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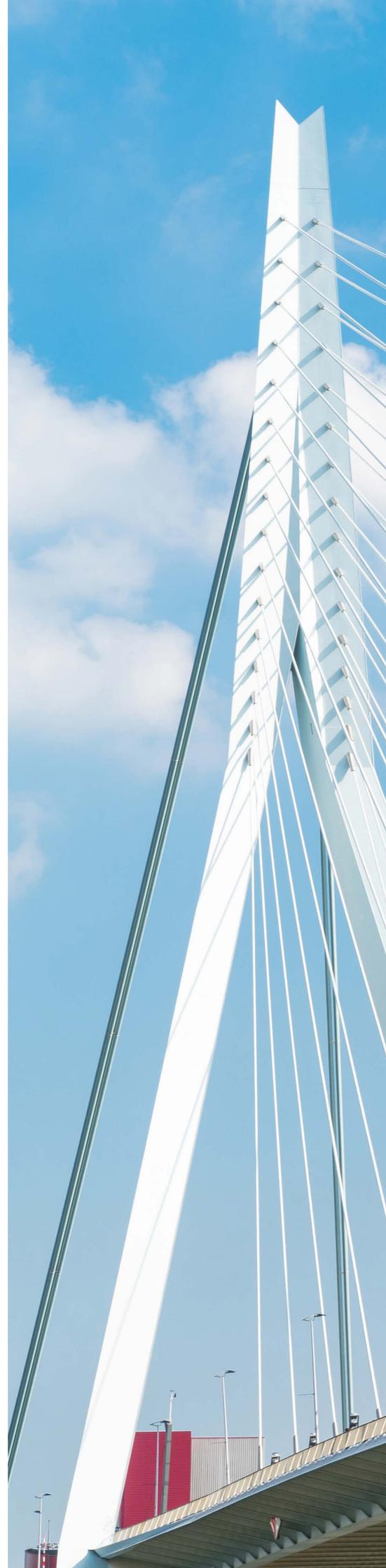
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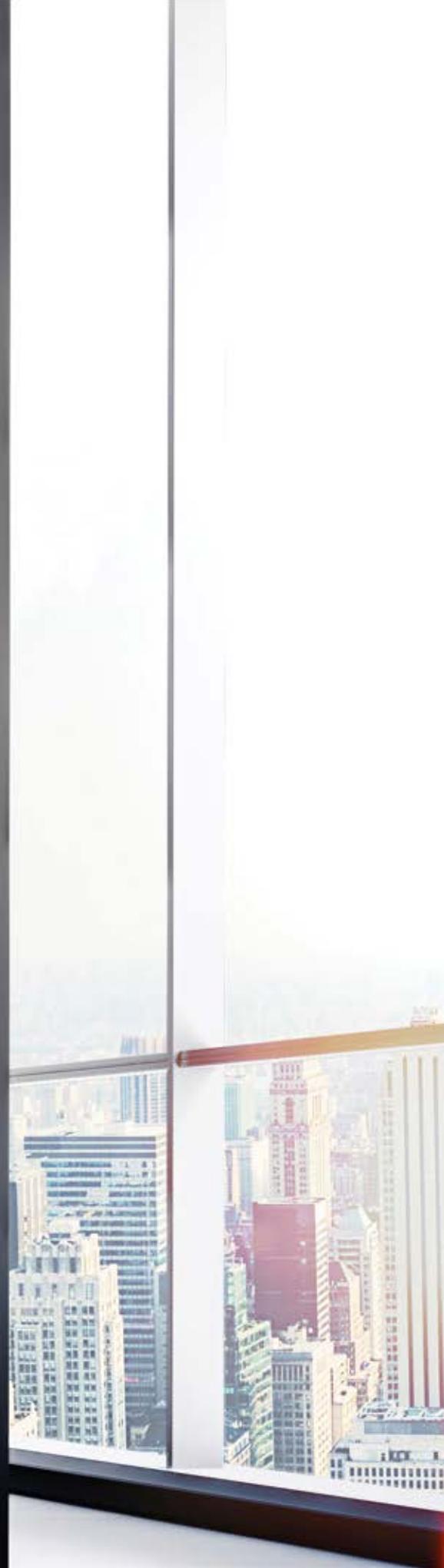
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Glossary

A	
AE	Approved Enterprise
AGRA	Associated Gas Re-injection Act
B	
BEPS	Base Erosion and Profit Shifting
BOJ	Best of Judgement
C	
CAMA	Companies and Allied Matters Act
CBCR	Country-by-Country Reporting
CBN	Central Bank of Nigeria
CCI	Certificate of Capital Importation
CGIS	Comptroller-General of the Nigeria Immigration Service
CGT	Capital Gains Tax
CIT	Companies Income Tax
CITA	Companies Income Tax Act
COA	Court of Appeal
CRS MCAA	Common Reporting Standard Multilateral Competent Authority Agreement
D	
DMB	Deposit Money Bank
DPR	Department of Petroleum Resources
DTA	Double Taxation Agreement
E	
ECA	Employee's Compensation Act
ECC	Export Credit Certificates
ECCI	Electronic Certificate of Capital Importation
ECF	Employee's Compensation Fund
EDT	Excess Dividend Tax
EEG	Export Expansion Grant
ERGP	Economic Recovery and Growth Plan
F	
FBIR	Federal Board of Inland Revenue
FDI	Foreign Direct Investment
FEC	Federal Executive Council
FG	Federal Government
FGN	Federal Government of Nigeria
FHC	Federal High Court
FIRS	Federal Inland Revenue Service
FIRSEA	Federal Inland Revenue Service Establishment Act

FRC	Financial Reporting Council of Nigeria
FY	Financial Year
G	
GDP	Gross Domestic Product
H	
HMO	Health Maintenance Organisation
I	
ITF	Industrial Training Fund
J	
JTB	Joint Tax Board
JV	Joint Venture
L	
LASG	Lagos State Government
LASWA	Lagos State Waterways Authority
LIRS	Lagos State Internal Revenue Service
M	
MLI	Multilateral Instrument
MNE	Multinational Enterprises
MPR	Monetary Policy Rate
MRR	Minimum Re-Discount Rate
MTEF/FSP	Medium Term Expenditure Framework and Fiscal Strategy Paper
N	
NAICOM	National Insurance Commission
NCA	Nigerian Communications Act
NCC	Nigerian Communications Commission
NDCC	Negotiable Duty Credit Certificate
NECA	Nigeria Employers' Consultative Association
NEITI	Nigeria Extractive Industries Transparency Initiative
NEPC	Nigerian Export Promotion Council
NHIS	National Health Insurance Scheme
NIMASA	Nigeria Maritime Administration and Safety Agency
NIMC	National Identity Management Commission
NIPC	Nigerian Investment Promotion Commission
NIWA	National Inland Waterways Authority
NORA	Notice of Refusal to Amend
NOTAP	National Office for Technology Acquisition and Promotion
NPP	National Petroleum Policy

NRC	Non-resident Company
NSITF	Nigeria Social Insurance Trust Fund
NTP	National Tax Policy
O	
OECD	Organisation for Economic Co-operation and Development
OPEC	Organisation of Petroleum Exporting Countries
P	
PEBEC	The Presidential Enabling Business Environment Council
PENCOM	National Pension Commission
PFA	Pension Fund Administrator
PFC	Pension Fund Custodian
PIGB	Petroleum Industry Governance Bill
PPT	Petroleum Profits Tax
PPTA	Petroleum Profits Tax Act
PSC	Production Sharing Contract
R	
RSA	Retirement Savings Account
RTA	Relevant Tax Authority
S	
SBIR	State Board of Internal Revenue
SDA	Stamp Duties Act
T	
TAC	Tax Appeal Commissioners
TAT	Tax Appeal Tribunal
TET	Tertiary Education Tax
TP	Transfer Pricing
V	
VAIDS	Voluntary Assets and Income Declaration Scheme
VAT	Value Added Tax
VC	Voluntary Contribution
VOA	Visa on Arrival
VOARS	Voluntary Offshore Assets Regularisation Scheme
W	
WHT	Withholding Tax
Y	
YOA	Year of Assessment



2.0

Preface

The need for tax administrators to continuously adhere to the canons of taxation for efficient and effective tax administration cannot be over-emphasized. This is especially necessary to reduce tax controversies and disputes to the barest minimum.

Furthermore, the constantly changing economic landscape requires governments at all levels to develop frameworks that will provide a competitive tax landscape for business, effectively accelerate tax revenues, proactively curb tax evasion, and create opportunities for the country's teeming population. A situation where the last time the CITA and VAT Act were reviewed was 12 years ago leaves much to be desired. Thus, there is an urgent need for government to reform our outdated tax laws to reflect current economic realities. An efficient way of doing this is to return to the practice of enacting a Finance Act soon after the passage of the annual Federal Budget through which our tax laws can be constantly reviewed in accordance with global best practices.

Government must also be fiscally responsible by being accountable for the revenues generated and thereby win taxpayers' confidence to improve voluntary compliance.

The FG implemented its VAIDS programme from July 2017 to June 2018 to give defaulting taxpayers the opportunity to regularize their tax affairs with full amnesty. The initiative was modestly successful, and contributed in some measure to the FIRS' ability to expand the tax net and achieve its record tax revenue collection of ₦5.3 trillion in 2018.

The FG also reconstituted the TAT and inaugurated the new TACs in 2018. This has restored the hope of taxpayers who have been practically left without recourse since the tenure of the last set of TACs expired in 2016.

This edition of the Nigerian Tax Journal summarizes the decided tax cases and administrative pronouncements by RTAs and Tax Administrators in 2018. We have also published, for the first time, an article by an academic; and republished extracts of articles written by some of our tax professionals during the year with references for further reading by users of the Journal.

As with the previous two editions, this compendium will serve as a reference material for tax administrations, practitioners and academics. We hope that you find the insights in the publication useful, and encourage you to provide feedback to us via e-mail to NG-FMTaxEnquiries@ng.kpmg.com



Wole Obayomi
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3.0

Executive Summary

We are pleased to publish the third edition of the Nigerian Tax Journal. This edition contains a summary of significant decisions on various tax cases (which became publicly available in 2018) that have helped to provide clarity on key tax issues. The Updates on Tax and Regulatory Issues section highlights declarations by the FG, FIRS and LIRS, amongst others. The Journal also features thought leadership articles authored by subject-matter experts at KPMG Nigeria and the academia during the year.

The Nigerian economy grew by 1.93% in 2018, buoyed largely by improved dynamics in the non-oil sector of the economy, which grew by 2% during the year. The oil sector also grew, though at a lower rate of 1.14%. Accretion to the foreign exchange reserves improved by 10.8% during the year, and stood at \$43.12 billion at year-end.

According to the Executive Chairman of FIRS, the tax authority recorded a total revenue of ₦5.32 trillion in 2018 – its highest ever revenue collection. The oil economy contributed ₦2.47 trillion (about 46%) of this amount, while the non-oil economy contributed ₦2.85 trillion (about 54%). The FG's VAIDS programme contributed less than 1% to the FIRS' total revenue for the year. Over 5,122 applications were received between

1 July 2017 and 30 June 2018, amounting to voluntary declarations of over ₦92 billion, out of which, more than ₦54 billion was paid by companies¹.

The outlook for the Nigerian tax environment looks challenging. The sustainable way forward is for the government to implement holistic tax reforms to improve the robustness, efficiency and effectiveness of the Nigerian tax system, and for tax administrators to continue to leverage technology to improve voluntary tax compliance and expand the tax base.

However, Tax Directors and Heads of Tax should be aware that the FG and State Governments are likely to continue to adopt aggressive collection methods in 2019, to shore up tax revenues. It is, therefore, critical that taxpayers ensure full tax compliance and be ready to explore available channels for dispute resolution, including seeking redress at the TAT and the courts.

This issue of the KPMG Nigerian Tax Journal will serve as a reference material on key tax issues as they affect business decision, which will assist CFOs, Tax Directors and Heads of Tax in evaluating and managing their tax risks.

We trust that you will find the Journal very useful for your purpose.

¹ Page 11 of the October – December 2018 edition of Gauge, a quarterly publication of the FIRS





4.0

Tax Outlook for 2019

We...hope that RTAs will balance their aggressive drive for revenue growth with Government's plan of improving the ease of doing business in Nigeria.

This is crucial, considering that Nigeria dropped one place on the 2019 World Bank Ease of Doing Business Index.

President Muhammadu Buhari laid the 2019 National Budget of Continuity ("the Budget") before the Joint Session of the National Assembly on 19 December 2018. The total revenue projected is ₦6.97 trillion, which is 3 percent lower than the 2018 estimate of ₦7.17 trillion. More than half of the budgeted revenue is expected to come from oil receipts (amounting to ₦3.73 trillion) based on a benchmark oil price of US\$60 per barrel and oil production estimates of 2.3 million barrels per day (at ₦305 to \$1).

Non-oil revenues, on the other hand, are projected to contribute ₦1.39 trillion, which represents 20% of total revenue, and is the same as the amount that was budgeted for 2018. The estimate for non-oil revenues comprises the FG's share of ₦799.52 billion from CIT, ₦229.34 billion from VAT, ₦302.55 billion from Customs and Excise Duties, and ₦54.13 from Federation Account Levies.

The balance of ₦1.85 trillion will come from proceeds expected from the FG's share of oil assets ownership restructuring (₦710.00 billion), independent revenues (₦624.58 billion), grants and donor funding (₦209.92 billion), domestic recoveries, assets and fines (₦203.38 billion), signature bonus (₦84.23 billion), and other sources (₦19.88 billion).

There are no proposed changes to the tax laws in the 2019 Budget Proposals. Based on the 2019 – 2021 MTEF/FSP ("the Paper"), tax rates are expected to remain static. However, the Paper contemplates an increase in the VAT rate on luxury items (which are not specified) from 5% to 15%. This proposed increase, alongside improvements in collection efficiency and an expansion of the tax base, is expected to drive an 11% increase in the FG's share of VAT revenue (relative to the 2018 figure of ₦207.51 billion).

According to the Executive Chairman of FIRS, the tax authority aims to achieve a record revenue collection of ₦8.3 trillion in 2019. This represents a whopping increase of 56% over and above the tax authority's unprecedented revenue collection of ₦5.32 trillion in 2018!

We understand that the FIRS intend to achieve this target by focusing more on cross-border transactions, particularly the taxation of the digital economy, to ensure that MNEs pay their fair share of tax in Nigeria. The issuance of revised TP regulations in 2018 and the domestication of Action 13 of the OECD BEPS Action Plan via the publication of Nigeria's CbCR Regulations in 2018, are clear pointers in this regard.

There is no gainsaying that the FIRS and State Tax Authorities will continue to scrutinize domestic transactions and indigenous taxpayers as well, to boost tax yield and stem tax evasion. In this regard, we expect RTAs to sustain the laudable initiatives they introduced in 2018, such as the increased deployment of technology in tax administration and the implementation of JTB's collaborative framework for joint tax audits by Federal and State Tax Authorities.

Unfortunately, some of the tax authorities' somewhat controversial initiatives may also be retained. These include initiatives such as: the freezing of taxpayers' bank accounts over alleged tax liabilities; the issuance of public notices (some of which are inconsistent with the enabling tax legislation) to block perceived tax loopholes; and the adoption of property valuation as a basis for imposing BOJ tax assessments, which the FHC has recently ruled as being illegal.

We, however, hope that RTAs will balance their aggressive drive for revenue growth with Government's plan of improving the ease of doing business in Nigeria. This is crucial, considering that Nigeria dropped one place on the 2019 World Bank Ease of Doing Business Index (from 145 in 2018 to 146 in 2019 out of the 190 countries surveyed) despite moving up 14 places under the "Paying Taxes" Indicator in the survey. Thus, concerted efforts must be made by RTAs to sustain the improvement on this front.

Whilst the achievement of the FG's stated objective (in the ERGP) of a top-100 ranking on the Index by 2020 may prove to be a Herculean task, we have highlighted below some of the initiatives that the FG and State Governments should implement in 2019, to improve the overall tax environment:

- Operationalize the Road Infrastructure Development and Refurbishment Investment Tax Credit Scheme, and partner with the private sector on other well-thought-through, development-focused tax incentives in critical areas like power, healthcare, and education.
- Enact critical legislation such as: the PIGB; the other components of the Petroleum Industry Bill (i.e. the Petroleum Industry Fiscal Bill and Petroleum Host Community Bill); the Companies and Allied Matters Act (Repeal and Re-enactment) Bill, 2018; and the Omnibus Bill that was developed by the PEBEC in conjunction with numerous private sector players and think tanks to amend obsolete and anti-business provisions in various, extant pieces of legislation.
- Amend the Deep Offshore and Inland Basin Production Sharing Act to provide the basis for increasing the profit oil share of government when oil price exceeds USD20 per barrel in real terms. This will help resolve the ongoing dispute between PSC operators and the Attorney General of the Federation & the three States of Akwa Ibom, Bayelsa and Rivers.
- Extend the VAT (Exemption of Commissions on Stock Exchange Transactions) Order, 2014 (which will lapse on 24 July 2019) pending when the Nigerian capital market will be sufficiently deepened.
- Finalise the draft Executive Order on the modification of VAT in the Nigerian electricity supply industry. However, the scope of the Order should be expanded to include mini-grid operators, which act as both generating and distribution companies. Hopefully, the current dispute between the Nigeria Customs Service and the Renewable Energy Association of Nigeria on the applicable duty rate for solar power equipment will be resolved.
- Fix the teething problems that have plagued the deployment of technology in tax administration. These include issues of frequent downtimes and the delay in rolling out electronic foreign currency denominated WHT credit notes.
- Hold stakeholders' consultation before finalising tax-related public notices, regulations and directives.
- Domesticate the CRS-MCAA to enable RTAs in Nigeria to automatically exchange tax information with tax authorities in participating jurisdictions.
- Prosecute tax evaders that failed to take advantage of the VAIDS programme. This will ensure the credibility of future tax amnesty programmes, and serve as a deterrent to other taxpayers.
- Implement an effective tax risk management process, given the resource constraints faced by RTAs. This will help streamline tax audit processes, and enable RTAs to bring more individuals and informal sector players into the tax net.

The implementation of the above initiatives will help to achieve the government's target of 15% tax-to-GDP ratio and make the Nigerian tax environment competitive.



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5.0

2018 in Review

5.1. Significant tax rulings

Companies Income Tax

1. Olokun Pisces Limited vs FIRS¹

Background

Section 23(1)(q) of CITA exempts from CIT the profits of any Nigerian company in respect of goods exported from Nigeria, provided that the proceeds from that export are repatriated to Nigeria and used exclusively for the purchase of raw materials, plant, equipment and spare parts.

Section 19 of CITA subjects to tax, dividend paid out of profits on which no tax is payable due to no total profits or total profits less than the amount of dividend paid. The application of this section has generated significant debate between the FIRS and taxpayers, especially where the dividend declared is from tax-exempt income or retained earnings.

Facts of the case

Olokun Pisces Limited (“OPL” or “the Company”) is engaged in the business of fish trawling, packaging and exportation of fish, fingerlings, ports and prawns.

This case was an appeal by OPL against an earlier judgment of the TAT² on the applicability of EDT (based on Section 19 of CITA) to dividends declared out of the Company’s export profits. The Company had paid dividends in the 2009 to 2012 YOAs when it had no total profits, as a result of which the FIRS assessed it to EDT and subsequently issued a NORA. The Company appealed the NORA at the TAT. However, the Tribunal held that the Company was liable to additional CIT liability under Section 19 of CITA, as it did not satisfy all the conditions stipulated in Section 23(1)(q) of the Act for the tax-exemption of export profits. Dissatisfied with the TAT’s decision, the Company filed an appeal at the FHC.

The major issue for determination at the FHC was whether OPL had discharged the burden of proof by providing evidence to sufficiently support the repatriation and utilisation of its export proceeds in compliance with Section 23(1)(q) of CITA.

The decision

The FHC upheld the TAT’s decision and ruled in favour of the FIRS. Specifically, the FHC stated that the evidence presented by OPL did not sufficiently prove that the Company had repatriated its export proceeds to Nigeria, and even if it did, there was no evidence that the profit was used to purchase raw materials, plant, equipment and spare parts as required by Section 23(1)(q) of CITA. Consequently, the FHC held that OPL’s export profit was subject to tax under Section 19 of CITA.

² Suit No: FHC/L/5A/2016

³ Appeal No: TAT/LZ/CIT/076/014. Please refer to page 9 of the 2017 Nigerian Tax Journal.

Petroleum Profits Tax

1. FIRS vs The Shell Petroleum Development Company of Nigeria Ltd⁴

Background

Section 3 of AGRA forbids any company engaged in the production of oil or gas from flaring associated gas after 1 January 1984, without obtaining the written permission of the Minister for Petroleum Resources. The section also empowers the Minister to issue gas flaring certificates to qualifying companies specifying the terms and conditions or fees payable for continued gas flaring, where he is satisfied that utilization or re-injection of the produced gas is not appropriate or feasible.

Section 10 of the PPTA provides that only expenses wholly, exclusively and necessarily incurred by an oil and gas company in an accounting period, in respect of its petroleum operations, are tax-deductible. The tax deductibility of gas flaring fees – or gas flaring penalties, as they are sometimes called – has been a subject of debate for decades in the Nigerian petroleum industry.

Facts of the case

The Shell Petroleum Development Company of Nigeria Ltd (“Shell” or “the Company”) treated payments it made to the DPR for gas flared between 2006 and 2008, as tax-deductible. The receipts issued by the DPR in this regard referred to the gas flaring payments as “penalties”.

Upon reviewing the Company’s tax returns, the FIRS disallowed the payments on the grounds that they related to penalties. Shell appealed the FIRS’ decision at the TAT, and got a favourable judgment from the Tribunal to the effect that the payments were tax-deductible for PPT purposes, as they qualified as royalties rather than penalties.

This FHC case was, therefore, an appeal of the TAT’s decision by the FIRS. The main issues for determination were:

- a. Whether the TAT acted ultra vires when it held that the payments made to DPR for gas flared do not constitute penalty, thereby reversing the decision of the Minister for Petroleum Resources on the nature of the payments
- b. Whether the amounts paid for gas flared are tax-deductible.

The decision

The FHC set aside the decision of the TAT and ruled in favour of the FIRS, holding that the TAT acted ultra vires its statutory powers by substituting the class of payment made by Shell to the DPR, from “penalty” to “royalty”. The court also held that the payments for gas flared are not tax-deductible, as they do not fall within the category of expenses incurred wholly, exclusively and necessarily for petroleum operations, as envisaged by Section 10 of the PPTA.

2. FIRS vs Mobil Production Nigeria Unlimited⁵

Background

As discussed in the above FIRS vs Shell case, Section 3 of AGRA forbids any company engaged in the production of oil or gas, from flaring associated gas without obtaining a written permission or certificate from the Minister for Petroleum Resources, whilst Section 10 of the PPTA provides the underlying basis for the tax-deductibility of expenses incurred in respect of its petroleum operations. One of the perennial tax issues in the Nigerian petroleum industry is whether gas flaring fees or penalties are tax-deductible.

Facts of the case

Between 2006 and 2008, Mobil Production Nigeria Unlimited (“Mobil” or “the Company”) made payments in arrears to the DPR for gas flared, and treated the “gas flaring fees” as tax-deductible in its PPT returns for the years.

Following a NEITI audit on the Company, the FIRS disallowed the gas flaring fees for tax purposes, and assessed Mobil to additional tax on the grounds that the payments were illegal and did not satisfy the provisions of Section 10 of the PPTA. Accordingly, Mobil challenged the position of the FIRS at the TAT.

The TAT upheld Mobil’s position and set aside the FIRS’ assessments. The TAT’s ruling was based on the fact that AGRA and other applicable laws do not contain any provision for monetary penalties where gas is flared without the written permission of the Minister. Hence, the payments made by Mobil to the DPR were not penalties but fees that are tax-deductible under Section 10(1)(l) of the PPTA.

Dissatisfied with the TAT’s position, the FIRS lodged an appeal at the FHC. The main issues for determination were whether:

- Mobil complied with the provisions of Sections 3(1) and (2) of AGRA; and

⁴ Suit No: FHC/L/1A/2017

⁵ Suit No: FHC/L/3A/2017

- Payments made by Mobil in respect of gas flared without ministerial permit or certificate can be considered as tax-deductible expenses

The decision

The FHC ruled that Mobil contravened the provisions of Sections 3(1) and (2) of AGRA and Regulations 1(a) to (e) of the Associated Gas Re-injection (Continued Flaring of Gas) Regulations, by not obtaining the requisite ministerial permit or certificate prior to flaring gas. In particular, the FHC stated that the failure of the Minister of Petroleum Resources to respond to Mobil's application for a permit to flare gas or to issue a certificate could not be presumed to be an approval.

Consequently, the FHC's position was that the gas flaring payments made by Mobil between 2006 and 2008 were illegal, and should not enjoy the benefit of tax-deductibility that gas flaring payments legitimately made pursuant to Section 3 of AGRA qualify for under Section 10(1)(l) of the PPTA⁶.

Transaction Taxes

1. Vodacom Business Nigeria Limited vs FIRS⁷

Background

In Nigeria, VAT is chargeable on the supply of goods and services, other than those exempted under the VAT Act.

Section 10 of the VAT Act requires an NRC carrying on business in Nigeria to register with the FIRS using the address of the Nigerian party with which it has a subsisting contract (i.e. its Nigerian customer). The NRC is also required to include VAT on the invoices it issues to the Nigerian customer.

Facts of the case

This case was an appeal against the decision of the TAT⁸ on the applicability of VAT on services provided by New Skies Satellites ("NSS"), an NRC, to Vodacom Business Nigeria Limited ("Vodacom").

Vodacom entered into a contract with NSS

for the supply of bandwidth capacities for its use in Nigeria. The bandwidth capacities were transmitted by NSS to its satellite in orbit and received in Nigeria by Vodacom via its earth-based satellite. The NRC did not charge VAT on its invoice to Vodacom for the service rendered, and Vodacom did not remit VAT to the FIRS on the transaction.

The FIRS assessed Vodacom to VAT on the transaction. Vodacom objected to the assessment, but the FIRS refused to amend its position. Consequently, Vodacom filed an appeal at the TAT to determine whether the transaction between it (Vodacom) and NSS was a VATable transaction.

The TAT held that the transaction was liable to VAT in Nigeria. Dissatisfied with the TAT's decision, Vodacom appealed the judgment at the FHC and sought that it be set aside.

The decision

The FHC upheld the decision of the TAT, and ruled in favour of the FIRS, on the basis that the transaction between Vodacom and NSS constitutes a supply of service that is liable to Nigerian VAT based on the provisions of Section 2 of the VAT Act. In delivering the judgment, the FHC held that the location of a supplier is of no consequence, as long as the recipient of the service is based in Nigeria and the service is provided for a consideration. The FHC also ruled that the fact that an NRC does not issue a tax invoice to a Nigerian customer does not preclude the latter from accounting for the VAT due on the transaction.

2. FIRS vs Gazprom Oil & Gas Nigeria Limited⁹

Background

As highlighted in the above FIRS vs Vodacom case, VAT is chargeable in Nigeria on the supply of goods and services, other than those exempted under the VAT Act.

Section 10 of the VAT Act requires an NRC carrying on business in Nigeria to register with the FIRS using the address of the Nigerian party with which it has a subsisting contract (i.e. its Nigerian customer), and include VAT on its invoices to the Nigerian customer.

⁶ Section 10(1)(l) of the PPTA provides for the tax-deductibility of "all sums, the liability of which was incurred by the company during that period to the Federal Government, or to any State or Local Government Council in Nigeria by way of duty, customs and excise duties, stamp duties, education tax, tax (other than the tax imposed by this Act) or any other rate, fee or other like charges."

⁷ Appeal No: FHC/L/4A/2016.

⁸ Appeal No: TAT/LZ/VAT/016/2015. Please refer to page 14 of the 2017 Nigerian Tax Journal.

Facts of the case

Gazprom Oil & Gas Nigeria Limited (“Gazprom” or “the Company”) contracted various NRCs to supply it with consultancy and advisory services on an on-going basis, to enable it to make investment choices in different African countries. Upon receipt of the consultancy and advisory services, Gazprom paid the agreed fees to the NRCs without accounting for Nigerian VAT thereon to the FIRS. Following a tax audit, the FIRS issued additional VAT assessments to Gazprom on the transactions.

Gazprom objected to the additional assessments and subsequently lodged an appeal at the TAT. The Company’s position was that it had no obligation to account for VAT on the services since the NRCs were not carrying on business in Nigeria, and did not issue tax invoices (i.e. invoices that reflect Nigerian VAT) to Gazprom.

The TAT agreed with Gazprom’s position and ruled in its favour. However, the FIRS disagreed with the decision of the Tribunal, and consequently appealed the decision at the FHC. The sole issue for determination was whether the supply of goods and services made by an NRC to a Nigerian company or person should be subject to VAT.

The decision

The FHC overturned the decision of the TAT and ruled in favour of the FIRS. The court held that carrying on business in Nigeria is not limited to physical presence of an NRC in Nigeria; and that where an NRC fails to include VAT on its invoice, the NRC’s failure does not obviate the obligation for the Nigerian company (which is the ultimate consumer of the good or service) to pay the tax to the FIRS.

3. **Attorney General, Lagos State vs Eko Hotels Limited & Federal Board of Internal Revenue**¹⁰

Background

There are three levels of taxation in Nigeria based on the three-tiers of government in the country: FG, State Governments, and Local Governments. The 1999 Constitution of the Federal Republic of Nigeria, as amended (“the Nigerian Constitution”), highlights the taxes (and other matters) that the National Assembly and State Houses of Assembly can

⁹ Suit No: FHC/ABJ/TA/1/2015

legislate on. Thus, based on relevant tax legislation and the Taxes and Levies (Approved List for Collection) Act (as amended), the taxes collectible by each tier of government are reasonably clear.

However, there has been a raging controversy on the issue of consumption tax since Nigeria returned to democratic rule in 1999. This is because, whilst the FIRS collect VAT on behalf of the three tiers of government¹¹, some State Governments, notably Lagos State, have imposed other forms of consumption tax at the same rate as VAT. This has, expectedly, raised concerns bordering on multiple taxation and the applicability or otherwise of the doctrine of covering the field. This doctrine is enunciated in Section 4(5) of the Nigerian Constitution which provides that *“If any Law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other Law shall, to the extent of the inconsistency, be void.”*

Facts of the case

The LIRS demanded from Eko Hotels Limited (“EHL” or “the Company”), Sales Tax on sales to its customers. However, the Company was of the view that the consumption tax collected on its sales is payable as VAT to the FBIR. It objected to the LIRS’ position, and subsequently filed a suit against both the Attorney General of Lagos State and the FBIR and requested the FHC to determine which body it ought to remit the tax collected.

The FHC ruled on 20 December 2004 that Eko Hotels was obligated as a taxable person to remit the tax deducted on sales to its customers, to the FBIR. Dissatisfied with the decision of the FHC, the LASG appealed to the COA, which upheld the decision of the

FHC. Still aggrieved by this position, the LASG filed an appeal at the Supreme Court. The main issue for determination was whether EHL should remit the tax it collects on sales to its customers, to the LIRS as required by the Lagos State Sales Tax Law and the Lagos State Sales Tax (Schedule Amendment) Order 2000, or to the FIRS as required by the VAT Act.

The decision

The Supreme Court ruled in favour of EHL and the FBIR on the basis that the imposition of Sales Tax by Lagos State would amount to double taxation of the same goods and services, payable by the same consumers under two different legislation. In delivering the judgment, the court relied on the doctrine of “covering the field” to rule that once an existing Act of the National Assembly (i.e. VAT Act) has covered the field, the Act of the National Assembly must prevail even if the Lagos State House of Assembly has the requisite legislative competence to enact the Sales Tax Law.

Other Tax and Regulatory Matters

1. The Registered Trustees of Hotel Owners and Managers Association of Lagos vs Attorney General of Lagos and FIRS¹²

Background

The Hotel Occupancy and Restaurant Consumption Law, Cap. H8, Laws of Lagos State 2015 (“the Law”) imposes a 5% tax on any person who pays for the use or possession of any hotel, hotel facility or event centre or purchases consumable goods or services in any restaurant (whether or not located within a hotel) in Lagos State. Section 9 of the Act empowers the LIRS to make rules and regulations for the determination, collection and

¹⁰ SC.321/2007

¹¹ VAT was introduced by VAT Decree No. 102 of 1993, to replace the Sales Tax applicable in various States of the Federation. Based on the current basis for VAT revenue allocation, the FG is entitled to 15% of revenue collected, while State Governments and Local Governments are entitled to 50% and 35%, respectively.

remittance of taxes due, and for proper administration of the Law.

Fact of the case

In 2017, the LIRS issued the Hotel Occupancy and Restaurant Consumption (Fiscalisation) Regulations ("the Regulations") pursuant to its powers under Section 9 of the Law. The Regulations require all persons who own, manage or control any business or supply any goods or services chargeable under the Law, to use an Electronic Fiscal Device to record all taxable transactions.

The Registered Trustees of Hotel Owners and Managers Association of Lagos ("RTHMAL" or "the Trustees"), being displeased with the provisions of the Regulations, filed an ex-parte motion with the FHC for an Order of Interim Injunction restraining:

- i. The LIRS, its agents, servants, privies, or any other person from enforcing and/or implementing the provisions of the Act and/or the Regulations.
- ii. The LIRS, its agents, servants, privies, etc. from visiting members of RTHMAL between 1 March – 10 March 2018 or any other period before or thereafter for the purpose of installing the Fiscal Electronic Device and/or any other purposes whatsoever in furtherance of the Law and/or the Regulations.

The decision

The FHC granted RTHMAL's request by issuing the above Order on 21 March 2018.

However, following further representations by the counsels to the first defendant and the plaintiffs, the FHC varied its initial Order on 7 May 2018. The new FHC Order allows the LASG to continue to enforce the Law, but not the Regulations, pending the final determination of the substantive suit. In essence, the LASG is permitted to continue to enforce the provisions of the Law pending the determination of the suit, but cannot install any Fiscal Electronic Devices or enforce any provisions of the Regulations.

2. Nigeria LNG Limited vs Attorney General of the Federation, Global West Vessel Specialists Nigeria Limited and NIMASA ("the Defendants")¹³

Background

The Nigeria LNG (Fiscal Incentives, Guarantees and Assurances) Act ("the Act") provides certain tax exemptions, guarantees and assurances to the Nigeria LNG Limited ("NLNG" or "the Company"), its agents, shareholders, subsidiaries, affiliates, contractors and sub-contractors. The validity and scope of these exemptions, guarantees and assurances have been called to question by tax and regulatory authorities over the years.

Facts of the case

The NIMASA Act imposes a levy of 3% of gross freight earnings on all international inbound and outbound cargo from ships or shipping companies operating in Nigeria. Similarly, Section 43(a) of the Coastal and Inland Shipping (Cabotage) Act imposes a surcharge of 2% of the contract sum performed by any vessel engaged in coastal trade.

Furthermore, the Marine Environment (Sea Protection Levy) Regulations 2012 made pursuant to NIMASA Act impose a sea protection levy on certain commercially operated vessels. Finally, Regulations 14 and 20 of the Merchant Shipping (Ship Generated Marine Waste Reception Facilities) Regulations 2012 impose certain levies on ships calling at or operating within a port, terminal or otherwise operating a commercial service within Nigerian waters.

The NIMASA sought to impose the above levies on the NLNG and vessels owned, chartered or contracted by the Company for its operations. However, following disagreement on the issue, NIMASA mounted a blockade on the Bonny Channel to prevent the free movement of the vessels. A political solution was subsequently proffered to the issue, under which the NLNG was required to make certain payments to NIMASA.

However, the NLNG was dissatisfied with the above decision, and approached the FHC for the determination of a number of questions which are summarized below:

- Whether the NLNG Act is an existing, valid and binding law in Nigeria

¹² FHC Order and Ruling with Suit No: FHC/L/CS/360/2018

¹³ Suit No: FHC/L/CS/847/2013

- Whether in view of relevant provisions of the NLNG Act, the provisions of the NIMASA Act, Cabotage Act, Marine Environment Regulations and Merchant Shipping Regulations are applicable to the Company, its agents, shareholders, subsidiaries, contractors and sub-contractors

The decision

The FHC ruled in favour of NLNG in respect of all the issues raised, upheld the validity of the NLNG Act and the tax exemptions, guarantees and assurances contained therein, and granted the reliefs sought by the Company¹⁴.

5. IHS Nigeria Limited vs Attorney General of the Federation & Others¹⁵

Background

The Nigerian Constitution delineates the legislative powers of the National Assembly and State Houses of Assembly. The Taxes and Levies (Approved List for Collection) Act (as amended) ("the Act") also specifies the taxes collectible by the Federal, State and Local Governments.

The NCA was enacted by the National Assembly in 2003, in exercise of its constitutional powers. Section 135 of the Act provides that *"licensees under [the] Act may require approvals of the State Government, Local Government or other relevant authority for installation, placing, laying or maintenance of any or across any land and it shall be the responsibility of any such licensees to obtain such approvals"*.

The Registration of Business Premises (Amendment No 1) Law of Abia State specifies a Registration Fee of ₦100,000 and and Renewal Fee of ₦80,000, for Mobile Communication Mast / Station Site. Also, Section 5 of the Abia State Basic Environmental (Amendment No 1) Law prohibits telecommunications operators from siting, installing, building, or establishing mast stations or signal sensitive devices without the prior approval of the Abia State Environmental Protection Agency ("the Agency"). The

section also requires such operators to conduct the appropriate Environmental Impact Assessment in respect of each base station.

Facts of the case

In line with a directive and guidelines issued by the NCC, IHS Nigeria Limited ("IHS" or "the Company") acquired towers and cellular masts from MTN Communication Limited, Emerging Markets Telecommunications Services Limited and other telecommunication companies. Some of the masts were located in Abia State.

In September 2016, the Abia State Environmental Protection Agency issued demand notices to IHS to pay "Environmental Support Fee" for the telecommunication masts in Abia State. In addition, the Abia State Government, through its various agencies, served IHS demand notices imposing Business Premises Levy of ₦100,000 per mast site.

Consequently, IHS filed an appeal at the FHC, challenging the legality of the Business Premises Levy and Environmental Support Tax imposed by the Abia State Government, through its various agencies, on the Company's telecommunications critical infrastructure.

The decision

The FHC held that the House of Assembly in a State can legislate on matters not included in the exclusive legislative list, particularly on issues relating to land, physical planning and environmental matters. Consequently, the Abia State Government could impose the above taxes on the Company under certain circumstances. The Court, however, held that the station sites where IHS' masts are located do not constitute business premises within the context of the enabling legislation. Consequently, the FHC ruled that the amount imposed (per mast site) is illegal, oppressive and amounts to multiple taxation.

¹⁴ The COA has suspended the judgment and referred the case to the FHC for retrial by a new Judge

¹⁵ Suit No: FHC/UM/CS/146/16

5.2 Updates on tax and regulatory issues

1. FG signs double taxation agreement with Singapore

The FGN has signed a bilateral agreement (“the Agreement” or “the DTA”) with Singapore for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains. The Agreement was signed on 2 August 2017 and approved by President Muhammadu Buhari on 26 March 2018.

The Inland Revenue Authority of Singapore announced, on 3 August 2018, that the DTA had been ratified in Singapore, and would enter into force on 1 November 2018, with an effective date of 1 January 2019. However, the Agreement will need to be ratified by Nigeria’s National Assembly, as required by the Nigerian Constitution, before it enters into force in Nigeria.

2. FG reconstitutes TAT and appoints TACs

On 12 July 2018, the Honourable Minister of Finance (“the Minister”) announced the reconstitution of the TAT in the six (6) geopolitical zones of Nigeria, in addition to Lagos and Abuja. This is pursuant to the powers conferred on the Minister by Paragraph 1(2) of the Fifth Schedule to the FIRS (Establishment) Act, 2007. The TACs were inaugurated by the Minister on 5 November 2018.

The TACs, who are expected to hold office for a term of 3 years from their date of appointment, were drafted from various professional bodies such as the Institute of Chartered Accountants of Nigeria, Association of National Accountants of Nigeria, the Chartered Institute of Taxation of Nigeria, the Nigerian Bar Association and the Nigerian Association of Chambers of Commerce & Industry, Mines and Agriculture. A number of the new commissioners have extensive experience in tax administration,

policy, enforcement and practice, having served for many years at the FIRS. We hope that the reconstituted TAT will be able to discharge its statutory function effectively and efficiently with such a wide representation.

The tenure of the previous TACs expired in May 2016, which resulted in the TAT’s technical suspension, and created a two-year vacuum in tax dispute resolution in Nigeria. Given the plethora of tax appeals that accumulated during the interregnum, the reconstitution of the TAT by the FG is a welcome development.

Taxpayers aggrieved by decisions of any tax authority in Nigeria now have the option to seek redress at the TAT. Those with pending cases at the TAT should expect to receive notifications from the relevant Zones of the TAT for the continuation of such appeals.

3. FIRS mandate taxpayers to display VAT registration certificates at their business premises

In November 2018, the FIRS informed the general public that it had commenced the issuance of VAT certificates to all taxpayers registered for VAT collection purpose. The FIRS also mandated VAT collectors to display the VAT certificates at their business premises and required taxpayers to report VAT collectors who fail to adhere to this directive.

4. FG issues Official Gazette of approved pioneer industries and products

The FGN has, by Official Gazette No. 84, Vol.104 of 2017 (“the Gazette”), published a comprehensive list of pioneer industries and products (“the pioneer list”) referenced S.I. No. 24 of 14 August 2017, and effective from 7 August 2017.

The pioneer list comprises 99 pioneer industries (which include the extant pioneer industries and

27 new industries approved by the FEC in August 2017) including sectors such as agriculture, manufacturing, information and communications, financial services etc.

Pioneer status is a fiscal incentive provided under the Industrial Development (Income Tax Relief) Act, Cap I7, LFN, 2004, and administered by the NIPC. The incentive entitles eligible companies to income tax holiday for up to five (5) years – three (3) years in the first instance, renewable for an additional maximum period of two (2) years. In addition to income tax holiday, pioneer companies enjoy other benefits, such as exemption of dividends paid out of pioneer profits from withholding tax.

The review and expansion of the pioneer list by the FEC is a welcome development that aligns with its objective of economic diversification through acceleration of the growth of the non-oil sector of the economy. The expansion of the list is expected to stimulate the interest of investors in the new pioneer industries and attract the much-needed private capital to the economy. It is also expected that the NIPC will continue to streamline its processes to ensure timely approval of application by eligible investors for the incentive.

5. **PENCOM issues guidelines on Voluntary Pension Contribution**

PENCOM issued its Guidelines on “Voluntary Contribution under the Contributory Pension Scheme”, following an earlier circular issued to PFAs and PFCs in November 2017. The Guidelines aim to establish a uniform set of rules for the operation of, and participation in, Voluntary Contributions (VCs).

The Guidelines specify the eligibility criteria for persons who may make VC. They include:

- an employee in an organization with three or more employees
- any worker/retiree in an organization that operates a Closed Pension Fund Administration scheme (and employed prior to June 2014)

or an Approved Existing Scheme

- any person who is either retired, disengaged or whose employment was terminated and is currently receiving pension under the Contributory Pension Scheme but secures another employment on a contract basis
- any retiree under the defunct Defined Benefit Scheme who secures another contract of employment
- judicial officers, members of the Armed Forces and Secret Service
- any appointee of the President of the Federal Republic of Nigeria, State Governor and elected officers who are not career civil servants
- any foreigner who resides and works in the Nigerian formal sector.

The Guidelines further prescribe a limit of one-third of an employee’s monthly salary as maximum contribution to the employee’s VC, in line with the Labour Act of 1990. VC shall only be made once a month for all categories of contributors.

The Guidelines also provide that VC shall only be made in Naira and prescribe a penalty of not less than 2 per cent of the unremitted contribution for each month or part of each month that the default continues.

Active or mandatory contributors (i.e. contributors obliged to make pension contributions) shall only have access to 50% of VCs made into their Retirement Savings Account (RSA) after two (2) years of such contributions. Where withdrawal is made before 5 years, the income which accrues to the VC shall be liable to tax. Other categories of contributors will only be eligible to withdraw all their VC at the expiration or termination of their contracts. Here, both the principal amount of the VC and the income thereon will be liable to tax, where the VC is withdrawn before the end of five years.

6. FIRS publish revised TP Regulations

The FIRS issued its Income Tax (TP) Regulations, 2018 (“the new Regulations”) in November 2018. The new Regulations, which have an effective commencement date of 12 March 2018, repealed the Income Tax (TP) Regulations, 2012 which took effect on 2 August 2012.

Some of the significant changes stipulated in the new Regulations are highlighted below:

- a. **Penalties:** The new Regulations stipulate exorbitant penalties for non-compliance. For example, failure to submit TP Declaration Form within statutory deadline will attract a penalty of ₦10 million plus ₦10,000 for every day in which the failure continues.
- b. **Connected persons:** The Regulations replaced the term “connected taxable persons” in the old Regulations with “connected persons”. Persons are now deemed to be connected where “one person has the ability to control or influence the other person in making financial, commercial or operational decisions, or there is a third person who has the ability to control or influence both persons in making financial, commercial or operational decisions”.
- c. **Intra-group services and Intangibles:** The new Regulations adopted the modalities provided in the OECD TP Guidelines for determining the existence of intra-group services and intangibles, and compliance with the arm’s length principle.

The Regulations further specify the maximum amount that will be allowable for tax purposes in respect of “transfer of rights in an intangible, other than the alienation of an intangible”. This is 5% of direct earnings before interest, tax, depreciation and amortisation (EBITDA) derived from the commercial activity in which the right was exploited.
- d. **Safe harbour:** The Regulations expunged the safe harbour arrangement applicable under the old Regulations.

e. Filing of updated TP declaration:

The new Regulations specify certain trigger events for the filing of updated declaration by connected persons. These include merger and acquisition transactions involving the connected person or its parent company, and “any other change in the structure, arrangement or circumstances of the person ... which influences whether it will be considered to be connected or not connected to another person”. The updated declaration is to be submitted to the FIRS within six months of the end of the accounting year in which the event occurred.

Furthermore, a connected person is required to make a notification to the FIRS as part of its TP declaration, where there is a change in its directorship by way of an appointment or retirement of a director.

7. Introduction of Voluntary Offshore Assets Regularisation Scheme

On 8 October 2018, President Muhammadu Buhari signed Executive Order No. 008 (“the Order”) authorizing the Attorney-General of the Federation and Minister of Justice to set up a Voluntary Offshore Assets Regularization Scheme in Switzerland (“VOARS” or “the Scheme”). The Scheme applies to all persons, entities and their intermediaries who hold offshore assets and are in default of their tax liabilities.

The Scheme provides a one-year window commencing 8 October 2018, during which affected taxpayers can declare their offshore assets and income from sources outside Nigeria that relate to the preceding 30 YOAs, regularize their tax status and ensure full compliance.

To participate, eligible taxpayers must voluntarily make complete and verifiable disclosures of their offshore assets and income through the Voluntary Offshore Assets Regularization Facility in Switzerland to be set up by the FGN. Such taxpayers are also expected to, amongst other things, pay a one-time levy of 35% of their offshore assets to the FGN in lieu of all outstanding taxes, penalties and interest; and ensure full tax compliance on their residual

offshore assets after accessing the Scheme by paying taxes to the FGN.

In exchange, qualified taxpayers shall obtain permanent immunity from criminal prosecution for tax offences, waiver of interest and penalties on the declared and regularized offshore assets and waiver from tax audit of the declared and regularized offshore assets.

Any eligible taxpayer that fails to take advantage of the opportunity provided by the Scheme shall, upon its expiration, be liable to pay in full, the principal tax liability due (inclusive of interest and penalties). The taxpayer may also be subject to comprehensive tax audit, investigation, charges and enforcement procedures concerning the offshore asset.

8. **Introduction of Flare Gas (Prevention of Waste and Pollution) Regulations, 2018**

President Muhammadu Buhari, in his capacity as the Minister of Petroleum Resources (“the Minister”), has signed the Flare Gas (Prevention of Waste and Pollution) Regulations, 2018 (“the Regulations”) into law. The Regulations seek to minimize the environmental and social impact caused by flaring natural gas, protect the environment, prevent waste of natural resources and create social and economic benefits from gas flare capture. The effective date of commencement of the Regulations was 5 July 2018.

9. **FIRS give taxpayers 15-day ultimatum for withholding tax reconciliation**

The FIRS, in its continued drive for the digitization of tax administration in Nigeria, started issuing notices to taxpayers in August 2018, to reconcile their unutilised WHT credit balances with it within 15 days of receiving the notice. For this purpose, taxpayers were required to submit their unutilised WHT credit notes to the FIRS for confirmation, reconciliation and approval.

The FIRS’ initiative is intended to culminate in the transfer of taxpayers’ agreed WHT credit balances to their online accounts on the FIRS’ portal and enable them to utilise their outstanding WHT credits effortlessly when filing their future CIT returns.

10. **Federal Ministry of Interior commences online processing of applications**

The Federal Ministry of Interior (“FMI” or “the Ministry”) commenced online processing of applications in September 2018. Consequently, manual applications are no longer accepted by the Ministry. Applicants are now required to log on to www.ecitibiz.interior.gov.ng to initiate their applications. However, they are still required to submit hard copies of the following support documents to the Ministry for upload to the portal:

- Certificate of Incorporation
- Company’s Financial Statements
- Expatriate Quota (EQ) approval(s) – *These should include the Establishment Grant and all other approvals issued from 2008 till date*
- Business Permit (BP)
- Training Programme for Nigerian Employees
- Details of Nigerian Understudies
- Expatriate Monthly Returns for three months preceding the date of the application.

The online portal generates EQ, BP and other application forms, and has online payment functionality for ease of payment by users. It also serves as a centralized and interactive database for all applications and services provided by the Citizenship and Business Department of the FMI.





11. FIRS issue CbCR Regulations

The FIRS published the Income Tax (CbCR) Regulations, 2018 (“CbCR Regulations”) on 19 June 2018. The Regulations became effective on 1 January 2018.

Based on the Regulations, MNE Groups with consolidated revenue of ₦160 billion, whose Ultimate Parent Entity is tax-resident in Nigeria, are required to file CbCR with the FIRS annually, commencing from 1 January 2018. The Report is to be submitted not later than one year after the end of the accounting period to which the Report relates. Some of the information to be submitted include amount of revenue, profit or loss before income tax, income tax paid, income tax accrued, stated capital, accumulated earnings, number of employees and tangible assets other than cash or cash equivalents.

The Regulations impose a penalty of ₦10 million for failure to file CbCR within the statutory timeline, and ₦1 million for every month in which the failure continues. Filing incorrect or false report attracts a penalty of ₦10 million, while failure to notify the FIRS of the entity that will file the CbCR within the statutory period attracts a penalty of ₦5 million and ₦10,000 for every day in which the failure continues.

12. FIRS issue Guidelines for CbCR in Nigeria

The FIRS issued its Guidelines for CbCR (“the Guidelines”) on 11 July 2018, to supplement the Income Tax CbCR Regulations, 2018 (“the CbC Regulations”). The Guidelines are intended to provide guidance to the general public, especially MNEs operating in Nigeria, on the procedure for completing and filing CbC reports.

Part I of the Guidelines provides a general background to the OECD’s BEPS Project which introduced the CbCR requirement for MNEs. It explicitly states that the OECD (2018) Guidance on the Implementation of CbC Reporting – BEPS Action 13, as may be updated from time to time (“OECD Guidance”), will be relied upon for any clarification or explanation that is not covered in the Guidelines.

Parts II and III of the Guidelines provide definitions of terms used in the annual CbCR template, and instructions on the period to be covered by the template, the data to be used in populating it, and how each table in the CbCR template should be completed. These instructions are the same as those provided in the OECD Guidance.

Part IV of the Guidelines stipulates

how branches, permanent establishments, investment funds, partnerships and other entities would be treated for CbCR purposes. Of particular note in this Part is the guidance that the consolidation rule in the International Financial Reporting Standards will be adopted as the accounting basis for determining the existence and membership of a group which is required to file a CbC Report in Nigeria.

The final Part of the Guidelines focuses on CbC filing obligations. Essentially, it specifies the CbC Notification Form which every resident member of an MNE Group is required to submit yearly to the FIRS pursuant to Regulation 6 of the CbC Regulations. It also clarifies issues bordering on CbCR threshold, determination of consolidated revenue, and merger, acquisition and demerger arrangements.

13. **OECD issues discussion draft on financial transactions**

The OECD, on 3 July 2018, issued a discussion draft on the transfer pricing of financial transactions under the report on Actions 8 to 10 of the Base Erosion and Profit Shifting Action Plan (“Aligning Transfer Pricing Outcomes with Value Creation”).

The first part of the discussion draft provides additional guidance on how to apply the principles laid down in Section D.1 of Chapter I of the Transfer Pricing Guidelines to financial transactions. In addition, the discussion draft clearly states that the guidance provided does not prevent countries from stipulating measures to address capital structure and interest deductibility in their domestic legislation.

Furthermore, the discussion draft covers issues relating to the pricing of financial transactions, such as captive insurance, cash pooling, guarantees, hedging, intra-group loans, and treasury function.

14. **OECD issues guidance on Hard-to-Value Intangibles and Transactional Profit Split Method**

The OECD, on Thursday, 21 June 2018, released new guidance on application of the approach to Hard-To-Value Intangibles (HTVI) and the Transactional Profit Split Method (TPSM) under BEPS Actions 8 and 10, respectively.

The new guidance is aimed at harmonizing the understanding and practice among tax administrations on how to apply adjustments resulting from the application of this approach. The guidance has been formally included in the OECD Transfer Pricing (TP) Guidelines as an annex to Chapter VI, and is expected to improve consistency and reduce the risk of economic double taxation.

The revised guidance on TPSM replaces the previous text in Chapter II of the July 2017 edition of the OECD TP Guidelines. Essentially, the guidance maintains the basic rule that TPSM should be applied where it is found to be the most suitable method for determining the arm’s length price range for a controlled transaction that is being analysed. Further to this, it provides detailed guidance that would aid the determination of when TPSM is, indeed, the most appropriate TP method for a transaction.

15. **Passage of CAMA (Repeal and Re-enactment) Bill, 2018**

On Tuesday, 15 May 2018, the Senate of the Federal Republic of Nigeria passed the CAMA (Cap C20, LFN, 2004) Repeal and Re-enactment Bill, 2018 (“the Bill”), following a recommendation of the Senate Committee on Trade and Investment. The Bill consolidates the proposed amendments from two related bills: CAMA Cap C20 LFN, 2004 (Amendment) Bill, 2016 and the CAMA Cap C20 LFN 2004 (Amendment) Bill, 2017.

The Bill seeks to establish an efficient means of regulating businesses, minimize the compliance burden of SMEs, enhance transparency and shareholder

engagement and promote a friendly business climate in Nigeria.

16. FG approves new excise duty rates for tobacco products and alcoholic beverages

President Muhammadu Buhari, on 11 March 2018, approved an amendment to the extant excise duty rates for tobacco products and alcoholic beverages (beer, wine and spirits). Under the new scheme, tobacco products would attract specific rates (ranging from ₦1 to ₦2.90 per stick of cigarette) in addition to the existing 20 percent ad valorem rate. For alcoholic beverages, however, the existing ad-valorem rates would be replaced with specific rates (ranging from ₦0.30k to ₦2.00 per centilitre of beverages).

The new excise duty regime, which has an effective date of 4 June 2018, has been moderated over a three-year period in order to minimize the impact on prices of the affected products.

17. President signs Executive Order to enhance local content in public procurement

President Muhammadu Buhari, in February 2018, signed Executive Order No. 005 ("the Order") for Planning and Execution of Projects, Promotion of Nigerian Content in Contracts and Science, Engineering and Technology.

The Order promotes the utilization of indigenous resources (raw

materials and personnel) in public procurement process. Amongst other things, it:

- directs procuring authorities to give preference to Nigerian companies and firms in the award of contracts in line with the Public Procurement Act 2007
- provides that Nigerian companies or firms duly registered in accordance with the laws of Nigeria, with current practicing licence, shall lead any consultancy services involving Joint Venture relationships and agreements, relating to law, Engineering, ICT, Architecture, Procurement, Quantity Surveying, etc.
- prohibits the Ministry of Interior from granting visas to foreign workers whose skills are readily available in Nigeria
- provides that the grant of expatriate quota should be contingent on applicants training the number of persons required for the execution of the project in Nigeria
- directs Ministries, Departments and Agencies of government to engage indigenous professionals in the planning, design and execution of national security projects, and give consideration to foreign professionals only where it is certified by the appropriate authority that such expertise is not available in Nigeria.

However, where the requisite indigenous expertise is lacking, the Order requires procuring entities to give preference to foreign companies or firms with a verifiable plan for indigenous development, in the award of contracts.

18. **Lagos State Government passes Land Use Charge Bill into law**

On 29 January 2018, the Lagos State House of Assembly passed the LUC Law, 2018 to repeal and replace the LUC Law, 2001. The Law imposes a land-based charge on all real properties situated in Lagos State. It also consolidates all property and land based rates and charges payable under the Land Rates Law, Neighbourhood Improvement Charge and Tenement Rates.

The Law defines property to include a building, any improvement on land, a parcel of land, leasehold of up to ten years. It, however, exempts property owned and occupied by a religious body and used exclusively as a place of worship or religious education, public cemeteries, property used as a registered educational institution certified by the Commissioner to be non-profit making, all palaces of recognized Obas and Chiefs not used

for commercial purposes and any property as may be exempted by the Governor in a State Official Gazette.

The annual land use charge is arrived at by multiplying the market value of the property by the applicable relief rate and annual charge rate described in the schedule to the Law. A general relief of 40% is applied in the calculation of the charge. The penalty for non-compliance with the provision of the LUC Law is ₦250,000 or imprisonment for a period of 3 months.

19. **FG signs double taxation agreement with Spain**

President Muhammadu Buhari, on Friday, 26 January 2018 signed the Avoidance of Double Taxation Agreement between the Federal Republic of Nigeria and the Kingdom of Spain (Domestication and Enforcement) Act, 2018.

The Agreement had been awaiting ratification by the legislature for about nine years, as required under the Nigerian Constitution.

6.0 Featured Articles



“

This article interrogates the extent to which a SBIR can validly exercise its powers outside the territory of its State and concludes that a SBIR lacks power to enforce the provisions of its State tax laws outside its territory.

”

A. Academia article

1. Threat of Inter-territorial Enforcement – States Board can only bark and not bite

by Prof Abiola Sanni, FCTI, FC Arb

As the drive for internally generated revenue becomes intensified, SBIRs in Nigeria are increasingly seeking to enforce payment of tax obligation from out-of-state taxpayers or agents of collection. It is now commonplace for taxpayers or agents of collection to receive correspondence from SBIRs, other than the SBIR of the State of their location or operation, demanding performance of a range of obligations including request for return(s) or other information, meeting(s), notification of intention to carry out an audit or demand for payment of tax due (demand notice), etc. The tone and contents of some of the correspondence are usually magisterial, assertive, compelling and laced with statutory provisions purportedly backing the action of the SBIRs.

This article interrogates the extent to which a SBIR can validly exercise its powers outside the territory of its State and concludes that a SBIR lacks power to enforce the provisions of its State tax laws outside its territory. Since the existing law falls short of the laudable objective of curbing evasion arising from mobility of tax bases and taxpayers, the paper recommends a possible proactive response by the SBIRs.

The two main theories of division of taxing powers are Conventional Model and Public Choice Approach. There is convergence between the two theories that taxes on highly mobile bases are best reserved for use by the FG while taxes on immobile bases are best for local governments. Thus, progressive PIT should be vested in the FG while the States and Local Governments could impose flat PIT rates or consumption tax within their territories.

The scheme of allocation of taxing powers in Nigeria, however, diverges from these prescriptions. Though PIT is imposed by a federal statute applicable nationwide, States are primarily responsible for its administration through their respective SBIRs while the FIRS administers that for residents of the Federal Capital Territory, members of the Armed Forces, among others. In these circumstances, revenue leakages are inevitable as taxpayers and income move across State boundaries without any reliable means of recording and documentation for data analysis purposes.



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Attempts by a SBIR to enforce tax compliance outside its territory may be futile on legal grounds. Section 4(7) of the Constitution of the Federal Republic of Nigeria, 1999 vests the House of Assembly of a State with power to make laws for the peace, order and good government "of the State or any part thereof". Thus, the power of the State House of Assembly is limited to its geographical territory. Following the principle of *nemo dat quod non habet* (a person cannot give what he does not have), a House of Assembly lacks the power to establish an agency whose powers will extend beyond the territorial scope of that of the House of Assembly. Accordingly, section 1 of Land Use Charge Law and Hotel Occupancy Restaurant Consumption Law of Lagos State expressly limits their application to Lagos State alone and not beyond.

From pure legal theory, each State of the Federation is separate and distinct and has obligation not to impede the functioning or operation of other States and their agencies. Thus, a SBIR cannot exercise its powers beyond the confines of the geographical territory for which it was established. As far back as 1729, an English court in the case of **Attorney General v. Lutwydye**¹⁶ refused to enforce import duties on tobacco sold at Dumfries, Scotland. Later in 1775, another English court in **Holman v Johnson**¹⁷ made a statement that has become peremptory that "no country ever takes notice of the revenue laws of another." In **Government of India v Taylor**¹⁸, the House of Lords rejected the claim for the recovery of CGT levied by an Indian Government on a company trading in India whose assets were transferred to England shortly before being wound up¹⁹.

The main challenge posed by the territoriality rule is that a country must devise means of collecting taxes that may be due to it from foreign taxpayers while taxpayers and/or their properties are still within the country. This development, *inter alia*, led to the concept of WHT on income of non-resident taxpayers who may not be available in the country during the normal tax period to file returns as and when due.

Perhaps, the first opportunity to test the principle of territoriality in Nigeria presented itself in the case of **RSBIR v Globestar Engineering**²⁰ where the RSBIR obtained an ex-parte order of distraint from the Rivers State High Court for the purpose of enforcing an alleged tax liability due from a company based in Lagos State and proceeded to register the order at the Lagos State High Court. Globestar challenged the order of registration. The Lagos State High Court held that tax laws and tax obligations in Rivers State are not enforceable in Lagos State. Consequently, the court set aside the registration of the order and all steps taken pursuant to the order.

This ruling is arguably remarkable on the basis that the issue was an enforcement of an order of a court and not the enforcement of the Law of Rivers State. The act of registering the distraining order in Lagos State is a recognition of the sovereignty of Lagos State over its territory and an application for the co-operation of Lagos State in overcoming the challenge of the principle of territoriality. Accordingly, the registration should have made the ex-parte order enforceable as if it were that of Lagos State High Court. In my view, the facts of the case of Globestar are quite distinguishable from the line of authorities which established the principle of territoriality which, no doubt, would have been applicable if Rivers State had wanted to enforce any of its State tax laws in Lagos State.

The international community has been able to avoid the harshness of this rule through DTAs and Exchange of Information Agreements, among others. A viable pathway for a SBIR includes seeking the co-operation of the other State(s) and leveraging the JTB's platform to, *inter alia*, undertake Joint Tax Audits and resolve issues with inter-state dimensions. Without such collaboration, it is too simplistic for a SBIR to expect compliance from an enlightened out-of-state taxpayer on the basis of threat. Except such a taxpayer has presence in the State, the SBIR may realize at end of the day that it can only bark and not bite.

¹⁶ (1729) 145 Eng. Rep. 674 (Ex. Div.)

¹⁷ (1775) 1 Cowp 341 at 343, 98 ER 1120 at 1121

¹⁸ [1955] AC 491

¹⁹ The principle is no longer recognized as good law within the European Union because of the EU Mutual Assistance Directive which requires the government of any EU Member State (A) to assist any other EU government (B) to collect the tax due or allegedly due to B by deploying A's tax enforcement resources to act directly against a taxpayer on behalf of B where the taxpayer or his property is located is within A's jurisdiction. There is also the OECD FATF and European Union Code of Conduct.

²⁰ Suit No. LD/119NRJ/2017 delivered on 14th July 2017



B. Articles authored by KPMG Professionals

1. Business Implications of Nigeria's Excess Dividend Tax

by Wole Obayomi and Chima Azumarah



Wole Obayomi



Chima Azumarah

Excess Dividend Tax is an anti-avoidance provision that imposes tax on dividends distributed by a company, where the company either has no total profits or the total profits are less than the dividends paid. The provision of section 19 of CITA on excess dividend tax was applied to treat dividends distributed by the appellant from retained earnings as its total profits for the relevant years of assessment in the recent judgment of the FHC in *Oando v. FIRS* (Appeal No. FHC/L/6A/2014).

Section 19 of CITA provides that “Where a dividend is paid out as profit on which no tax is payable due to: (a) no total profits; or (b) total profits which are less than the amount of dividend which is paid, whether or not the recipient of the dividend is a Nigerian company, is paid by a Nigerian company, the Company paying the dividend shall be charged to tax at the rate prescribed in section 40(1) of this Act as if the dividend is the total profits of the company for the year of assessment to which the accounts, out of which the dividend is declared, relates.”

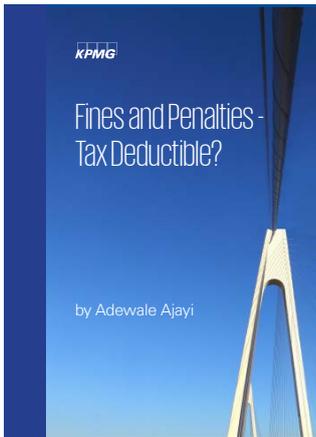
On the face of it, there is no ambiguity about this provision as it seeks to limit a company's ability to declare dividends in a year of assessment to which the accounts from which the dividends declared relate in two situations, namely:

- (a) where the company has no total profits at all; and
- (b) where the company has total profits, it is only entitled to declare dividends up to the amount of its total profits and no more.

Where a company elects to declare dividends in (a) above, or dividends in excess of its total profits in (b) above, the dividends will be taxed as if it were its total profits.

In essence, a robust interpretation of section 19 should not have led to the controversy arising from *Oando v. FIRS* if both the TAT and the FHC had painstakingly analyzed and interpreted the provision, especially in the context of the key issue before them for determination.

You can read the full article in the 17 and 18 September 2018 editions of “Bloomberg BNA Daily Tax Report: International”.



2. Fines and Penalties – Tax Deductible?

by Adewale Ajayi



Adewale Ajayi

Recent cases in Nigeria have triggered the question of whether fines and penalties are tax deductible for tax purposes.

The NCC fined MTN Nigeria \$5.2 billion in 2015 for failure to deactivate some unregistered customers. Based on subsequent negotiations, the FG reduced the fine to \$3.2 billion. MTN claimed the related expense in its tax returns. However, the Nigerian tax authority rejected the claim and therefore disallowed the expense for tax purposes.

In a related matter, the FHC ruled in the case between FIRS and Mobil Producing Nigeria Unlimited (2018) 37 TLRN 1 that gas flaring charges were not tax deductible simply because there was no documentary evidence of the Minister’s written permission to flare gas.

Section 3 of the AGRA requires the Minister for Petroleum Resources to give a written permission to flare gas and for the Minister to issue gas flaring certificates subsequent to the payment of the relevant fees.

Section 24 of the Nigerian CITA provides that: “For the purpose of ascertaining the profits or loss of any company of any period from any source chargeable . . . there shall be deducted all expenses for that period by that Company wholly, exclusively, necessarily and reasonably incurred in the production of those profits.”

Section 10 of the PPTA contains similar provision, except that it excludes “reasonably” from the provision and includes the phrase whether incurred “within or without Nigeria.” Sections 27 and 13 of the CITA and PPTA respectively provide for specific expenses that are not allowable for tax. Fines and penalties are not listed in those sections. The question, therefore, is how do you treat such expenses for tax purposes in the light of the judgment by the FHC?

You can read the full article in “Tax Notes International” of 12 November 2018 (Volume 92, Number 7).



3. Revised TP Regulations in Nigeria – Implications for MNEs

by **Tayo Ogungbenro, Victor Adegite and Omojo Okwa**

The recent TP Regulations in Nigeria have introduced some major changes which impose additional obligations and requirements for taxpayers. Significant administrative penalties have also been introduced in an attempt to improve compliance.

Nigeria’s FIRS released the revised Income Tax (TP) Regulations (2018) (“the revised Regulations”), which became effective on March 12, 2018. The Regulations apply to a company’s basis periods commencing after that date.

The major changes introduced by the revised Regulations are considered in the article, which you can read in Bloomberg BNA Tax Planning International Review Journal (October 2018 Edition).

You can also read the full article at: <https://bit.ly/2Wctcpl>



Tayo Ogungbenro



Victor Adegite



Omojo Okwa



4. TP in Nigeria: Last Year in Retrospect and Outlook for 2018

by **Victor Adegite and Nwakaego Ogueri-Onyeukwu**

The UN dedicates each year for a cause, topic or theme. Year 2017 was dedicated to sustainable tourism for development. However, considering the significant events and developments in the international tax space in 2017, and with the benefit of hindsight, it would have been ideal to declare 2017 as the year of international taxation and TP.

This article highlights some of the significant developments in 2017 and discusses the impact of these developments on the Nigeria TP landscape and on taxpayers in particular.

You can read the full article in Bloomberg BNA Tax Planning International Review Journal (February 2018 Edition).



Victor Adegite



Nwakaego Ogueri-Onyeukwu



5. Nigeria's 2018 Budget: Consolidating Economic Growth and Recovery

by Adewale Ajayi



Adewale Ajayi

President Muhammadu Buhari has presented the 2018 budget to the National Assembly (the Nigerian Parliament, comprising the Senate and the House of Representatives). The key objectives of the budget of consolidation are to sustain the reflationary strategies of the 2017 budget, diversify the economy and improve infrastructure. The underlying assumptions of the budget are as follows: oil production volume of 2.3 million barrels per day at an average price of \$47 per barrel (the benchmark price contained in the Budget Speech was \$45). However, the National Assembly increased this to \$47 when approving the Medium Term Expenditure Framework;

- average exchange rate of 305 Nigerian naira to \$1;
- average inflation rate of 12.42 percent;
- GDP growth rate of 3.5 percent.

In 2018, the FG expects to generate revenue of about \$22 billion and spend \$28 billion, resulting in a net deficit of \$6 billion. According to the government, the deficit will be financed mainly by external borrowing and tax collection. Currently, the tax-to-GDP ratio is 6 percent, which government plans to increase to 15 percent over a period of time.

Consequently, the government has implemented a Voluntary Offshore Assets and Income Declaration Scheme to achieve this objective. The FG also plans to improve the business environment through the grant of tax credits to companies that invest in road infrastructure.

You can read the full article in "Tax Practice International Review" of 30 April 2018.



6. The Multilateral Instrument and its Impact on Business in Nigeria

by **Tayo Ogungbenro, Victor Adegite and Gali Aka**

The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (“the multilateral instrument” or “MLI”) is an effort to quickly and efficiently implement some of the measures that grew out of the OECD’S BEPS project. Specifically, it addresses the treaty-related measures covered by BEPS actions 2 (hybrid mismatch arrangements), 6 (treaty abuse), 7 (artificial avoidance of permanent establishment status), and 14 (dispute resolution).

The article reviews the key elements of the MLI and the provisional list of reservations and notifications made by Nigeria. It concludes with an examination of how these changes will affect business in Nigeria and provide some brief recommendations to both businesses and the Nigerian government as the MLI enters into force.

You can read the full article in “Tax Notes International” of 19 March 2018 (Volume 89, Number 12).



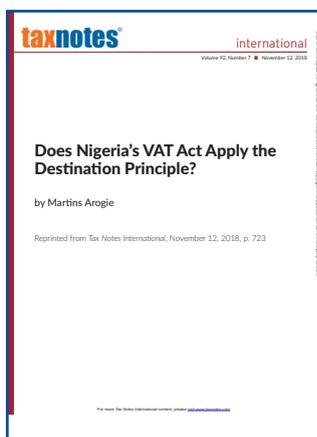
Tayo Ogungbenro



Victor Adegite



Gali Aka



7. Does Nigeria’s VAT Act Apply the Destination Principle?

by **Martins Arogie**

The pace of globalization has quickened, and the world is becoming increasingly interconnected. As cross-border transactions become the norm, the rules that govern these types of interactions must keep up with changing realities. This is no easy task because countries still want to maintain their independence and sovereignty, at least to some degree. Even jurisdictions that traditionally worked closely together to formulate and implement rules for coexistence have recently struggled to justify the benefits of cooperation. This has fuelled the rise of populism and nationalism around the world.

Regardless, countries must realize that the rules they make within their borders affect interactions across their borders. One area in which this realization is important is the application of domestic VAT or goods and services taxes to international trade. Significantly, this is also one area in which many argue that there is a semblance of a global rule. But is that true?

You can read the full article in “Tax Notes International” of 12 November 2018 (Volume 92, Number 7).



Martins Arogie



8. Taxation of Insurance Companies in Nigeria – in Need of Reform

by Chika Ozulumba and Cynthia Ibe

The insurance industry is strategic to every economy. In many countries, the insurance industry promotes economic development by reducing the capital which companies need to operate, thereby fostering investment and innovation. Capital costs can be lower than traditional capital as insurance does not assume all the risks of equity capital. In addition, the insurance industry creates an environment of greater certainty and promotes sensible risk-management measures, through the price mechanism and other methods.

However, unlike in the developed countries of the world, where the insurance industry is acknowledged to be making a significant contribution to economic development, one cannot proudly say that the insurance industry has played a major role in Nigeria.

Although Nigeria's large population indicates a potentially huge market for insurance products, the underdevelopment of the industry is largely due to the lack of investment (local and foreign) required to stimulate economic development. One of the factors attributable to the unattractiveness of this industry in Nigeria is the unfriendly corporate tax system. The taxation of insurance companies is currently far more stringent than the taxation of other companies in Nigeria. There are also fewer incentives for companies operating in the insurance industry, despite the fact that the sector is largely underdeveloped but has strong growth potential.

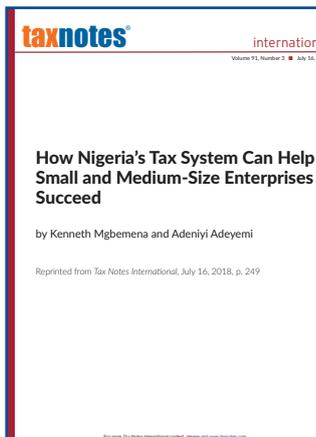
You can read the full article in Bloomberg BNA Tax Planning International Review Journal (February 2018 Edition).



Chika Ozulumba



Cynthia Ibe



9. How Nigeria's Tax System Can Help Small and Medium-Size Enterprises Succeed

by Kenneth Mgbemena and Adeniyi Adeyemi

Small and medium-size enterprises (SMEs) play a very important role in any economy. They are a key engine for growth, generating employment and creating opportunities for individuals to develop entrepreneurial skills. Nigeria defines SMEs broadly as businesses with a turnover of less than NGN100 million per year (about \$278,000) and fewer than 300 employees. SMEs dominate Nigeria's economy and are responsible for 48 percent of the nation's GDP.

Over time, the government has enacted policy initiatives intended to help SMEs thrive. However, these policies do not appear to have translated into measurable growth or a business environment that allows SMEs to realize their full potential. This may be due to flaws in their implementation or the outright inadequacy of the policy initiatives. For example, the National Tax Policy recognizes the need to create favorable tax regimes for SMEs, but there is no legislative backing to give effect to this policy objective. Consequently, SMEs' contribution to national tax revenue remains low and grossly insignificant.

This article discusses the importance of having a special tax regime for SMEs in Nigeria, looks at other countries where SMEs operate under special tax environments that support their survival and growth, and makes relevant recommendations.

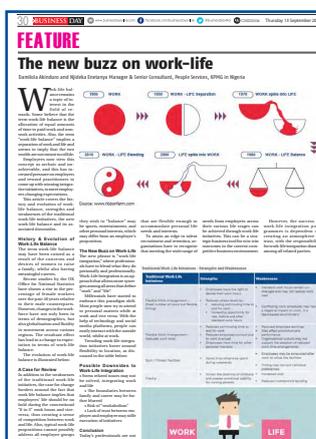
You can read the full article in "Tax Notes International" of 16 July 2018 (Volume 91, Number 13).



Kenneth Mgbemena



Adeniyi Adeyemi



10. The New Buzz on Work-life

by Damilola Akinduro and Njideka Enetanya

Work-life balance remains a topic of interest in the field of rewards. Some believe that the term work-life balance is the allocation of equal amounts of time to paid work and non-work activities. Also, the term "work-life balance" implies a separation of work and life and seems to imply that the two worlds are not meant to collide.

Employees now view this concept as archaic and unachievable, and this has increased pressure on employers and reward practitioners to come up with winning integrative initiatives, to meet employees changing expectations. This article covers the history and evolution of work-life balance, strengths and weaknesses of the traditional work-life initiatives, the new work-life balance and its associated downsides.

You can read the full article in Business Day of 13 September 2018 (August 2018 Edition)



Damilola Akinduro



Njideka Enetanya



11. Non-resident Companies and the Conundrum of Tax Deduction at Source

by Ebenezer Ibeneme

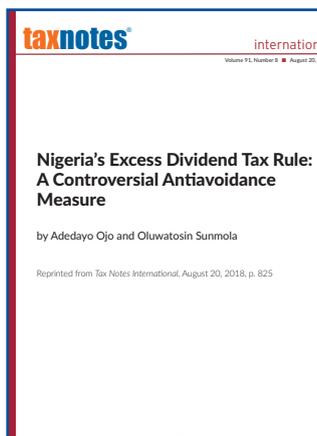


Ebenezer Ibeneme

In Nigeria, registered taxpayers are required to deduct WHT from qualifying payments to other taxpayers. This requirement also applies to VAT; albeit limited to government ministries, departments and agencies, all companies operating in the oil and gas industry and Nigerian companies making payment to foreign companies for VAT-able supplies. With the exception of the latter, the relevant tax provisions containing this requirement do not make a distinction between Nigerian companies and foreign companies operating in Nigeria (typically referred to as non-resident companies (“NRCs”)), when specifying the party to which the requirement to deduct tax at source applies.

However, over the years, the prevailing practice in tax administration in Nigeria has been that NRCs are not expected or obligated to deduct tax at source from payments, in transactions where they are the paying party. This practice may have resulted from the FIRS’ perceived lack of adequate oversight over the operations of NRCs in Nigeria. The FIRS stated as much in its Information Circular on the operation of WHT in Nigeria (Information Circular No. 2006/02: Further Explanatory Comments on Withholding Tax Principle and Operation, February 2006), where it held that NRCs “are not empowered to deduct any type of WHT...” and gave as its rationale for this provision, the impracticability of the tax authorities reviewing NRCs’ records to ensure compliance with the requirement. This practice was further bolstered by the turnover basis of assessment (deemed profit basis) applied, at the time, to the taxation of incomes of NRCs. Under the deemed profits basis regime, these companies were not required to submit tax returns based on the detailed financial records of their operations in Nigeria. This perceived limitation was in truth unfounded, as the tax laws empower the tax authorities to request additional information from a taxpayer, NRCs included, to enable them to determine compliance with the taxpayer’s tax obligation.

You can read the full article in “Tax Planning International Indirect Taxes” of July 2018.



12. Nigeria's Excess Dividend Tax Rule: A Controversial Anti-avoidance Measure

by Adedayo Ojo and Oluwatosin Sunmola

Austin O'Malley wrote: "In levying taxes and in shearing sheep it is well to stop when you get down to the skin." Globally, multinational enterprises structure their transactions to take advantage of tax planning opportunities in various jurisdictions and maximize after-tax earnings. Governments are, not surprisingly, unfavourably disposed toward the uncontrolled tax planning initiatives of taxpayers. As a result, many countries have put anti-avoidance measures in place to curtail taxpayers' unbridled tax avoidance efforts.

Anti-avoidance rules focus on the substance of a transaction and typically prohibit aggressive tax planning. For cross-border transactions, the OECD's base erosion and profit-shifting project has proposed ways to address the various challenges posed by tax avoidance.

In Nigeria, the laws governing the taxation of individuals and corporate bodies include several anti-avoidance measures, such as regulations on artificial transactions. Anti-avoidance measures can be either specific or general in nature. Regardless, the aim of these measures is to mitigate the effect of gaps in the tax laws that a taxpayer could leverage to reduce its tax payable and, in turn, that could reduce government revenue. In some cases, however, these measures can overreach and — in pursuit of its valid goal of preventing avoidance — the government can subject some taxpayers to double taxation or taxation of exempt income.

One of the more contentious anti-avoidance measures in Nigeria is section 19 of CITA, which states conditions under which a company may still be liable for income tax even if it reports an accounting loss — a provision known as the excess dividend tax (EDT). The application of this section has generated significant debate between the FIRS and taxpayers, with both sides turning to the judiciary to settle some disputes.

This article summarizes some of the various judicial rulings on this anti-avoidance provision. The information and analysis in this article will help taxpayers to better understand the law and take necessary steps to address issues that may arise from the law on EDT.

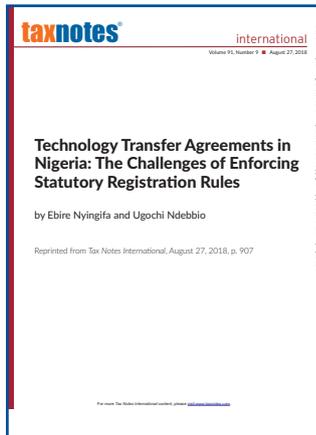
You can read the full article in "Tax Notes International" of August 2018 (page 285).



Adedayo Ojo



Oluwatosin Sunmola



13. Technology Transfer Agreements in Nigeria: The Challenges of Enforcing Statutory Registration Rules

by Ugochi Ndebbio and Ebire Nyingifa

In 2016, the FRC issued nine rules to help ensure the accuracy and reliability of financial reports and corporate disclosures. The FRC exercised its powers under sections 8(2), 30, and 53(2) of the Financial Reporting Council of Nigeria Act, No. 6, 2011 (FRC Act) to issue the rules.

Of particular note is Rule 4, titled Transactions Requiring Registration From Statutory Bodies Such as the NOTAP. Rule 4 states that: transactions and/or events of a financial nature that require approval and/or registration or any act to be performed by a statutory body in Nigeria and/or where a statute clearly provides for a particular act to be performed and/or registration to be obtained; such transactions or events shall be regarded as having financial reporting implication only when such act is performed and/or such registration is obtained.

The Rule also directs that the entity must disclose the details of the required act or the registration it obtained from the relevant statutory body by way of a note in the financial statements.

NOTAP is the federal agency statutorily empowered to register and approve technology transfer agreements between Nigerian companies and foreign entities. Through these technology transfer agreements, a foreign entity receives a fee for conferring the right to use intellectual property assets (such as trademarks, patents, know-how, or software), offering technical or managerial assistance, or providing supplies. By virtue of FRC Rule 4, when fees arise from an agreement that requires registration with NOTAP, an entity can only accrue for or consider those fees in the financial reporting process after NOTAP registers and approves the agreement.

Noncompliance with FRC rules may lead the FRC to impose severe penalties on any company whose financial statements are not in compliance, its auditors, or any other registered professional involved in the preparation of such financial reports or other documents of a financial nature. Under the FRC Act, penalties may include civil, administrative, or criminal sanctions.

You can read the full article in "Tax Notes International" of August 2018 (page 907)



Ugochi Ndebbio



Ebire Nyingifa



14. Taxation of Maintenance Organizations in Nigeria

by Ugochi Ndebbio and Blessing Idem

The CITA provides the framework for the taxation of companies (other than upstream oil and gas companies) in Nigeria. The CITA also contains specific provisions which guide the taxation of specialized companies. One of such provisions is Section 16 which provides the basis of taxation of insurance companies.

The section neither defines the term “insurance company / business” nor makes reference to any other legislation which may be relied on in establishing the extent of this definition. Although the primary point of reference may assumed to be the Insurance Act and, by extension, NAICOM Act. However, can it really be cast in stone that the extent of the application of the special regime cannot be stretched to include other recognised forms of insurance, regulated by other specific statutes (for example, NHIS Act, which is simply another Act regulating this specific form of Insurance in Nigeria)?

In view of the non-specificity of CITA on the definition of an insurance business, it could be argued that since health insurance is recognised by the Insurance Act as a form of life insurance notwithstanding that health insurance is not regulated by NAICOM, HMOs can be deemed to be carrying out health insurance business and should therefore be taxed as insurance businesses.

The salient provisions of section 16 sets different parameters for calculating the adjusted profit of insurance companies, by restricting amounts claimable as other reserves and outgoings for tax deductibility. Also, the period for carrying forward losses is limited to 4 years only. In addition, it prescribes a different and more stringent tax base for calculating minimum tax for insurance companies.

Overall, the tax regime for insurance companies, as provided in section 16, can be seen as more punitive than the regimes applicable to other forms of businesses. Therefore, there may rightly be a reluctance for HMOs to wish to be subjected to tax under the provisions of section 16.

You can read the full article in “BusinessDay Newspaper” of 29 August 2018 and 5 September 2018.



Ugochi Ndebbio



Blessing Idem



15. Taking Tax into the Boardroom: How Far Have Nigerian Companies Come?

by Kenneth Mgbemena and Blessing Idem

Tax has become an important source of revenue for the Nigerian government. The 2018 budget makes this evident as the FG projects that tax will account for about 34 percent (about NGN1.4 trillion) of the country's non-oil revenue in 2018. Also, the government's medium-term plans (2018 to 2020) include raising the tax-to-GDP ratio from 6 percent to 15 percent. To achieve this, the government intends to expand the tax base as opposed to increasing the tax rates — at least for now.

The government has implemented specific measures to help it realize this tax target. One example is the recently concluded Voluntary Assets and Income Declaration Scheme, which the government launched in July 2017. Also, the government has ramped up "tax audits" on banks and other revenue collection agents by the Revenue Mobilization, Allocation and Fiscal Commission.

In light of the above, it is incumbent on companies in Nigeria to re-evaluate the position of tax issues in their overall corporate strategy. It is true that tax has always been among companies' biggest costs. However, in recent times, it has also become a significant source of business risk. Since tax has assumed this new dimension, corporate executives must begin to see it as a strategic issue and recognize its importance. Companies that pay less attention to tax will be exposed to the risk of paying huge tax liabilities in the event of a tax audit. Other companies will suffer damage to their reputation, especially when the government establishes a prima facie case of tax evasion against them.

Broadly, tax cost and risk — if not properly managed — may adversely affect a company and negatively influence its corporate image. As this article will demonstrate, top executives of companies in Nigeria must pay close attention to tax governance and risk management, much like they heed issues of corporate governance and risk management.

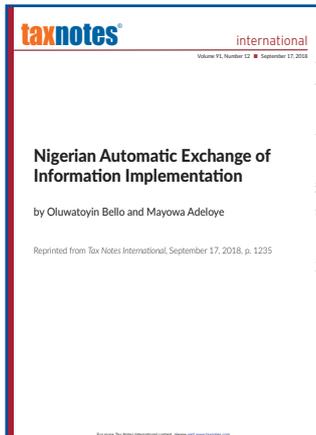
You can read the full article in "Tax Notes International" of 10 September 2018 (Volume 91, Number 11).



Kenneth Mgbemena



Blessing Idem



16. Implementing Automatic Exchange of Information in Nigeria

by Oluwatoyin Bello and Mayowa Adeloje

It is easy for individuals and corporations to make, hold, and manage investments through offshore financial institutions. While it is not a crime in most countries to hold these investments, unscrupulous people may try to shield any returns from their resident country's taxation.

To improve international tax transparency and reduce tax evasion, the OECD introduced the CRS MCAA, a multilateral framework agreement that provides a standardized and efficient mechanism to facilitate the automatic exchange of information (AEOI). As of June 26, 102 jurisdictions had signed the CRS MCAA and have committed to exchanging information with one another under the AEOI mechanism.

Nigeria signed the agreement on August 17, 2017, with the goal of implementing automatic exchange of financial information among participating jurisdictions. The FEC ratified the agreement on July 4. Nigeria is the 71st jurisdiction to join the CRS MCAA and is expected to make its first exchange by September 2019.

The successful implementation of AEOI in Nigeria will require the cooperation of relevant stakeholders: tax authorities, regulatory agencies, financial institutions, and taxpayers (account holders). However, account holders are concerned about how AEOI will affect them: the nature of the information to be exchanged, the extent of confidentiality, and how their money is exposed.

This article discusses AEOI, what account holders should know, and the roles of key stakeholders described in the AEOI implementation handbook.

You can read the full article in "Tax Notes International" of 17 September 2018 (Volume 91, Number 12).



Oluwatoyin Bello



Mayowa Adeloje



17. TP and Quasi Equity Loans – Considerations for the Imputation of Interest

by Ngozi Onyebezie and Gali Aka



Ngozi Onyebezie



Gali Aka

The Nigerian Income Tax (TP) Regulations, 2012 list the lending and borrowing of money as one of the transactions that should be conducted in a manner consistent with the arm's length principle. Inter-company financial transactions are quite common especially among MNEs. These kind of transactions include debt, guarantees, and quasi-equity loans. The focus of this article is imputation of interest on loans – taxing the lender on the arm's length rate of interest - where the actual reward is less than arm's length. Shareholders' loans, otherwise referred to as quasi equity loans, fall in this category. This article also reviews quasi-equity loan arrangements from a Nigerian perspective.

Shareholders' loan: Debt or quasi - equity? It has often been a subject of debate between taxpayers and the revenue authorities whether shareholders' loan should attract interest at market rates in circumstances where the shareholders' loan was advanced to provide funding to an offshore company. More often than not, such shareholders' loan is used to fund the start-up operations of the offshore entity and it is not expected that the loan will be serviced in the foreseeable future. Taxpayers often present the argument that shareholders' loans function as additional share capital i.e. equity and that the purpose is to provide a more flexible use of capital. As such, it is permissible for such loans to be interest free. Tax authorities in the jurisdiction of the borrower usually align to the borrower's argument especially in circumstances where there is capital yet to be paid-up. On the other hand, taxing authorities in the jurisdiction of the lender argue that an arm's length interest should apply on such loan as is expected in a transaction between two unrelated parties.

It could be argued that the equity function argument is invalid in the TP context as TP treats the parties to a transaction as if they were independent, negating equity participation. TP puts aside such connections to arrive at an arm's length answer. However, the reasoning for the equity function argument is that if debt is non-arm's length, then it is, in effect, equity.

You can read the full article in "BusinessDay Newspaper" of 12 and 19 September 2018.



18. Key Tax and Regulatory Considerations for Foreign Investors in Nigeria

by Oreoluwa Akinboboye



Oreoluwa Akinboboye

Over the years, foreign investors have persistently shown interest in participating in the Nigerian economy. Despite recent economic upheavals, the country had received FDI of around \$118 billion as at December 2017. This puts the country in the top 30 percent of global investment destinations. What is driving and sustaining the interest of foreign investors in Nigeria?

Nigeria is an economy that is rich in natural resources and has a huge population. As the seventh largest population in the world and one of the richest countries in natural resources, Nigeria presents the ideal climate for investment to thrive. In practical terms, considering that supply and demand drive enterprise, Nigeria's diverse natural resources (supply) and huge population (demand) present an attractive investment location for foreign investors.

The FG's introduction of the investors' and exporters' foreign exchange window, which is meant to boost liquidity in the foreign exchange market and ensure timely execution and settlement of eligible transactions (which include dividends), has further improved the investment climate in the country. The window, which opened in April 2017, allows authorized dealers to source foreign exchange for eligible transactions at the prevailing market rates. Consequently, supply of foreign exchange for investment and export has increased, and the open market exchange rate has improved since the window opened. In 2018, merger and acquisition transactions in Nigeria are expected to rise by 455 percent, from \$716.4 million to a level of about \$4 billion.

However, foreign investors should ensure that they pay attention to certain key tax and regulatory considerations often overlooked. These can undermine the return on their investment, and are considered below.

You can read the full article in Bloomberg BNA Tax Planning International Review Journal (August 2018 Edition)



19. Compensation Philosophy: How Do You Intend to Reward Your Employees

by Boluwaji Apana and Busola Farinmade

Compensation Philosophy is the bedrock of how organisations reward the talent required to achieve business objectives. At the very least, it provides guidance on where a company aspires to anchor its pay within a comparator group and what compensation elements will be covered. Organisations typically communicate their Pay Philosophies via annual reports, proxy statements, remuneration reports, websites, amongst others. Managers and Supervisors are critical change agents that organisations can leverage to also communicate their Pay Philosophy.

A well-articulated and communicated Pay Philosophy can go a long way in ensuring that employees perceive the employer and reward process as transparent, fair and equitable. It, therefore, engenders a culture of trust and openness between the employer and the employee. Being a strategic tool, a Pay Philosophy, therefore, should be carefully defined, after taking into consideration certain pertinent factors, such as:

- Business strategy
- Single versus multiple pay philosophies
- Reward focus

A company's Compensation Philosophy is never a standalone mantra. Rather, it should be reflective of the HR strategy and the bigger picture of organisational goals. A company's Compensation Philosophy can be likened to the 'seconds' hand of a clock, moving consistently to achieve the goals of the minute and hour hands, which represent the company's Reward and HR Strategies, respectively. A proper fit among these three elements is essential to drive business strategy.

You can read more in HR People Africa Magazine (July 2018 Edition)



Boluwaji Apana



Busola Farinmade



20. Getting Tax Right – A Guided Approach for SMEs and Growing Businesses

by Uzo Obienu, Tobi David and Samuel Adewumi

The Nigerian tax environment is changing fast! The instability of oil prices and the resultant dip in government revenue has seen government (at the federal and state levels) place unprecedented emphasis on increasing revenue generated from tax and expanding the tax net to include individuals and companies not previously captured.

In addition, governments and regulators in other parts of the world have placed significant emphasis on tracing global tax footprints, tax compliance, transparency, morality and reporting.

The implication of the above is that business owners are being forced to take tax matters more seriously and pay more than lip service to tax matters. In particular, SMEs that may have previously thought themselves to be invisible to the tax authorities or outside the radar of the tax authorities are very quickly realizing that this is not quite the case!

However, while bigger companies may find it relatively easy to get their acts together, SMEs, which are only just coming to terms with the changing realities, may face quite an uphill task in putting in place, the necessary elements that would guarantee their success in getting tax right. Besides having limited resources to commit to tax compliance or planning, there is the lack of understanding of the technicalities and best practices in doing this.

This article seeks to provide insight on how SMEs can get started in designing a personalized tax management model that will enable them to achieve success in getting their taxes right. It considers the questions SMEs need to answer to do this, and provides effective and workable strategies which SMEs can adopt.

You can read the full article in “BusinessDay Newspaper” of 31 October 2018



Uzo Obienu



Tobi David



Samuel Adewumi



21. Managing TP Risks in Nigeria: The Importance of Proactivity

by Victor Adegite



Victor Adegite

In recent years, central governments and tax authorities around the world have paid more attention to TP. Different countries are introducing legislation, rules or regulations with detailed requirements for taxpayers (mostly companies) to document and support the application of the arm's length principle to their intercompany transactions. Globalisation has also had a great impact on the importance of TP, as a large part of global trade takes place within MNEs.

From the tax authorities' perspective, TP is important in that setting of prices for the provision of services or sale of tangible or intangible property has significant impact on the profitability of companies, which may in turn affect tax payable. The tax authorities would usually strive to defend its tax base and ensure it collects adequate tax that reflects the level of economic activity taking place within its jurisdiction.

On the other hand, the taxpayer often sees TP as a way of optimising its group profit. This is achieved by evaluating the performance of each entity within the group, anticipating possible double taxation issues and areas for supply chain management. The opposing perspectives and objectives of the tax authorities and taxpayers often lead to controversies. It is, therefore, important for taxpayers to know the existing TP risks so they can proactively address them without compromising the law.

You can read the full article in the "BusinessDay Newspaper" of 20 December 2017 (Page 34).



22. A Review of the Nigerian Country-by-Country Reporting Regulations

by Victor Adegite



Victor Adegite

A new dawn arose for the world of taxation on 5 October 2015. On that day, the Final Reports of the OECD/G20 Base Erosion and Profit Shifting (BEPS) initiative were published. Action 13 of the OECD/G20 BEPS initiative, which is one of the 15 Action Points, relates to transfer pricing documentation. According to the OECD and the G20, BEPS Action 13 requires the development of rules regarding TP documentation to enhance transparency for tax administration, taking into consideration the compliance costs for business. The rules to be developed will include a requirement that MNEs provide all relevant governments with needed information on their global allocation of the income, economic activity and taxes paid among countries according to a common template.

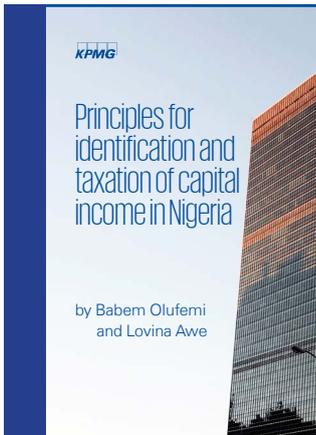
Since October 2015, jurisdictions worldwide have taken steps to implement the recommendations of the Final Report on Action 13. The implementation of Action 13 requires governments and tax administrations to enact laws or publish regulations that mandate covered taxpayers within their jurisdiction to adopt a three-tiered approach to TP documentation. The approach entails the preparation of:

- (i) a Master File (MF);
- (ii) a Local File (LF); and
- (iii) a country-by-country Report (CbC report). The OECD provided a legislation template for a model CbC report to be used by tax administrations and governments to ensure easy and uniform implementation. Consequently, as at 26 October 2018, 74 jurisdictions have enacted legislation regarding CbC reports.

Nigeria joined the group of nations with CbC report legislation on 19 June 2018 when the FIRS published the Income Tax (Country-by-Country Reporting) Regulations S.I. No. 6, 2018 (the "Regulations"). Although the Regulations were published mid-2018, they have retroactive effect from 1 January 2018. The Regulations broadly align with the OECD model legislation.

This article reviews the salient features of the Regulations (see section 2.), comparing them with similar legislation in other jurisdictions and highlights areas of divergence (see section 3.), and discusses key issues for multinational enterprises (MNEs) that are required to file CbC reports in Nigeria (see section 4.). The article ends with some conclusions in section 5.

You can read in "Bulletin for International Taxation" of 5 November 2018 (Volume 72, Number 12).



23. Principles for identification and taxation of capital income in Nigeria

by Babem Olufemi and Lovina Awe

Certainty¹ is one of the central themes of a good tax system. Certainty of tax rules allows taxpayers to plan their tax affairs properly. However, tax rules cannot be static, due to the dynamic and increasingly complex nature of business transactions. This is why, in developed tax jurisdictions, tax rules are reviewed, clarified, or amended, on a regular basis by either the tax authorities or the legal court system.

One tax rule that is a subject of continuous dispute and review in many jurisdictions is the proper identification/classification of income as either revenue or capital for tax purposes. Disputes between taxpayers and tax authorities with respect to this rule normally arise in countries where different tax rates apply to both classes of income, and where the tax laws do not provide sufficient guidance in identifying the incomes. This is a common area of dispute in Nigeria.

Over time, a number of principles have been established to distinguish between a revenue sum and a capital sum received for tax purposes. These principles, which are drawn from decided cases and practice in other tax jurisdictions, may provide guidelines in evaluating incomes as revenue or capital. The commonly applied principles are discussed in this article.

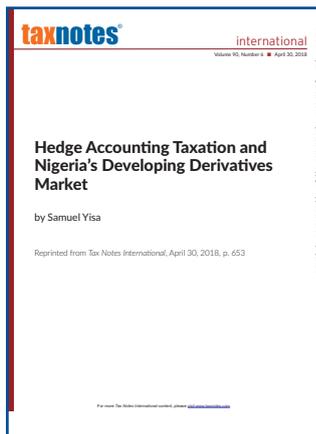
You can read the full article at: <https://bit.ly/2PEih5I>



Babem Olufemi



Lovina Awe



24. Hedge Accounting Taxation and Nigeria's Developing Derivatives Market

by Samuel Yisa

The Lagos Commodity and Futures Exchange recently announced its intention to operationalize the bourse through a collaborative partnership between the Association of Stockbroking Houses of Nigeria and the Central Securities Clearing System PLC. The Nigerian Stock Exchange has also announced plans to develop a robust exchange-traded derivatives market, which will reinforce current arrangements to commoditize risk management products and create wealth for investors.

As Nigeria's derivatives market becomes more structured and operational, the issue of hedge accounting will become pertinent. Hedge accounting isn't new; it has always been a key component of IAS 39 (Financial Instruments: Measurement and Recognition), which has been modified and replaced by IFRS 9.

This article explains the key concepts of hedging and related tax issues. You can read the full article in "Tax Notes International" of 30 April 2018 (Volume 90, Number 6).



Samuel Yisa



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