



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

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ABSTRACT

Does Nigeria have the laws and policies required for optimizing tax revenue from the digital economy? Answering this question, is the primary objective of this paper. The pervasive and global nature of the digital economy is such that nations cannot opt out of its impact of economic activities in their jurisdiction. Nigeria has also made changes to her legal and policy framework, to plug holes and improve revenue from intangible business transactions with non-resident companies. Given the dynamic nature of the digital economy, it is important that Nigerian tax laws are also responsive, adapting promptly to their changing nature. The paper concludes that the rapidity of amendment of tax laws via the Finance Act 2019 and Finance Act 2021, as well as the regularity of administrative clarifications and subsidiary regulations by the FIRS is commendable and vital if Nigerian tax laws will remain robust enough to address the fiscal issues associated with the digital economy. the paper recommends continuous review of their overall impact on the economy and their reconcilability with the overall objective of the country to grow its digital economy. This will ensure that the taxes have minimal unintended outcomes like exacerbating the digital divide, and undermining the economic activities of young, underemployed youths who depend on the digital economy.

Keywords: digital economy, Non-Resident Companies, taxation

1. INTRODUCTION

Governments engage in taxation for a variety of reasons. Fiscal policy enables governments to correct market imbalances and achieve income redistribution. Also, tax revenue constitutes a major source of finance for public administration and provision of economic and social services. Furthermore, the excessive rent generated by digital companies have sparked calls for states to deal with the market distortions that prevent governments from capturing enough taxes from multinational digital companies like Facebook, Amazon, Google etc.¹ For the states, fiscal policy becomes a tool in the hands of policy makers, as means minimizing public revenue loss.² More so for a country like Nigeria, where company income tax contributes the highest quota (46%) followed by value added tax (VAT)(14%).³ Also available data show there is considerable room for improvement in the nation's tax receipts, with tax-to GDP ratio of 7%, which is below the 16% average of other countries in sub-Saharan Africa. More worryingly, while other countries are experiencing improving tax-to-GDP ratios, Nigeria's is decreasing. There is general agreement that current international tax frameworks lag technological evolution and the

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

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

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

digital economy.⁴ Difficulties exist in determining the appropriate means of addressing the challenge. Different countries have adopted diverse approaches to fill the gap. Some have enacted or proposed new legislation that will impose digital sale tax. Others have chosen to work within the framework of the OECD or other regional or international arrangements. Rather than enacting a new, distinct digital service tax law, Nigeria is opted to improve her corporate income tax and value added tax (VAT) laws to address the issues.

The Nigerian constitution⁵ provides the regulatory framework for tax jurisdiction in the country. Its supremacy is ensured by s.1(1) which asserts that it “is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.” It also voids any other law that is inconsistent with its provisions to the extent of inconsistency of the other law.⁶ Having guaranteed that no moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria, it preserves the right and power of the state to impose or enforce any tax, rate or duty.⁷ Hence, the mandatory imposition and enforcement of tax is a necessary exercise of governmental powers on a citizen and does not constitute derogation from the citizen’s right to property.

Under the Constitution, taxing power, which is the power of a tier of government to impose a tax by its own law and prescribe conditions for the collection and due administration of the tax either by its own agency or that of another tier of government, follow the division of legislative powers.⁸ s.4(2) vests on the National Assembly, the power to make laws on any matter included in the Exclusive Legislative List. Item 59 of the Exclusive Legislative List vests on the Federal Government, the power to impose taxes on the incomes, profits and capital gains, as well as prescribing the means of collecting it.⁹

The Nigerian government has undertaken series of tax reform projects to improve the tax system. These reform efforts have sought to broaden the tax base, restore the confidence of taxpayers in the tax system, reduce its complexity while enhancing the user experience, with a view to promoting voluntary compliance.¹⁰ The first major change in the nation’s tax system was the introduction of consumption based tax – Value Added Tax (VAT), which came into effect from January 1994.¹¹ VAT replaced the sales tax which was introduced in 1986 and was imposed on domestic and imported goods with the exception of excluded items like food, medicine etc.

In 1998, Decree no. 21 of 1998 sought to address the issue of multiple taxation by streamlining the taxes that are payable to the federal, state and local governments. The tax reform of 2004 led to the amendment and enactment of nine legislations: the Federal Inland Revenue Service Act 2004, Personal Income Tax Act 2004, Petroleum Profit Tax Act 2004, Value-Added Tax Act 2004, Education Tax Act 2004, Custom Excise Tariff Etc. (Consolidation) Act 2004, National Sugar Development Act 2004 And National Automotive Council Act 2004. In 2012, the National Tax Policy (2012 Tax Policy) was launched. The 2012 Tax Policy stipulates the primary guidelines for the systematic development of the Nigeria tax system. The Policy was designed to achieve some specific objectives, among others: to guide the operation and review of the tax system; provide the basis for future tax legislation and administration; serve as a point of reference for all stakeholders on taxation. It provided a benchmark on which

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

⁵ The Constitution of the Federal Republic of Nigeria, 1999 (as amended) C23 L.F.N. 2004, available at <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm> (accessed on December 12, 2021)

⁶s. 1 (3) of the 1999 Constitution

⁷ s. 44(2)(a)

⁸ Abiola Sanni, ‘Division of Taxing Powers under The 1999 Constitution’, <<https://ir.unilag.edu.ng/bitstream/handle/123456789/8347/DIVISION%20OF%20TAXING%20POWERS%20UNDER%20THE%201999%20CONSTITUTION.pdf?sequence=1&isAllowed=y>> accessed 6 November 2021

⁹ Second Schedule Part II Paragraph 7. See also *MTN Nigeria Communications Limited v. Benue State Internal Revenue Board Service* (2021) LPELR-56259(CA)

¹⁰ For fuller discussion on this, see Dickson Oriakhi and Rolle Ahuru, ‘The Impact of Tax Reform on Federal Revenue Generation in Nigeria’, *Journal of Policy and Development Studies* Vol. 9, No. 1

¹¹ See Value Added Tax Decree no. 102 of 1993

stakeholders shall be held accountable; and provide clarity on the roles and responsibilities of stakeholders in the tax System.

In the main, the Policy addressed a number of key issues including the establishment of a tax preference point for all stakeholders, and reaffirmed government shift of focus from direct to indirect tax, reduction of the personal income tax from 25 percent to 17.5 percent, and company income tax from 30 to 20 percent, avoiding internal multiple taxation on income, property, imports, production and turnover by the various tiers of government, reducing and streamlining the number of tax incentives in the Nigeria tax system, collection of taxes only by career administrators that are public servants, thereby prohibiting the use of ad-hoc tax administrators, vesting of the power to impose, reduce, increase, review or cancel any rate of tax on the National Assembly, especially with respect to taxes from the executive, subjecting the Nigeria's tax system to comprehensive reviews every three years pertaining to existing tax legislations.¹² The 2012 Tax Policy also introduced the Taxpayers Identification Number (TIN) which established a national database of taxpayer, with the active collaboration of states and federal government tax authorities. Registration is a primary step in the tax administration process as it creates a means by which every taxable person (which includes companies, enterprises, partnerships and other business entities) must be registered for tax purposes. The Policy mandates tax authorities at Federal and State level to issue a unique Tax Identification Number (TIN) along prescribed and standard formats, upon registration by the taxpayers. Since it is unique and nationwide, no taxpayer should have more than one TIN irrespective of place of registration. Hence, the TIN provides a uniform mode of identification for all taxpayers in Nigeria.

Although it is not a legislation, the Policy set out the broad framework of tax reform in Nigeria, that birthed the improvements in the law. It sought to achieve the following:

- a. *To Promote Fiscal Responsibility and Accountability* - One of the main goals of the National Tax Policy is to fashion a tax system, which ensures that Government transparently and judiciously accounts for the revenue it generates through taxation by investing in the provision of public goods and services, needed by Nigerians. This will help improve their appreciation of the tax system as a strong tool for National Development.
- b. *To Facilitate Economic Growth and Development* – It seeks to use the tax system as a catalyst for investment, engenders entrepreneurship and productivity, while sustaining economic growth that promotes the wellbeing of Nigerians. To accomplish this, the tax system should encourage investment and propensity to save and be a burden, but should be applied proactively with other policy measures to fuel economic growth and development.
- c. *To Provide the Government with Stable Resources for the Provision of Public Goods and Services*: The Nigerian government needs to increase her revenue to meet the growing need for public goods and services. As such, it needs a tax system capable of generating sufficient revenue for her developmental aspirations. The Policy, therefore, seeks to provide the state with the taxation mechanism to aggregate revenue that it shall invest in judicious expenditure that will ultimately improve the well-being of all Nigerians.
- d. *To Address Inequalities in Income Distribution*: Tax is a tool for wealth and income distribution, more so, in a country like Nigeria that is marked by significant income inequalities. Thus, the Nigeria's tax system should take identify of the nation's unique economic circumstances and seek to bridge the gap between the highest and lowest income groups, by taxing those in the higher income bracket appropriate with a view to generating revenue to provide amenities that will promote economic growth and lift more people out of poverty.
- e. *To Provide Economic Stabilisation*: As a resource producing nation, Nigeria's economy has been marked by volatile booms and recessions occasioned by fluctuations in the price of crude oil. An improved tax system is therefore important to help complement the efforts of monetary policy to achieve economic stability.

¹² Oriakhi and Ahuru, p. 99

- f. *To Pursue Fairness and Equity:* Nigeria's Tax system must be fair and harmonized to ensure horizontal and vertical equity; by, on the one hand, ensuring equal treatment of equal individuals and seeking to avoid discrimination against economically similar entities respectively. And on the other hand, its vertical equity seeks to address the issue of fairness among different income categories. Hence, the Nigerian Tax System shall recognise the ability-to-pay principle, in that individuals should be taxed according to their ability to bear the tax burden. Individuals and entities that earn high incomes should pay a corresponding high percentage of tax. The overall tax system shall therefore be fair, so that similar cases are treated similarly.
- g. *To Correct Market Failures or Imperfections:* The Nigerian tax system can correct market failures in situations where it is the most efficient tool to be applied. To this end, taxes may be reviewed upwards or downwards as may be necessary to achieve Government's intentions. Market failures which the Nigerian tax system may address are those that are because of externalities and those arising from natural monopolies.

This chapter provides an overview of the various federal tax laws that are directly applicable to the digital economy in Nigeria, with a view to determining their application to Nigeria's digital economy.

2. LEGAL FRAMEWORK FOR TAXING DIGITAL ECONOMY IN NIGERIA -

The principal law regulating the payment of company income tax in Nigeria is the Companies Income Tax Act (CITA).¹³ It imposes a tax on the profits of any company accruing in, derived from, brought into or received in Nigeria.¹⁴ Companies have artificial personality, and derive their existence from the law.¹⁵ CITA defines a company as "any company or corporation (other than corporation sole) established by or under any law in force in Nigeria or elsewhere"¹⁶ while a NRC or "Foreign company"¹⁷ is "any company or corporation (other than a corporation sole) established by or under any law in force in any territory or country outside Nigeria."¹⁸ The distinction made by CITA between company and foreign company is vital. Without that distinction, it will imply that the provisions of CITA apply to foreign or NRCs that carry on economic activities in Nigeria, so long as they are registered somewhere. However, with the distinction made, it is clear that the application of the Act will in some cases differ, depending on a company's place of registration. CITA defines "Nigerian company" as "any company incorporated under the Companies and Allied Matters Act or any enactment replaced by that Act".¹⁹ For Nigerian companies, that is, companies registered in Nigeria, all their profits arising from any trade accruing in, derived from, brought into, or received in Nigeria is subject to CITA.²⁰ A Nigerian company's profits are deemed to accrue in Nigeria regardless of where they arise or whether they are brought into or received in Nigeria.²¹ CITA imposes a 30% tax on the profits of every company apart from those specifically exempted under the Act.²² It also prescribes penalties for violation.

It is important to note that the Companies and Allied Matters Act (CAMA) does not recognize the right of a company incorporated outside Nigeria to carry on business in Nigeria or exercise any of the powers of a registered company until it is incorporated in Nigeria.²³ It imposes a penalty for any violation of this

¹³ Companies Income Tax Act (CITA) Cap C21, LFN 2004(as amended).

¹⁴The Act excludes the profits of any company accruing in, derived from, brought into, or received in, that are subject to tax under the Capital Gains Tax Act, Petroleum Profits Tax Act and Personal Income Tax Act. See s. 9 CITA

¹⁵ See *Salomon v. Salomon* (1897) AC 22. See also *Gani Fawehinmi v Nigeria Bar Association* (No.2) [1989] 2 NWLR (PT.105) 588

¹⁶ s. 105, CITA.

¹⁷ CITA refers to "foreign company" which is synonymous with a non-resident company (NRC). For that purpose, both terms will be used interchangeably in this work.

¹⁸ s. 105, CITA. This meaning is slightly modified as "any company formed or incorporated under any law in Nigeria;" in the provisions of Finance Act 2021.

¹⁹ *Ibid*

²⁰ s. 9, CITA

²¹ s. 13(1) CITA

²² s. 40(1) CITA

²³ Companies and Allied Matters Act (CAMA) CAP 20, LFN, 2004, s. 54(1)

requirement of incorporation.²⁴ Clearly, CITA on the other hand recognizes that such companies may carry on economic activity and therefore be liable to tax in Nigeria. Thus, there is an apparent difference in the position of these critical legislations which are for the regulation of the incorporation, control and management of companies, on the one hand, and for the taxation of the profits of companies on the other hand²⁵. Adopting the position of CAMA will generally lead to loss of revenue for the state and truncate government's effort to tax foreign companies in the digital economy.

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

2.1 Companies Income Tax - Pre-Finance Act 2019

The taxation of income of either individuals or corporate entities is typically premised on some form of connecting factor, which determines whether the entity will be liable to tax within a particular jurisdiction. Prior to 2019, only Non-Resident companies that fell under section 13(2) CITA were liable to pay Companies Income Tax; digital companies were exempted from paying companies income tax and had minimal tax liability. The extent of their tax liability was limited to withholding tax where such companies entered into a contract with a Nigerian company or individual. Withholding tax is not in itself a tax but an advance payment to offset or reduce future tax obligations. It is typically deducted at the source when payment is made²⁶.

Traditionally, income taxes are premised on a structure, and its imposition is limited to the geographical location of a taxable entity with the basic considerations of the source of income and/or fixed base. Section 9 of CITA elaborates on this by subjecting all profits of any Nigerian company arising from any trade accruing in, derived from, brought into, or received in Nigeria to Companies Income Tax. This above assertion covers more of non-digital economy.

Section 13(1) of the CITA states that a Nigerian company's profits are deemed to accrue in Nigeria regardless of where they arise or whether they are brought into or received in Nigeria. As a result, as long as a business is based in Nigeria, it is required to pay tax on its earnings. A foreign or non-resident company ("NRC") is only taxable in Nigeria if it can be proven that it has a commercial presence/business interest in the country and has the ascertainable profit that is or could be attributable to its presence in the country.²⁷The Act further provides that the existence of any of the activities listed below or a combination of such activities would amount to the existence of an established taxable commercial presence:²⁸

- a. the profits of an NRC from any trade or business were only deemed to be derived from Nigeria and assessable to company income tax as follows:
- b. if the company has a fixed base in Nigeria to the extent that the profit is attributable to the fixed base; or
- c. if it does not have a fixed base in Nigeria but habitually operate a trade or business through a person in Nigeria authorized to conclude contracts on its behalf or on behalf of some other companies controlled by it or which have controlling interest in it or habitually maintains a stock

²⁴ s. 55, CAMA

²⁵ See DC John, 'Corporate Taxation Laws in Nigeria: A Review', *International Journal of Advanced Legal Studies and Governance*, Vol. 2, No. 1, April 2011 236 – 256, p. 238

²⁶ 'Further Explanatory Comments On Withholding Tax Principle And Operation', Federal Inland Revenue Service Information Circular,[2006], <[https://taxaide.com.ng/files/FURTHER-EXPLANATORY-COMMENTS-ON-WITHHOLDING-TAX-200602%20\(1\).pdf](https://taxaide.com.ng/files/FURTHER-EXPLANATORY-COMMENTS-ON-WITHHOLDING-TAX-200602%20(1).pdf)> accessed 4 March 2022.

²⁷ Section 13(2) of CITA. 88 Section 13(2 a – d) of CITA.

²⁸ Value Added Tax Act Cap V1, LFN 2004 (as amended) (hereinafter referred to as "VAT Act")

of goods or merchandise in Nigeria from which deliveries are regularly made by a person on behalf of the company to the extent that the profit is attributable to business or trade or activities carried on through that person; or

- d. Derives profits from that trade or business or activities which involves a single contract for surveys, deliveries, installations or construction; or
- e. Where the trade or business or activities is between the company and another person controlled by it or which has a controlling interest in it and conditions are made or imposed between that company and such persons in their commercial or financial relations which in the opinion of the FIRS is deemed to be artificial or fictitious, so much of the profit adjusted by the Board to reflect arm's length transaction.

The above provisions of the CITA limited the taxation of business profits of NRCs to only occasions where the NRC:

- a. has a fixed base in Nigeria (which requires some element of physical presence); or
- b. concludes contracts through a dependent agent in Nigeria; or
- c. engage in turn-key projects in Nigeria; or
- d. carries on trade or business with persons who have controlling interests in the NRC, and the conditions made or imposed between the NRC and such persons in their commercial or financial relations are deemed to be artificial or fictitious by the FIRS.

This regime did not contemplate the taxation of income derived by NRCs from digital services or products offered to persons resident in Nigeria. The parameters, which were designed for the traditional economy, are clearly ineffective for the digital economy, since most of the MNEs have no fixed base of business nor operate through agents under the control of the MNE in Nigeria. Also, the nature of products anticipated by the Act are physical "stock of goods or merchandise", not digital goods and services. In addition, these companies do not execute turnkey projects and have no related party acting for them. Accordingly, profits from their economic activities in Nigeria cannot be subject to tax under the CITA. Retaining the law in this manner would have constituted significant loss of revenue for Nigeria from transactions in digital economy.

The implication of s. 13 of CITA is that foreign companies are required to have a "fixed base" in Nigeria. However, this is very much not like companies within the digital economy, which tend to structure their businesses in a way that enables them to avoid being caught by the definition of "fixed base" under Nigerian law. The resultant effect of this is that the tax authorities are unable to collect any form of taxes from these companies. It should also be noted that, while the traditional income tax regime fails to tax companies in the digital economy, the regime for taxing goods is equally inefficient. The Value Added Tax Act is the current structure in relation to taxation of goods, and it imposes a tax on all goods and services, whether produced or rendered in Nigeria or not.²⁹ However, exemptions were granted for medical and pharmaceutical products, basic food items, fertilizers, agricultural and veterinary medicine, books and educational materials, farming, and transportation equipment.³⁰

The application of the VAT Act to services provided by a non-resident company outside Nigeria to a person resident in Nigeria has been a topic of discussion for many years. The FIRS" previously held the position that such services should be subject to VAT in Nigeria because the recipient is a Nigerian resident, whereas tax-payers held that such services were not subject to VAT in Nigeria. This was the crux of the dispute in *Vodacom Business Nigeria Limited v FIRS*.³¹ In that case, the Court of Appeal applied the "destination principle" and determined that a non-resident company's supply of satellite network bandwidth capacities to a Nigerian company was subject to VAT in Nigeria because the bandwidth was supplied and enjoyed in Nigeria.

²⁹ Section 2, Value Added Tax Act CAP. V1. LFN. 2004. (VAT Act)

³⁰ Section 3, VAT Act; First Schedule, Value Act.

³¹ Appeal No.CA/LA/L/556/2018.

In 2017, the Nigerian Federal Executive Council, which is the highest decision-making organ of the Executive, approved the National Tax Policy (the Policy).³² The Policy, which is part of efforts aimed at diversifying the sources of government revenues by significantly increasing tax to Gross Domestic Product (GDP) ratio, required an overhaul of the nation's tax policy. The Policy identified the irregular review of tax legislation that have become obsolete and out of tune with current economic realities, as one of the challenges facing Nigeria's tax system.³³ The taxation of the digital economy is one of the areas where Nigeria tax laws were out of tune with economic realities. Although the Policy is not a subsidiary legislation³⁴, it serves as a framework guide for tax legislation and administration in the country.³⁵ The directive of the FIRS, through its former Chairman, Mr. Babatunde Fowler, in August 2019 is also noteworthy in discussing the taxation of digital services in Nigeria. He announced that transactions involving digital purchases of goods and services would be subject to VAT through the appointment of payment portals as collecting agents. The shortcoming of this directive is evidenced by the shifting of the burden of taxation to final customers and not the NRCs. It has been submitted that this initiative was not focused on digital services, but a broadening of the VAT base to extend to such companies.

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

The Finance Act 2019 (2019 Act/FA 2019)³⁶ amends the tax laws to accommodate changes that will enhance better taxation of NRCs operating in the country by the introduction of the concept of Significant Economic Presence (SEP). By so doing, the 2019 Act tackled the cardinal issues of nexus and allocation of profit that states face in taxing the digital economy.

Under the 2019 Act, digital platforms are regarded as non-resident companies and their profit deemed to be derived in Nigeria if they meet the SEP requirements. Of particular importance is the 2019 Act's amendment of s. 13(2) (CITA) that the profits of a company other than a Nigerian company from any trade or business shall be deemed to be derived from Nigeria if it transmits, emits or receives signals, sounds, messages, images or data of any kind by cable, radio, electromagnetic systems or any other electronic or wireless apparatus to Nigeria in respect of any activity, including electronic commerce, application store, high frequency trading, electronic data storage, online adverts, participative network platform, online payments and so on, to the extent that the company has significant economic presence in Nigeria and profit can be attributable to such activity. Furthermore, if the trade or business of a company comprises the furnishing of technical, management, consultancy or professional services outside of Nigeria, to a person resident in Nigeria, to the extent that the company has a significant economic presence in Nigeria.³⁷

The effect of the provision is that SEP becomes the nexus rule for NRCs in Nigeria. It dematerializes the requirement of fixed base under the CITA. But the 2019 Act does not define SEP. However, it empowers the Minister of Finance to determine what constitutes SEP by a Ministerial Order.³⁸ Pursuant to this, the Minister issued Companies Income Tax (Significant Economic Presence) Order, 2020 (the Order)³⁹ which provides two basic standpoints for determining SEP depending on the type of business in focus. By the provisions of the Order, a foreign entity involved in digital transactions will be deemed to have created an SEP in Nigeria and therefore liable to tax if it:

³² See, FMoF, National Tax Policy (n 171)

³³ *Ibid*

³⁴ *UBN Plc v Ifeoruwa Nig. (Ent.) Ltd*, (2007) 7 NWLR (pt. 1032) 135

³⁵ R Newman. Overview of the National Tax Policy and its Implication for Tax Administration In Nigeria*. Vol. 10(2). *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 44

³⁶ Finance Act 2019, available at <https://www.firs.gov.ng/wp-content/uploads/2021/02/finance-act-2019-official-gazette-1.pdf> accessed 4 May 2021

³⁷ S. 4(b) FA 2019/s. 13(2)(e) CITA

³⁸ s. 4(c) FA 2019/ s. 13(4) CITA

³⁹ See Companies Income Tax (Significant Economic Presence) Order, 2020, <https://firs.gov.ng/wp-content/uploads/2021/07/significant-economic-presence-order-2020.pdf> accessed 8 May 2021

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

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

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

The Order provides that the activities carried out by connected persons in any accounting year shall be aggregated in order to determine whether the N25 million annual gross turnover threshold was met. The Order further requires that for a foreign company providing technical, professional, management, and consultancy services, there is SEP in Nigeria, when it earns any income or receives any payment from a person resident in Nigeria, or a fixed base or agent of a foreign company in Nigeria. Given the above amendments to Nigerian tax legislation, entities within the Nigerian digital economy are now liable to pay tax in Nigeria. Therefore, all NRCs that meet the above thresholds are required to register with the FIRS for income tax purposes and to file their returns with the tax authorities at the appropriate time.⁴⁰

It is important to note that, under Section 16 of the Finance Act 2020, the company will be required to provide a declaration of the corresponding year of assessment which includes the complete audited account and financial statements of the operation of the Nigerian company, attested by an independent qualified or certified accountant in Nigeria, where any company is liable to a tax pursuant to Section 13(2) CITA, including companies with significant economic presence. It must also include tax computation schedules based on profits attributable to its Nigerian operations, as well as a true and correct written statement containing the amounts of profits from each and every source in Nigeria, as well as duly completed Company's income Tax Self-assessment forms.

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

s. 4 of the Finance Act 2021 (2021 Act)⁴¹ sought to clarify the state of the law on what constitutes SEP. It amends s.13 CITA by substituting for subsection (2), a new subsection (2) which provides that the profits of a company other than a Nigerian company from any trade or business shall be deemed to be derived from or taxable in Nigeria where –

- a. that company has a fixed base of business in Nigeria to the extent that the profit is attributable to the fixed base;
- b. it does not have such a fixed base in Nigeria but habitually operates a trade or business through a person in Nigeria authorised to conduct on its behalf or on behalf of some other companies controlled by it or which have a controlling interest in it; or habitually maintains a stock of goods or merchandise in Nigeria from which deliveries are regularly made by a person on behalf of the

⁴⁰ S. 55 CITA.

⁴¹ Finance Act 2021.

company, to the extent that the profit is attributable to the business or trade or activities carried on through that person;

- c. it transmits, emits or receives signals, sounds, messages, images or data of any kind by cable, radio, electromagnetic systems or any other electronic or wireless apparatus to Nigeria in respect of any activity, including electronic commerce, application store, high frequency trading, electronic data storage, online adverts, participative network platform, online payments and so on, to the extent that the company has significant economic presence in Nigeria and profit can be attributable to such activity;
- d. that trade or business or activities involves a single contract for surveys, deliveries, installations or construction, the profit from that contract;
- e. the trade or business comprises the furnishing of technical, management, consultancy or professional services outside of Nigeria to a person resident in Nigeria to the extent that the company has significant economic presence in Nigeria; provided that the withholding tax applicable to the income under this paragraph shall be the final tax on the income of a non-resident recipient who does not otherwise fall within the scope of subsection 2 (a) – (d); or
- f. the trade, business or activities is between the company and another person controlled by it or which has a controlling interest in it and conditions are made or imposed between the company and such person in their commercial or financial relations which in the opinion of the Service is deemed to be artificial or fictitious, so much of the profit adjusted by the Service to reflect arm's length transaction.”

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

that company transmits, emits or receives signals, sounds, messages, images or data of any kind by cable, radio, electromagnetic systems or any other electronic or wireless apparatus to Nigeria in respect of any commerce, trade or activity, including electronic commerce, application store, high frequency trading, electronic data storage, online adverts, participative network platform or online payments, to the extent that the company has significant economic presence in Nigeria, *assess and charge that company for that year of assessment on such fair and reasonable percentage of that part of the turnover attributable to that presence;*⁴²

Once an NRC has established taxable presence in Nigeria, the Act requires it to file income tax returns together with their global audited financial statements, and audited financial statements for their Nigerian operations.⁴³ Thus, every non-resident company that is carrying on business in Nigeria is, required to prepare and submit to the FIRS, in respect of its operations in Nigeria, income tax returns containing the documents prescribed by S.55 of CITA.⁴⁴ With respect to NRCs, s. 55(2) provides that

Where any company other than a Nigerian company derives profit from or is taxable in Nigeria under section 13 (2) of this Act, such company shall be required to submit a return for the relevant year of assessment containing:

- (a) The company's full audited financial statements and the financial statement of the Nigerian operations, attested by an independent qualified or certified accountant in Nigeria;
- (b) Tax computation schedules based on the profits attributable to its Nigerian operations;
- (c) A true and correct statement, in writing, containing the amount of profits from each and every source in Nigeria; and
- (d) Duly completed Companies Income Tax Self-Assessment Forms.

⁴² Emphasis mine

⁴³ s. 55

⁴⁴ FIRS, PUBLIC NOTICE ON FILING OF TAX RETURNS BY NON-RESIDENT COMPANIES UNDER THE COMPANIES INCOME TAX ACT, CAP C21 LFN 2004 (AS AMENDED), <https://firs.gov.ng/wp-content/uploads/2021/01/Public-Notice-on-Income-Tax>Returns-by-Non-Resident-Companies.pdf> last accessed July 28, 2022

This requirement is not applicable to NRCs whose income from Nigeria is only subject to WHT (for example NRCs earning passive income or providing technical/professional management/technical services remotely) are exempted from the filing obligation.⁴⁵ With this requirement to file income tax returns, the provisions of s.53, which imposes penalty and interest for deliberate filing of incorrect tax returns will apply to NRCs also. The Act does not define what constitutes deliberateness for the purpose of the section.

3. NIGERIA'S VAT REGIME AND THE DIGITAL ECONOMY

VAT is a consumption tax paid when goods are purchased and services rendered. It is a form of multi-layered sales tax that is imposed at various levels of purchase and sale of good and services based on the value added there to. As a form of tax, VAT is levied at every stage of consumption chain and borne ultimately by the final consumer of the goods or service.⁴⁶ Since it is levied on products or services, it applies across board and does not discriminate based on the income of the consumer.⁴⁷ The attractiveness of VAT as a form of taxation lies in its indirect nature; its ease of administration and difficulty in avoidance as well as its use a measure of economic growth, since it reflects general purchasing power.⁴⁸

Value Added Tax (VAT) in Nigeria is governed by Value Added Tax Act.⁴⁹ It was introduced in Nigeria through the Value Added Tax Act of 1993⁵⁰ and became operational from January 1, 1994. Its introduction marked the phasing out of phasing out of the Sales Tax Decree No. 7 of 1986.⁵¹ VAT is chargeable and payable on the supply of all goods and services (referred to as taxable goods and services) other than those good and services exempted⁵² under the Act.⁵³ The 1993 Act imposed a Vat rate of 5% on all taxable goods and services.⁵⁴

“Goods” are defined to mean: (a) all forms of tangible properties that are movable at the point of supply, but does not include money or securities; and (b) any intangible product, asset, or property over which a person has ownership or rights, or from which he derives benefits, and which can be transferred from one person to another, excluding interest in land. On the other hand “services” are defined as anything other than goods, money or securities which is supplied, excluding services provided under a contract of employment. Furthermore, “taxable supplies” means any transaction for the sale of goods or the performance of a service, for a consideration in money or money’s worth.

Where the supply of taxable goods and services is for monetary consideration, the value of taxable goods and service is deemed to be an amount which with the addition of the tax chargeable is equal to the consideration.⁵⁵ Where the supply is for a consideration not consisting of money, the value shall be deemed to be its market value.⁵⁶ In determining the value of taxable goods and services, the open market value shall be taken to be the amount that would fall due for goods and services supplied without monetary value.⁵⁷ In the case of imported taxable good, the value shall be the amount which is equal to the price of the goods so imported and the charges and expenses incurred for the purpose of importing it.⁵⁸

⁴⁵ See EY, Nigeria: Highlights of Finance Act 2020, https://www.ey.com/en_gl/tax-alerts/nigeria-highlights-of-finance-act-2020

⁴⁶ The value added refers to the amount of value added by a producer in product or services value chain. It is the difference between a company’s sales and its purchase of inputs from other firms.

⁴⁷ S. 10(2)

⁴⁸ U Enemu, C Moneme & O Okeke, ‘Taxation and Nigerian Economy: Benchmarking Value Added Tax 2000 –2020’, *vol. 2 No. 1 International Journal of Business and Management Research*, , 191 – 208, p. 192

⁴⁹ *Cap VI, LFN 2004(as amended)*.

⁵⁰ Value Added Tax Decree no 102 of 1993.

⁵¹ S. 45 VAT Act repealed the Sales Tax Act, subject to s. 6 of the Interpretation Act

⁵² The First Schedule to the Act contains a list of goods and services that are VAT-exempt.

⁵³ s. 3, VAT Act

⁵⁴ s. 4

⁵⁵ s. 5(1)(a)

⁵⁶ s. 5(1)(b)

⁵⁷ s. 5(3)

⁵⁸ s. 6

The Act empowers the Federal Inland Revenue Services to administer and manage the VAT.⁵⁹ The Service is empowered to do such things as it may deem necessary and expedient for the assessment and collection of the tax and shall account for all amounts so collected in accordance with the provisions of the Act. The Act mandates every taxable person⁶⁰ to register with the Service for the purpose of collection of tax within six months of the commencement of the Act or within six months of the commencement of business, whichever is earlier.⁶¹ Failure to register attracts a penalty stipulated under the Act.⁶² Every registered person⁶³ shall keep such record as is sufficient to determine the correct amount due under the Act. Government ministries and agencies are also required to register as agents of the Service for the purpose of collection of VAT⁶⁴ while evidence of VAT registration is a condition for obtaining a contract by every contractor transacting business with a government agency or ministry.⁶⁵ A non-resident company (NRC) carrying on business in Nigeria shall also register for the tax with the Service, using the address of the person with whom it has a subsisting contract as its address for purposes of correspondence relating to the tax.⁶⁶ The NRC shall include the tax in its invoice and the person to whom the goods or services are supplied in Nigeria shall remit the tax in the currency of the transaction. A taxable person shall pay the tax on taxable goods and services⁶⁷ and shall also collect the tax on goods and services it supplies.⁶⁸ A taxable person shall render monthly returns on or before the 30th of each month, a return of all taxable goods and services purchased or supplied in the preceding month.⁶⁹ The monthly return also applies to an importer of taxable goods imported into Nigeria.⁷⁰ In the event of a failure to render returns by a taxable person, the Service shall assess to the best of its judgment, the amount of tax due on the taxable goods and services purchased or supplied by the taxable person.⁷¹ Failure to remit VAT within the specified period attracts a penalty and interest at commercial rate.⁷² The tax can be recovered through proceeding by the Service at the Value Added Tax Tribunal established under the Act.⁷³ An aggrieved taxable person can also appeal to the Tribunal.⁷⁴ The Act stipulates various punishments for different forms of infringement against the Act, including furnishing the Service false documents⁷⁵, evasion of tax⁷⁶, failure to make attribution⁷⁷, etc.⁷⁸

⁵⁹ s. 7(1)

⁶⁰ s. 12 of the Value Added Tax (Amendment) Act 2007 defines a taxable person to include an individual or body of individuals, family, corporations sole, trustee or executor or a person who carries out in a place an economic activity, a person exploiting tangible or intangible property for the purpose of obtaining income therefrom by way of trade or business or a person or agency of government acting in that capacity. The section amends the definition of taxable person contained in s. 42 of the Principal Act. means a person who independently carries out in any place, an economic activity as a producer, wholesale trader, supplier of goods, supplier of services (including mining and other related activities) or person exploiting tangible or intangible property for the purpose of obtaining income there from by way of trade or business and includes a person and an agency of government acting in that capacity. See S. 45, VAT Act

⁶¹ S. 8(1)

⁶² S. 8(2)

⁶³ A registered person is any person who registers under section 8 of the Act.

⁶⁴ s. 9(1)

⁶⁵ s. 9(2)

⁶⁶ s. 10(1)

⁶⁷ s. 12(1) The tax payable by a taxable person is known as input tax. See s. 12(2)

⁶⁸ s. 14(1) The tax collected by a taxable person is known as output tax. See s. 14(2)

⁶⁹ s. 15(1)

⁷⁰ s. 15(2)

⁷¹ s. 18

⁷² s. 19

⁷³ s. 20(1) The Tribunal was established pursuant to the Second Schedule to the Act.

⁷⁴ s. 20(2)

⁷⁵ s. 25

⁷⁶ s. 26

⁷⁷ s. 27

⁷⁸ See ss 29 - 37

Revenue accruable from the Act shall be shared among the three tiers of government – the federal government (15%), the state governments and the Federal Capital Territory (50%) and the local governments (35%).⁷⁹

The Finance Act 2019 imposed VAT obligations on transactions conducted by non-resident digital companies.⁸⁰ The new legislation will apply to non-resident companies that makes a taxable supply to Nigeria such as digital platforms, high-frequency trading services, digital advertisement companies etc. Such NRCs are required to register for tax with the Service and obtain a Tax Identification Number.⁸¹ A non-resident digital company will add VAT charge to any transaction conducted with an individual in Nigeria on its platform.⁸² A mechanism for the collection of VAT is included by requiring the taxable person to whom a taxable supply is made in Nigeria, or such other person as may be appointed by the Service to withhold or collect the tax, as the case may be, and remit same to the Service.⁸³ Where a person appointed under subsection (3) has made a taxable supply to a taxable person in Nigeria, the taxable person shall not have the obligation to withhold the tax, except where the person so appointed has failed to collect the tax.⁸⁴ A non-resident person that makes a taxable supply to Nigeria may appoint a representative for the purpose of compliance with its tax obligations.⁸⁵ The Act gives the Service the power to issue a guideline for the purpose of giving effect to the provisions of this section, including the form, time and procedure for filing returns and payment by non-resident suppliers appointed by the Service under subsection (3).⁸⁶

The 2019 Act increased the VAT rate in Nigeria from the 5% provided under the VAT Act to a new rate of 7.5%.⁸⁷ also introduced a threshold for taxable persons, by exempting taxable persons with taxable supplies of less than Twenty-Five Million Naira (N25m) from accounting for VAT to the FIRS.⁸⁸ In order to determine the aforementioned N 25M threshold, the FIRS issued the *Clarification on the Implementation of the Value Added Tax (VAT) Provisions in the Finance Act 2019* (the Circular),⁸⁹ which provides that

- a. Taxable persons who have made taxable supplies of N25m prior to the introduction of the exemption shall continue to account for VAT, even if they have not made N25m taxable supplies in the current year;
- b. Taxable persons who did not attain N25m taxable supplies before February 1, 2020, are required to immediately commence accounting for VAT upon attaining the threshold at any time within the year;
- c. Taxable persons who are yet to attain the N25m threshold may voluntarily register and account for VAT (provided they give prior notification to the FIRS) and will be subject to all provisions of the VAT Act applicable to taxable persons above the threshold);
- d. Taxable persons who have not attained the N25m threshold but expect to attain the threshold at a future date within the calendar year shall immediately commence accounting for VAT;

⁷⁹ s. 40

⁸⁰ s. 30

⁸¹ s. 10(1) VAT Act

⁸² s. 10(2)

⁸³ s.10(3) Babajide Komolafe, 'Finance Act, 2021: Improving Revenue for Fiscal Performance', <<https://www.vanguardngr.com/2022/03/finance-act-2021-improving-revenue-for-fiscal-performance/>> accessed 4 June 2022

⁸⁴ s.10(4)

⁸⁵ s.10(5)

⁸⁶ s.10(6)

⁸⁷ See s. 34, Finance Act, 2019.

⁸⁸ s. 38, Finance Act, 2019. Companies that do not meet the threshold are also exempted from penalties for non-registration for VAT purposes.

⁸⁹ See FIRS, 'Clarification on the Implementation of the value Added Tax (VAT) Provisions in the Finance Act 2019', <https://pwnigeria.typepad.com/files/firs-vat-information-circular_may2020.pdf> accessed 2 June 2022). See also Banwo & Ighodalo, 'FIRS Clarifies Changes Introduced To Nigerian VAT Regime By The Finance Act 2019', <<https://banwo-ighodalo.com/grey-matter/firs-clarifies-changes-introduced-to-nigerian-vat-regime-by-the-finance-act-2019>> accessed 2 June 2022

- e. Taxable persons who make taxable supplies amounting to N25m and above within a calendar year are required to file monthly VAT returns to the FIRS, even if part or the whole of such supplies are exempt under the VAT Act. A calendar year, for the purpose of the Circular, is stated to be a period of 12 months beginning on a day marking the start of that year; and
- f. Taxable persons who attain the N25m. threshold are required to continue collecting VAT and filing VAT returns on a monthly basis.

However, provision of paragraph (III) the Circular, which make VAT registration optional or voluntary contravenes the mandatory requirement of VAT registration upon commencement of business. Section 8 of the VAT Act obliges all taxable persons to register with the FIRS, for VAT purposes, within six (6) months of the commencement of business or face the prescribed penalties. The six months grace period has been amended by the Finance Act, which requires registration for VAT purposes upon commencement of business in Nigeria. Section 46 of the Finance Act defines commencement of business as the date on which an entity carries out its first transaction in Nigeria, which shall be the earliest of the date it

- (I) begins to market or first advertises its products or services for sale
- (II) obtains an operating licence from a regulatory authority in Nigeria
- (III) makes its first sale or purchase
- (IV) executes its first trading contract after incorporation
- (V) issues or receives its first invoice;
- (VI) delivers or receives its first consignment of goods; or
- (VII) first renders services to its customers.

Where a taxable person permanently ceases to carry on a trade or business in Nigeria, it is required to notify the FIRS of its intention to deregister for tax purposes within ninety (90) days of such cessation of the trade or business.⁹⁰ Where a taxable entity fails to notify FIRS after cessation of business, the penalty for failure to file returns will continue to apply.

With regard to goods and services, the Finance Act provides that for VAT purposes, goods shall be deemed to be supplied in Nigeria if:

- a. the goods are physically present in Nigeria at the time of supply, imported into Nigeria for use by a person, assembled in Nigeria, or installed in Nigeria;
- b. or the beneficial owner of the rights in or over the goods is a taxable person in Nigeria and the goods or right is situated, registered or exercisable in Nigeria.

In the same vein, services are deemed to be supplied in Nigeria for VAT purposes if:

- i. The services are rendered in Nigeria by a person physically present in Nigeria at the time of service provision,
- ii. the services are provided to a person in Nigeria, regardless of whether the services are rendered within or outside Nigeria.

The Circular provides the following clarifications on ascertaining goods and services liable to VAT:

- a. VAT is chargeable on goods (including tangible or intangible property) and articles of trade;
- b. VAT is chargeable on rights in goods or property (such as rights in mineral resources, copyrights, and trademarks);
- c. VAT is chargeable on property (movable or immovable) such as assets, motor vehicles, oil wells, rigs, aircrafts, ships, buildings, roads, jetties, or any other type of property;
- d. VAT is chargeable on services rendered in Nigeria by a person physically present in Nigeria at the time of providing the service;
- e. VAT is chargeable on services provided to a person in Nigeria, regardless of whether the services are rendered within or outside Nigeria;

⁹⁰ s. 35

- f. VAT is chargeable on services performed in Nigeria to persons in Nigeria, irrespective of the residence status of the service provider;
- g. VAT is chargeable on services provided to persons while in Nigeria regardless of the medium of delivery of the services;
- h. VAT is chargeable on services rendered remotely, online, or by virtual means to Nigerian residents or persons in Nigeria; and
- i. *Services rendered to and consumed by a Nigerian resident while physically outside Nigeria are not liable to VAT in Nigeria.*⁹¹

Paragraphs e – h of the Circular relates to VAT liability of service in the digital economy. Where a non-resident person makes taxable supplies to a person in Nigeria or to a Nigeria resident, the non-resident is required to register for VAT with FIRS, using the address of the person to whom it is making the supply as the address for the purpose of correspondence relating to the tax. The VAT should be included in the invoice for the supply of goods and supply made. The Nigerian recipient is required to withhold and remit the VAT due on the invoice to the FIRS in the currency of the transaction. Thus a NRDC that make taxable supplies to persons in Nigeria, or to Nigerian residents, may be validly regarded as having carried on business in Nigeria within the meaning of the VAT Act.

Anticipating its enormous economic importance and potential, the FIRS has prioritized the collection of taxes from the digital economy, and has deployed a digital service interface, the Digital Economic Compliance (DEC) Tool. The Tool will facilitate the implementation of the Regime by assisting the Service in determining entities that fall within the SEP threshold and relevant turnover generated from Nigeria.⁹²

The OECD encourages the adoption of a simplified registration and collection mechanism as one of the means of addressing the difficulties associated with taxing NRCs. Hence, the FIRS issued *Guidelines on Simplified Compliance Regime for Value Added Tax (VAT) for Non-Resident Suppliers*⁹³, to facilitate the adoption of the new VAT requirements for Non-Resident Suppliers (NRS). It defines NRS as “the suppliers, located outside the territory of Nigeria, who supply taxable goods, services, digital products or intangibles to Nigeria through digital or electronic platforms or means or the intermediary where such intermediaries are not the actual owners or suppliers of the goods or services but facilitate the supply, issuance of invoices and payment”.⁹⁴ It amends, updates or replaces contents of any other Guideline, Circular, notice or other publication previously issued by the Service that is inconsistent with its contents to the extent of such inconsistency.⁹⁵ Its provisions apply to all categories of NRS - natural persons, trusts, partnerships, corporations, companies or any other person - engaging in the supply of goods, services, or intangibles to persons in Nigeria through electronic, digital, or similar platforms.⁹⁶

Two categories of NRS are anticipated by the Guidelines – (a) Where the supply is not made through intermediaries, the person making the supply; and (b.) Where the supply is made or facilitated through an intermediary or intermediaries, the intermediary through which the supply was made to Nigeria.⁹⁷ In the case of the first category, the Guidelines expects them to register for VAT in its own name, issue VAT invoices, collect and remit VAT due.⁹⁸ So, this will cover situations where a digital company sells software or services on its website directly to consumers in Nigeria. The second category would apply to platforms

⁹¹ The portions of the Circular applicable to the digital economy have been italicized for emphasis.

⁹² Busola Aro, ‘FIRS: We’ll ensure 100% automation of tax administration processes in 2022’, <<https://www.thecable.ng/firs-well-ensure-100-automation-of-tax-administration-processes-in-2022>> accessed 29 July, 2022

⁹³ FIRS, ‘Guidelines on Simplified Compliance Regime for Value Added Tax (VAT) for Non-Resident Suppliers, NO. 2021/19’. <<https://www.firs.gov.ng/wp-content/uploads/2021/10/Guidelines-on-Simplified-Compliance-Regime-of-VAT-for-Non-Resident-Suppliers-15102021.pdf>> accessed 2 July 2022

⁹⁴ *Ibid*, para. 24. The Guidelines use Non-Resident Suppliers (NRS) instead of Non-Resident Companies (NRCs) Both experiences are synonymous and used interchangeably in this section.

⁹⁵ *Ibid*. preamble

⁹⁶ *Ibid*. para 1(4) & 4(3)

⁹⁷ *Ibid*. para 5(1)(2)

⁹⁸ *Ibid*. para 5(3)

that serve as intermediaries for the sale of digital goods and services and are therefore deemed to be the suppliers thereof. Under paragraph 5.2(b) of the Guidelines, the intermediary is deemed to be the Supplier, for the purposes of these guidelines, and is required to register for VAT using its own name, issue VAT invoices, deduct and remit VAT due on the supplies made to Nigeria through its platform using its own TIN. In such instance, the deemed Supplier will have the primary responsibility for complying with the charging, collection, remittance, returns filing and record keeping obligations under the Guidelines.⁹⁹ The deemed supplier should collect the VAT when receiving payment from the customer.¹⁰⁰ In the case of platforms that do not receive payment directly or indirectly from the customer but are entitled to a commission on sales, the tax should be collected alongside the commission and remitted to the Service.¹⁰¹ Where the VAT on a supply has been accounted for under paragraph 5.2(b), the underlying supplier is exempt from further obligation under these guidelines with respect to such supply.¹⁰² The requirement of direct VAT registration reiterates the fact that with the coming into effect of the Finance Act 202, NRS do not need the address of their customers as its mailing address in Nigeria. Instead, every relevant NRS shall comply with the VAT Act (as amended) and the regime and practices enshrined in these Guidelines.¹⁰³

The Guidelines came into effect from 1st January 2022 with respect to supply of services and intangibles and shall apply to the supply of goods from 1st January 2024.¹⁰⁴ It makes the supply into Nigeria, of goods, services and intangibles as the basis for them being subject to VAT in the country.

Goods are supplied in Nigeria if:

- i. the goods are physically present in Nigeria at the time of supply, imported into Nigeria, assembled in Nigeria or installed in Nigeria, or
- ii. the beneficial owner of the rights in or over the goods is a taxable person in Nigeria and the goods or right is situated, registered or exercisable in Nigeria.

Internationally traded goods are taxable in Nigeria, when they are supplied to persons in Nigeria where the delivery address of the goods is in Nigeria¹⁰⁵, even though the goods were supplied through electronic or digital means (e.g. marketplace, platform, app, portal, etc.)¹⁰⁶ Such goods shall not be liable to VAT on entry into Nigeria¹⁰⁷ and VAT incurred under these Guidelines shall be deducted from the total VAT liability computed at the port of entry.¹⁰⁸ Charging of VAT on such goods does not prevent stop the Nigeria Custom Services or other agents of the Service from charging appropriate taxes on Goods that has not been so charged to tax under these guidelines or on such other goods which are not within the scope of these guidelines.¹⁰⁹

Services covered by the Guidelines include any intangible or services delivered via electronic or digital means or similar networks, whose supply is essentially automated, involves minimal human intervention, and is impossible to ensure in the absence of information technology.¹¹⁰ The Guidelines provide an overview of the nature of services contemplated thereunder¹¹¹ but excludes professional and consultancy services that are not automated but are delivered via the internet (e.g. via email); broadcasting services; telecommunications services; and services that are exempt from tax under the First Schedule to VAT Act.¹¹² and they are supplied in Nigeria:

⁹⁹ *Ibid.* para 5(4)

¹⁰⁰ *Ibid.* para 5(5)

¹⁰¹ *Ibid.* para 5(6)

¹⁰² *Ibid.* para 5(7)

¹⁰³ *Ibid.* para 1(6)

¹⁰⁴ *Ibid.* para 2(1)

¹⁰⁵ *Ibid.* para 16(3)

¹⁰⁶ *Ibid.* para 16(1)

¹⁰⁷ *Ibid.* para 16(4)

¹⁰⁸ *Ibid.* para 16(5)

¹⁰⁹ *Ibid.* para 14(6)

¹¹⁰ *Ibid.* para 14(1)

¹¹¹ *Ibid.* para 14(2)

¹¹² *Ibid.* para 14(3)

- i. If the service is rendered in Nigeria by a person physically present in Nigeria at the time of providing the service,
- ii. Irrespective of the jurisdiction of origin of the service, where the services is rendered to a person physically present in Nigeria at the time the service is rendered, or the service is consumed in Nigeria or whether or not the legal or contractual obligation to render such service rests on a person within or outside Nigeria, or
- iii. The service is connected with existing immovable property (including the services of agents, experts, engineers, architects, valuers, etc.); where the property is located in Nigeria.
- iv. it can be inferred from information provided that the consumers usual place of residence is Nigeria;¹¹³

The Guidelines provides directions on the taxing of internationally traded services in Nigeria. Nigeria's place of supply rules are built on place of consumption. As such, services consumed or otherwise utilised in Nigeria by individuals or businesses are taxable in Nigeria.¹¹⁴ Digitally supplied services are consumed or utilised in Nigeria where: (a) the recipient of the supplies resides in Nigeria, as evidenced by the billing, business, residential or postal address in Nigeria; (b) it can be inferred from information provided that the consumers usual place of residence is Nigeria; (c) the customer is a company incorporated under any law in Nigeria; (d) the customer's URL, geo-location or IP address is in Nigeria; (e) it is physically performed in Nigeria; (f) there is any other evidence suggesting that the supply is consumed or utilised in Nigeria or that such supplies can only utilised in Nigeria; or (g) a place of consumption cannot be established for the supplies, using any of the above indicia, the place of consumption is Nigeria if the payment for such supplies originates from a bank or any other financial institution licensed in Nigeria pursuant to Nigerian laws.¹¹⁵

An incorporeal is supplied in Nigeria if:

- i. the exploitation of the right is made by a person in Nigeria;
- ii. the right is registered in Nigeria, assigned to or acquired by, a person in Nigeria, regardless of whether the payment for its exploitation is made within or outside Nigeria, or
- iii. the incorporeal is connected with a tangible or immovable asset located in Nigeria..¹¹⁶

The Guidelines also do not deter the continuance of any mechanism put in place by an NRS for collecting and remitting VAT to the Service prior to the coming into effect of the Guidelines do not deter its continuance. Such mechanisms remain in place pending when the NRS can migrate to the simplified compliance regime introduced therein.¹¹⁷ Furthermore, the introduction of the simplified regime does not replace or restricts the power of the Service under the Section to appoint any person to collect and remit the tax.

It explains how the simplified VAT compliance will apply to of NRS supplying goods, services or intangibles to persons in Nigeria through electronic, digital or similar platforms for ease of compliance.¹¹⁸ Hence, it will apply to supplies, through digital means, of goods, services, intangibles and other digital products by persons not physically present, located or represented in Nigeria to businesses ("Business-to-Business" -B2B) or consumers ("Business-to-Consumers" - B2C) in Nigeria but excludes items expressly excluded from tax under the VAT Act.¹¹⁹

In line with s. 10(3) of the VAT Act which provides that, "taxable person, to whom the supply of taxable goods or services are made in Nigeria or such other person as may be appointed by the Service, shall

¹¹³ *Ibid.* para 3(2)(b)(i-iv)

¹¹⁴ *Ibid.* para 15(1)

¹¹⁵ *Ibid.* para 15(2). This condition will create a problem in the case of Nigerians, who are resident in foreign countries, that make payment using their Nigerian bank accounts. See PwC, 'FIRS Issues Simplified VAT Regime for Non-Resident Suppliers, <https://pwc-nigeria.typepad.com/files/pwc-tax-alert--firs-issues-simplified-vat-regime-for-non-resident-suppliers.pdf> accessed 28 July 2022

¹¹⁶ *Ibid.* para 3(2)(c)(i-iii)

¹¹⁷ *Ibid.* para 2(2)

¹¹⁸ *Ibid.* para 1(4)

¹¹⁹ *Ibid.* para 4(1)(2)

withhold and remit the tax to the Service in the currency of the transaction”, the Guideline provides for both self-charge and collection by NRS.¹²⁰ While the primary obligation to collect and remit VAT is on the NRS, where the NRS fails to do so, the person to whom the goods or service is supplied shall withhold or self-account for the tax in line with section 10(3) and section 14(4) of the Act.¹²¹ An NRS will be regarded as having failed to collect VAT on the supplies where (a) it does not include the transaction in its return; (b) from the facts of the transaction, it shows that the NRS has not charged VAT or collected the tax on the transaction. The Guidelines stipulate the consequences of the failure to account for or remit VAT or comply with the Guidelines. Where the NRS fails to account for or remit VAT or generally comply with these Guidelines, the Service may:

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

The Guidelines provide modalities for registration of NRS for VAT purposes. It restates the requirement that non-resident persons making taxable supplies of goods and services to Nigeria shall register for tax with the Service and obtain a Tax Identification Number (TIN). Having done that, all NRS are therefore required to register for tax via a dedicated link provided on FIRS website.¹²² The link enables NRS who have already registered for VAT in Nigeria to migrate to the Simplified Compliance Regime.¹²³ In order to qualify for registration, an NRS must have within 12 consecutive months immediately before the coming into effect of these guidelines or any 12 consecutive months thereafter, it has made or expects to make a single or series of supplies to Nigeria which (in aggregate value) amounts to \$25,000 (or its equivalent in other currencies) and meets any of the following conditions:

- a. The supplies are made by the NRS, through digital means, to a person in Nigeria from a location outside Nigeria,
- b. The supplies are delivered to, consumed or otherwise utilised in Nigeria,¹²⁴

Paragraph 9(2) provides the information required for registration. Once an NRS has registered, it is obliged to continue to fulfil the obligations stated in the Guidelines¹²⁵ unless it has been deregistered.¹²⁶ Deregistration can occur at the instance of an NRS, who has failed to meet the threshold of supplying digital goods in Nigeria worth \$25, 000 12 consecutive months immediately before the coming into effect of these guidelines or any 12 consecutive months thereafter for three consecutive years may communicate to the Service its intention to be deregistered from the regime.¹²⁷ Also, the Service may deregister such person after due verification that it no longer meets the pre-conditions for registration.¹²⁸ A deregistered NRS can apply to the Service for the reactivation of its registration.¹²⁹ In any case, registration relates to the collection and remitting of VAT and does not constitute taxable presence for income tax.¹³⁰ Also, the court noted that “there is nothing in the VAT Act that suggests that registration by a taxable person per se is a precondition for payment of VAT and or that the duty to pay VAT does not arise until a taxable person is registered”.¹³¹

¹²⁰ *Ibid*, para 6

¹²¹ *Ibid*, para. 6(4)

¹²² *Ibid*, para. 7(2)

¹²³ *Ibid*, para. 7(3)

¹²⁴ *Ibid*, para. 8(1)

¹²⁵ *Ibid*, para. 10

¹²⁶ *Ibid*, para. 8(2)

¹²⁷ *Ibid*, para. 11(1)

¹²⁸ *Ibid*, para. 11(1)

¹²⁹ *Ibid*, para. 11(3)

¹³⁰ *Ibid*, para. 12

¹³¹ *Al-Maseer Law Firm v. FIRS* (2019) LPELR-48628(CA)

The prevailing VAT rate, as may be varied by an Order from the Minister of Finance of an Act of the National Assembly, applies to NRS supplied goods and services.¹³² An electronic tax invoice shall be issued to a purchaser of the goods, services or intangible, in the format used in the NRS jurisdiction,¹³³ but must contain the following basic information: name and the TIN of the NRS; description, date and value of supply as well as the VAT charged. The Guidelines allows for a phased application of the requirement of issuance of tax invoice, upon application to the Service, provided that the NRS shall, from the effective date of these guidelines, file returns and pay the tax on all supplies made to persons in Nigeria.¹³⁴ An NRS registered for VAT purposes will be required to file monthly VAT returns remotely via a link provided by the Service; using a prescribed template issued by the Service, even for months where no taxable supply has been made to Nigeria.¹³⁵ The returns are to be rendered no later than 21 days after the end of the month in which the supplies were made.¹³⁶ Where an NRS is unable to file on time, it may obtain approval for extension of the due date of filing from FIRS, which shall not be more than one month and must be granted prior to the period specified in that Guideline.¹³⁷ A paying NRS is to note that all taxes payable in foreign currencies have three accounts each in the three major currencies in which taxes should be paid (i.e. US \$, GBP and Euro).¹³⁸ Where the transaction is in a currency other than Naira, US Dollars, Euro or British Pound, the currency may be converted to US Dollars, Euro or British Pound, for the purposes of remittance, using the Central Bank of Nigeria published Rate at Central Bank of Nigeria | Exchange Rate (cbn.gov.ng)¹³⁹

The Service will review these Guidelines on an ongoing basis and make changes that are considered desirable as appropriate in which case the NRS shall be notified as appropriate.¹⁴⁰

The Finance Act 2019 imposed VAT obligations on transactions conducted by non-resident digital companies.¹⁴¹ The 2019 Act increased the VAT rate in Nigeria from the 5% provided under the VAT Act to a new rate of 7.5%.¹⁴² also introduced a threshold for taxable persons, by exempting taxable persons with taxable supplies of less than Twenty-Five Million Naira (N25m) from accounting for VAT to the FIRS.¹⁴³

4. CONCLUSION

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

¹³² *Ibid*, para. 13

¹³³ *Ibid*, para. 17(1)

¹³⁴ *Ibid*, para. 17(2)

¹³⁵ *Ibid*, para. 18(1)(2)(3)

¹³⁶ *Ibid*, para. 18(5)

¹³⁷ *Ibid*, para. 18(6)

¹³⁸ *Ibid*, para. 19(1)

¹³⁹ *Ibid*, para. 19(7)

¹⁴⁰ *Ibid*, para. 27

¹⁴¹ s. 30

¹⁴² See s. 34, Finance Act, 2019.

¹⁴³ s. 38, Finance Act, 2019. Companies that do not meet the threshold are also exempted from penalties for non-registration for VAT purposes.

Whereas the new tax laws offer the prospect of generating income for the country, it is important to continuously review their overall impact on the economy and their reconcilability with the overall objective of the country to grow its digital economy. This will ensure that the taxes have minimal unintended outcomes like exacerbating the digital divide, and undermining the economic activities of young, underemployed youths who depend on the digital economy. Furthermore, there are no actual data, published by the government that outlines the potential revenue loss the nation would have incurred without the amendment. That is, it is essential to provide data on the wrong sought to be cured by the law and the revenue that has been realized by the country as a result of the unilateral steps taken. There is a need for a proper cost and benefit analysis in terms of the possible digital tax revenue mobilization and the likely creation of taxing distortions. This will ensure a qualitative assessment of the current approach and guidance for the future.