SEP. It amends s.13 CITA by substituting for subsection (2), a new subsection (2) which provides that the profits of a company other than a Nigerian company from any trade or business shall be deemed to be derived from or taxable in Nigeria where –

a. that company has a fixed base of business in Nigeria to the extent that the profit is attributable to the fixed base;
b. it does not have such a fixed base in Nigeria but habitually operates a trade or business through a person in Nigeria authorised to conduct on its behalf or behalf of some other companies controlled by it or which have a controlling interest in it; or habitually maintains a stock of goods or merchandise in Nigeria from which deliveries are regularly made by a person on behalf of the company, to the extent that the profit is attributable to the business or trade or activities carried on through that person;
c. it transmits, emits, or receives signals, sounds, messages, images, or data of any kind by cable, radio, electromagnetic systems, or any other electronic or wireless apparatus to Nigeria in respect of any activity, including electronic commerce, application store, high-frequency trading, electronic data storage, online adverts, participative network platform, online payments and so on, to the extent that the company has significant economic presence in Nigeria and profit can be attributable to such activity;
d. that trade or business or activities involves a single contract for surveys, deliveries, installations, or construction, the profit from that contract;

[34] s. 4(c) FA 2019/ s. 13(4) CITA
[35] See Companies Income Tax (Significant Economic Presence) Order, 2020, https://firs.gov.ng/wp-content/uploads/2021/07/significant-economic-presence-order-2020.pdf accessed 8 May 2021
[36] Finance Act 2021.

e. the trade or business comprises the furnishing of technical, management, consultancy, or professional services outside of Nigeria to a person resident in Nigeria to the extent that the company has a significant economic presence in Nigeria, provided that the withholding tax applicable to the income under this paragraph shall be the final tax on the income of a non-resident recipient who does not otherwise fall within the scope of subsection 2 (a) – (d); or
f. the trade, business, or activities are between the company and another person controlled by it or with a controlling interest in it. Conditions are made or imposed between the company and such person in their commercial or financial relations, which in the opinion of the Service is deemed to be artificial or fictitious, so much of the profit adjusted by the Service to reflect arm's length transaction."

These provisions aggregate the provisions of CITA and the amendment under the 2019 Act. The provisions of paragraphs (c) and (e) are relevant to this paper. The 2021 Act also amends the provisions of s. 30 by inserting a new s.30 (1)(b)(iia) which provides that

> that company transmits, emits, or receives signals, sounds, messages, images, or data of any kind by cable, radio, electromagnetic systems, or any other electronic or wireless apparatus to Nigeria in respect of any commerce, trade, or activity, including electronic commerce, application store, high-frequency trading, electronic data storage, online adverts, participative network platform or online payments, to the extent that the company has significant economic presence in Nigeria, *assess and charge that company for that year of assessment on such fair and reasonable percentage of that part of the turnover attributable to that presence*;"[37]

Once an NRC has established a taxable presence in Nigeria, the Act requires it to file income tax returns with its global and audited financial statements for its Nigerian operations.[38] Thus, every non-resident company that is carrying on business in Nigeria is required to prepare and submit to the FIRS, with respect to its operations in Nigeria, income tax returns containing the documents prescribed by S.55 of CITA.[39] With respect to NRCs, s. 55(2) provides that

> Where any company other than a Nigerian company derives profit from or is taxable in Nigeria under section 13 (2) of this Act, such company shall be required to submit a return for the relevant year of assessment containing:
> (a) The company's full audited financial statements and the financial statement of the Nigerian operations, attested by an independent qualified or certified accountant in Nigeria;
> (b) Tax computation schedules based on the profits attributable to its Nigerian operations;
> (c) A true and correct statement, in writing, containing the amount of profits from each and every source in Nigeria; and
> (d) Duly completed Companies Income Tax Self-Assessment Forms.

This requirement does not apply to NRCs whose income from Nigeria is only subject to WHT (for example, NRCs earning passive income or providing technical/professional management/technical services remotely), who are exempted from the filing obligation.[40] With this requirement to file income tax returns, the provisions of s.53, which imposes penalty and interest for the deliberate filing of incorrect tax returns, will also apply to NRCs. The Act does not define what constitutes deliberateness for the section.

It is important to note that, under Section 16 of the Finance Act 2020, the company will be required to provide a declaration of the corresponding year of assessment, which includes the complete audited account and financial statements of the operation of the Nigerian company, attested by an independent qualified or certified accountant in Nigeria, where any company is liable to a tax pursuant to Section

[37] Emphasis mine
[38] s. 55
[39] FIRS, PUBLIC NOTICE ON FILING OF TAX RETURNS BY NON-RESIDENT COMPANIES UNDER THE COMPANIES INCOME TAX ACT, CAP C21 LFN 2004 (AS AMENDED), https://firs.gov.ng/wp-content/uploads/2021/01/Public-Notice-on-Income-Tax-Returns-by-Non-Resident-Companies.pdf last accessed July 28, 2022
[40] See EY, Nigeria: Highlights of Finance Act 2020, https://www.ey.com/en_gl/tax-alerts/nigeria-highlights-of-finance-act-2020

13(2) CITA, including companies with significant economic presence. It must also include tax computation schedules based on profits attributable to its Nigerian operations, a true and correct written statement containing the earnings from each source in Nigeria, and duly completed Company income Tax Self-assessment forms.

The Value Added Tax Act is the current structure in relation to taxation of goods, and it imposes a tax on all goods and services, whether produced or rendered in Nigeria or not.[41] However, medical and pharmaceutical products, basic food items, fertilizers, agricultural and veterinary medicine, books and educational materials, and farming and transportation equipment were granted exemptions.[42]

The FIRS previously held that services provided by NRCs should be subject to VAT in Nigeria because the recipient is a Nigerian resident. In contrast, tax-payers held that such services were not subject to VAT in Nigeria. This was the crux of the dispute in *Vodacom Business Nigeria Limited v FIRS*.[43], the Court of Appeal applied the "destination principle." It determined that a non-resident company's supply of satellite network bandwidth capacities to a Nigerian company was subject to VAT in Nigeria because the bandwidth was supplied and enjoyed in Nigeria.

4. NIGERIA'S VAT REGIME AND THE DIGITAL ECONOMY

VAT is a consumption tax paid when goods are purchased and services rendered. It is a form of multi-layered sales tax imposed at various levels of purchase and sale of goods and services based on the value added thereto. As a form of tax, VAT is levied at every consumption chain stage and ultimately borne by the final consumer of the goods or services.[44] Since it is imposed on products or services, it applies across the board and does not discriminate based on the consumer's income.[45] The attractiveness of VAT as a form of taxation lies in its indirect nature, ease of administration, and difficulty in avoidance, as well as its use as a measure of economic growth since it reflects general purchasing power.[46]

Value Added Tax (VAT) in Nigeria is governed by the Value Added Tax Act.[47] It was introduced in Nigeria through the Value Added Tax Act of 1993[48] and became operational on January 1, 1994. Its introduction marked the phasing out of phasing out of the Sales Tax Decree No. 7 of 1986.[49] VAT is chargeable and payable on the supply of all goods and services (taxable goods and services) other than those goods and services exempted[50] under the Act.[51] The 1993 Act imposed a VAT rate of 5% on all taxable goods and services.[52]

"Goods" are defined to mean (a) all forms of tangible properties that are movable at the point of supply but do not include money or securities and (b) any intangible product, 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, excluding interest in land. On the other hand, "services" are defined as anything other than goods, money, or securities that are supplied, excluding services provided under a contract of employment. Furthermore, "taxable supplies" means any transaction for the sale of goods or the performance of a service, for a consideration in money or money's worth.

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[41] Section 2, Value Added Tax Act CAP. V1. LFN. 2004. (VAT Act)

[42] Section 3, VAT Act; First Schedule, Value Act.

[43] See *Vodacom Business Nigeria Limited v FIRS.* In that case, the Court of Appeal applied the "destination principle" and determined that a non-resident company's supply of satellite network bandwidth capacities to a Nigerian company was subject to VAT in Nigeria because the bandwidth was supplied and enjoyed in Nigeria. Appeal No.CA/LA/L/556/2018.

[44] The value added refers to the amount of value added by a producer in product or services value chain. It is the difference between a company's sales and its purchase of inputs from other firms.

[45] S. 10(2)

[46] U Enemuo, C Moneme & O Okeke, 'Taxation and Nigerian Economy: Benchmarking Value Added Tax 2000 –2020', *vol. 2 No. 1 International Journal of Business and Management Research, , 191 – 208*, p. 192

[47] *Cap V1, LFN 2004(as amended).*

[48] Value Added Tax Decree no 102 of 1993.

[49] S. 45 VAT Act repealed the Sales Tax Act, subject to s. 6 of the Interpretation Act

[50] The First Schedule to the Act contains a list of goods and services that are VAT-exempt.

[51] s. 3, VAT Act

[52] s. 4

Where the supply of taxable goods and services is for monetary consideration, the value of taxable goods and services is deemed to be an amount which, with the addition of the tax chargeable, is equal to the consideration.[53] Where the supply is for a consideration not consisting of money, the value shall be deemed to be its market value.[54] In determining the value of taxable goods and services, the open market value shall be the amount that would fall due for goods and services supplied without monetary value.[55] In the case of imported taxable goods, the value shall be the amount equal to the price of the goods so imported and the charges and expenses incurred for importing it.[56]

The Act empowers the Federal Inland Revenue Services to administer and manage the VAT.[57] The Service is empowered to do such things as it may deem necessary and reasonable for the assessment and collection of the tax. It shall account for all amounts so collected in accordance with the provisions of the Act. The Act mandates every taxable person[58] to register with the Service to collect tax within six months of the commencement of the Act or six months of the commencement of business, whichever is earlier.[59] An NRC carrying on business in Nigeria shall also register for the tax with the Service, using the address of the person with whom it has a subsisting contract as its address for correspondence relating to the tax. The NRC shall include the tax in its invoice, and the person to whom the goods or services are supplied in Nigeria shall remit the tax in the currency of the transaction.[60] A taxable person shall pay the tax on taxable goods and services[61] and collect the tax on goods and services it supplies.[62]

The Finance Act 2019 imposed VAT obligations on transactions conducted by non-resident digital companies.[63] The new legislation will apply to non-resident companies that make a taxable supply to Nigeria, such as digital platforms, high-frequency trading services, digital advertisement companies, etc. Such NRCs are required to register for tax with the Service and obtain a Tax Identification Number.[64] A non-resident digital company will add a VAT charge to any transaction conducted with an individual in Nigeria on its platform. [65] A mechanism for the collection of VAT is included by requiring the taxable person to whom a taxable supply is made in Nigeria or such other person as may be appointed by the Service to withhold or collect the tax, as the case may be, and remit same to the Service.[66] Where a person appointed under subsection (3) has made a taxable supply to a taxable person in Nigeria, the taxable person shall not have the obligation to withhold the tax, except where the person so appointed has failed to collect the tax.[67] A non-resident who makes a taxable supply to Nigeria may appoint a representative to comply with its tax obligations.[68] The Act gives the Service the power to issue a guideline to effect the

[53] s. 5(1)(a)
[54] s. 5(1)(b)
[55] s. 5(3)
[56] s. 6
[57] s. 7(1)
[58] s. 12 of the Value Added Tax (Amendment) Act 2007 defines a taxable person to include an individual or body of individuals, family, corporations sole, trustee or executor or a person who carries out in a place an economic activity, a person exploiting tangible or intangible property for the purpose of obtaining income therefrom by way of trade or business or a person or agency of government acting in that capacity. The section amends the definition of taxable person contained in s. 42 of the Principal Act. means a person who independently carries out in any place, an economic activity as a producer, wholesale trader, supplier of goods, supplier of services (including mining and other related activities) or person exploiting tangible or intangible property for the purpose of obtaining income there from by way of trade or business and includes a person and an agency of government acting in that capacity. See S. 45, VAT Act
[59] S. 8(1)
[60] s. 10(1)
[61] s. 12(1) The tax payable by a taxable person is known as input tax. See s. 12(2)
[62] s. 14(1) The tax collected by a taxable person is known as output tax. See s. 14(2)
[63] s. 30
[64] s. 10(1) VAT Act
[65] s. 10(2)
[66] s.10(3) Babajide Komolafe, 'Finance Act, 2021: Improving Revenue for Fiscal Performance', <https://www.vanguardngr.com/2022/03/finance-act-2021-improving-revenue-for-fiscal-performance/> accessed 4 June 2022
[67] s.10(4)
[68] s.10(5)

provisions of this section, including the form, time, and procedure for filing returns and payment by non-resident suppliers appointed by the Service under subsection (3).[69]

The 2019 Act increased the VAT rate in Nigeria from the 5% provided under the VAT Act to a new rate of 7.5% and[70] also introduced a threshold for taxable persons by exempting taxable persons with taxable supplies of less than Twenty-Five Million Naira (N25m) from accounting for VAT to the FIRS.[71] To determine the aforementioned N 25M threshold, the FIRS issued the *Clarification on the Implementation of the Value Added Tax (VAT) Provisions in the Finance Act 2019* (the Circular),[72] providing guidelines for VAT payment.

With regard to goods and services, the Finance Act provides that for VAT purposes, goods shall be deemed to be supplied in Nigeria if the goods are physically present in Nigeria at the time of supply, imported into Nigeria for use by a person, assembled in Nigeria, or installed in Nigeria; or the beneficial owner of the rights in or over the goods is a taxable person in Nigeria, and the goods or right is situated, registered or exercisable in Nigeria. In the same vein, services are deemed to be supplied in Nigeria for VAT purposes if the services are rendered in Nigeria by a person physically present at the time of service provision, the services are provided to a person in Nigeria, regardless of whether the services are rendered within or outside Nigeria.

Anticipating its enormous economic importance and potential, the FIRS has prioritized the collection of taxes from the digital economy and has deployed a digital service interface, the Digital Economic Compliance (DEC) Tool. The Tool will facilitate the implementation of the tax regime by assisting the Service in determining entities that fall within the SEP threshold and relevant turnover generated from Nigeria.[73]

The OECD encourages the adoption of a simplified registration and collection mechanism as one of the means of addressing the difficulties associated with taxing NRCs. Hence, the FIRS issued *Guidelines on Simplified Compliance Regime for Value Added Tax (VAT) for Non-Resident Suppliers*[74] to facilitate adopting the new VAT requirements for Non-Resident Suppliers (NRS). It defines NRS as "the suppliers, located outside the territory of Nigeria, who supply taxable goods, services, digital products or intangibles to Nigeria through digital or electronic platforms or means or the intermediary where such intermediaries are not the actual owners or suppliers of the goods or services but facilitate the supply, issuance of invoices and payment."[75] It amends, updates, or replaces contents of any other Guideline, Circular, notice, or other publication previously issued by the Service that is inconsistent with its contents to the extent of such inconsistency.[76] Its provisions apply to all categories of NRS - natural persons, trusts, partnerships, corporations, companies, or any other person - engaging in supplying goods, services, or intangibles to persons in Nigeria through electronic, digital, or similar platforms.[77]

The Guidelines anticipate two categories of NRS – (a) Where the supply is not made through intermediaries, the person making the supply, and (b.) Where the supply is made or facilitated through an

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[69] s.10(6)

[70] See s. 34, Finance Act, 2019.

[71] s. 38, Finance Act, 2019. Companies that do not meet the threshold are also exempted from penalties for non-registration for VAT purposes.

[72] See FIRS, 'Clarification on the Implementation of the value Added Tax (VAT) Provisions in the Finance Act 2019', <https://pwcnigeria.typepad.com/files/firs-vat-information-circular_may2020.pdf> accessed 2 June 2022). See also Banwo & Ighodalo, 'FIRS Clarifies Changes Introduced To Nigerian VAT Regime By The Finance Act 2019', <https://banwo-ighodalo.com/grey-matter/firs-clarifies-changes-introduced-to-nigerian-vat-regime-by-the-finance-act-2019> accessed 2 June 2022

[73] Busola Aro, 'FIRS: We'll ensure 100% automation of tax administration processes in 2022', <https://www.thecable.ng/firs-well-ensure-100-automation-of-tax-administration-processes-in-2022> accessed 29 July, 2022

[74] FIRS, 'Guidelines on Simplified Compliance Regime for Value Added Tax (VAT) for Non-Resident Suppliers, NO. 2021/19'. <https://www.firs.gov.ng/wp-content/uploads/2021/10/Guidelines-on-Simplified-Compliance-Regime-of-VAT-for-Non-Resident-Suppliers-15102021.pdf> accessed 2 July 2022

[75] *Ibid*, para. 24. The Guidelines use Non-Resident Suppliers (NRS) instead of Non-Resident Companies (NRCs) Both experiences are synonymous and used interchangeably in this section.

[76] *Ibid*. preamble

[77] *Ibid.* para 1(4) & 4(3)

intermediary or intermediaries, the intermediary through which the supply was made to Nigeria.[78] The Guidelines came into effect from 1st January 2022 with respect to the supply of services and intangibles and shall apply to the supply of goods from 1st January 2024.[79] It makes the supply into Nigeria, of goods, services, and intangibles as the basis for them being subject to VAT in the country. Goods are supplied in Nigeria if the goods are physically present in Nigeria at the time of supply, imported into Nigeria, assembled in Nigeria, or installed in Nigeria, or the beneficial owner of the rights in or over the goods is a taxable person in Nigeria.

Internationally traded goods are taxable in Nigeria when they are supplied to persons in Nigeria where the delivery address of the goods is in Nigeria[80], even though the goods were supplied through electronic or digital means (e.g., marketplace, platform, app, portal, etc.)[81] Such goods shall not be liable to VAT on entry into Nigeria[82] and VAT incurred under these Guidelines shall be deducted from the total VAT liability computed at the port of entry.[83] Charging VAT on such goods does not prevent the Nigeria Customs Services or other agents of the Service from charging appropriate taxes on goods that have not been so charged to tax under these guidelines or on other goods that are not within the scope of these guidelines.[84] Services covered by the Guidelines include any intangible services delivered via electronic or digital means or similar networks whose supply is essentially automated, involves minimal human intervention, and is impossible to ensure in the absence of information technology.[85]

As such, services consumed or otherwise utilised in Nigeria by individuals or businesses are taxable in Nigeria.[86] Digitally supplied services are consumed or utilised in Nigeria where: (a) the recipient of the supplies resides in Nigeria, as evidenced by the billing, business, residential, or postal address in Nigeria; (b) it can be inferred from information provided that the consumers usual place of residence is Nigeria; (c) the customer is a company incorporated under any law in Nigeria; (d)the customer's URL, geo-location or IP address is in Nigeria; (e)it is physically performed in Nigeria; (f) there is any other evidence suggesting that the supply is consumed or utilised in Nigeria or that such supplies can only utilised in Nigeria; or (g) a place of consumption cannot be established for the supplies, using any of the above indicia, the place of consumption is Nigeria if the payment for such supplies originates from a bank or any other financial institution licensed in Nigeria pursuant to Nigerian laws.[87] Hence, it will apply to supplies, through digital means, of goods, services, intangibles, and other digital products by persons not physically present, located, or represented in Nigeria to businesses ("Business-to-Business" -B2B) or consumers ("Business-to-Consumers" - B2C) in Nigeria but excludes items expressly excluded from tax under the VAT Act.[88]

An incorporeal is supplied in Nigeria if:

i. The exploitation of the right is made by a person in Nigeria;
ii. the right is registered in Nigeria, assigned to or acquired by a person in Nigeria, regardless of whether the payment for its exploitation is made within or outside Nigeria or
iii. the incorporeal is connected with a tangible or immovable asset located in Nigeria.[89]

[78] *Ibid.* para 5(1)(2)
[79] *Ibid.* para 2(1)
[80] *Ibid.* para 16(3)
[81] *Ibid.* para 16(1)
[82] *Ibid.* para 16(4)
[83] *Ibid.* para 16(5)
[84] *Ibid.* para 14(6)
[85] *Ibid.* para 14(1)
[86] *Ibid.* para 15(1)
[87] *Ibid.* para 15(2). This condition will create a problem in the case of Nigerians, who are resident in foreign countries, that make payment using their Nigerian bank accounts. See PwC, 'FIRS Issues Simplified VAT Regime for Non-Resident Suppliers, https://pwcnigeria.typepad.com/files/pwc-tax-alert---firs-issues-simplified-vat-regime-for-non-resident-suppliers.pdf accessed 28 July 2022
[88] *Ibid.* para 4(1)(2)
[89] *Ibid.* para 3(2)(c)(i-iii)

The Guidelines also do not deter the continuance of any mechanism put in place by an NRS for collecting and remitting VAT to the Service prior to the coming into effect of the Guidelines do not deter it continuance. Such mechanisms remain pending when the NRS can migrate to the simplified compliance regime introduced therein.[90] Furthermore, the introduction of the simplified regime does not replace or restrict the power of the Service under the Section to appoint any person to collect and remit the tax.

It explains how the simplified VAT compliance will apply to NRS supplying goods, services, or intangibles to persons in Nigeria through electronic, digital, or similar platforms for ease of compliance. [91]

In line with s. 10(3) of the VAT Act, which provides that a "taxable person, to whom the supply of taxable goods or services are made in Nigeria or such other person as may be appointed by the Service, shall withhold and remit the tax to the Service in the currency of the transaction," the Guideline provides for both self-charge and collection by NRS.[92] While the primary obligation to collect and remit VAT is on the NRS, where the NRS fails to do so, the person to whom the goods or service is supplied shall withhold or self-account for the tax in line with section 10(3) and section 14(4) of the Act.[93] An NRS will be regarded as having failed to collect VAT on the supplies where (a) it does not include the transaction in its return; (b) from the facts of the transaction, it shows that the NRS has not charged VAT or collected the tax on the transaction. The Guidelines stipulate the consequences of failing to account for or remit VAT or comply with the Guidelines. Where the NRS fails to account for or remit VAT or generally comply with these Guidelines, the Service may:

i. Take all necessary steps to recover the amount due and get restitution;
ii. Use the Mutual Administrative Assistance in tax collection instrument, where applicable, to collect the tax; and
iii. Do all such things as may be necessary to enforce the tax laws and collect the taxes due.

The Guidelines provide modalities for the registration of NRS for VAT purposes.[94]

The Finance Act 2019 imposed VAT obligations on transactions conducted by non-resident digital companies.[95] The 2019 Act increased the VAT rate in Nigeria from the 5% provided under the VAT Act to a new rate of 7.5% and also introduced a threshold for taxable persons by exempting taxable persons with taxable supplies of less than Twenty-Five Million Naira (N25m) from accounting for VAT to the FIRS.[96]

5. CONCLUSION

Tax legislation and policy provide the fulcrum for tax administration. Given the dynamic nature of the digital economy, Nigerian tax laws must also be responsive, adapting promptly to their changing nature. Such promptness will enable the State to plug identified loopholes and minimise tax avoidance. In cases where the loopholes result from tax laws that are capable of different interpretations, which create avenues for avoidance, clarification by way of necessary legal amendments or issuance of tax circulars or rulings helps resolve any such ambiguity. In this regard, the rapidity of amendment of tax laws via the Finance Act 2019 and Finance Act 2021, as well as the regularity of administrative clarifications and subsidiary regulations by the FIRS, is commendable and vital if Nigerian tax laws will remain robust enough to address the fiscal issues associated with the digital economy. The need to amend the laws to resolve the challenge arising from the difference between the tax law amendment and the country's double taxation treaty obligations is of more immediate importance.

Whereas the new tax laws offer the prospect of generating income for the country, it is crucial to continuously review their overall impact on the economy and their reconcilability with the overall

[90] *Ibid.* para 2(2)
[91] *Ibid.* para 1(4)
[92] *Ibid*, para 6
[93] *Ibid*, para. 6(4)
[94] *Ibid*, para. 7(2)
[95] s. 30
[96] s. 38, Finance Act, 2019. Companies that do not meet the threshold are also exempted from penalties for non-registration for VAT purposes.

objective of the country to grow its digital economy. This will ensure that the taxes have minimal unintended outcomes like exacerbating the digital divide and undermining the economic activities of young, underemployed youths who depend on the digital economy. Furthermore, no actual data published by the government outlines the potential revenue loss the nation would have incurred without the amendment. It is essential to provide data on the wrong sought to be cured by the law and the revenue the country has realised due to the unilateral steps taken. There is a need for a proper cost-and-benefit analysis regarding the possible digital tax revenue mobilisation and the likely creation of taxing distortions. This will ensure a qualitative assessment of the current approach and guidance for the future.