

CRITICAL ANALYSIS OF THE PETROLEUM INDUSTRY ACT, 2021 AND EMERGING ISSUES

by

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1.0 Introduction

- The fiscal provisions are contained in Chapter 4 and Schedules 5, 6 and 7 of the Petroleum Industry Act, 2021, (hereinafter referred to as "the PIA") and they are broad enough to include the objectives of the Chapter.
- As we already know, the PIA is divided into 5 chapters, 319 sections and 8 schedules. Chapter 4 consists of 49 sections of the main sections 258 to 306, distributed into Parts I-XI.
- Part I comprises of sections 258-260 provides for the objectives and administration of the fiscal provisions, and the introduction of Hydrocarbon Tax ("HT")
- Part II represented by sections 260 to 266 provides for the regime of Hydrocarbon Tax.
- Part III as represented in sections 267 and 268 deals with ASCERTAINMENT OF CHARGEABLE TAX.
- Part IV as represented in sections 269 to 272 provides for ASCERTAINMENT OF CHARGEABLE PROFITS AND CONSOLIDATION FOR TAX PURPOSES.

Introduction *contd.*

- Part V as represented in sections 273 to 276 provides for PERSONS CHARGEABLE to Hydrocarbon Tax.
- Part VI as represented in sections 277 to 287 provides for APPLICABILITY, ACCOUNTANTS AND PARTICULARS.
- Part VII as represented in sections 288 and 289 deals with APPEALS against assessments.
- Part VIII as represented in sections 290 to 296 provides for COLLECTION, RECOVERY AND REPAYMENT OF TAX.
- Part IX as represented in sections 297 to 301 provides for OFFENCES AND PENALTIES arising from making incorrect accounts, making false statements and returns.
- Part X as represented in section 302 deals with APPLICATION OF COMPANIES INCOME TAX TO PETROLEUM OPERATIONS.

Introduction *contd.*

- Part XI as represented in sections 303 to 306 provides for GENERAL PROVISIONS including payment of royalty, details of which provisions continues in the Seventh Schedule to the Act.
- THE RELEVANT SCHEDULES
 - i. Fifth Schedule: Capital Allowances (Interpretation)
 - ii. Sixth Schedule: Production Allowances and Cost Price Ratio Limit
 - iii. Seventh Schedule: Petroleum Fees, Rents and Royalty

2.0 Critical Analysis of the Fiscal Provisions

PART I - provides for the objectives and administration of the fiscal provisions, and the introduction of Hydrocarbon Tax ("HT")

SECTION 258 (Objectives)

This section deals with the objectives of the fiscal regime of the Act. It broadly takes two dimensions into consideration, to wit: it balances the government quest for revenue generation, on one hand, and promotion of investment incentives for investors, on the other hand.

SECTION 259 (Administration)

This section makes provision for the administration and collection of government revenues associated with the petroleum industry which shall be function of the Federal Inland Revenue Service (FIRS) and the Commission.

SECTION 260 [Application of this Part (Hydrocarbon Tax)]

Hydrocarbon tax is new tax introduced under the Act. This provision delimits the application of the fiscal regime of Hydrocarbon Tax. The tax is applicable to upstream petroleum operations in the onshore, shallow water and deep offshore, and condensates and natural gas liquids produced from associated gas.

Critical Analysis of the Fiscal Provisions (*contd.*)

PART II - provides for the regime of Hydrocarbon Tax

SECTION 261 (Charge of Hydrocarbon)

This section makes provision for the charge on hydrocarbon tax. The tax is charged upon the profits of any company engaged in upstream petroleum operations in relation to crude oil. The related profits to such operations of the affected companies or entities are charged, assessed and the tax shall be paid during each accounting period in accordance with the provisions of this Act. There is a proviso created in the same Act with respect to production sharing contract (PSC) executed prior to the commencement of the Act. Thus, hydrocarbon tax with respect to production sharing contract executed prior to the commencement of the Act will, pursuant to section 92 of the Act, be charged and assessed separately on the profits from each and every petroleum mining lease and payable during each accounting period in accordance with the provisions of this Act.

SECTION 263 (Assessable profits and losses)

Assessable profits are the profits from all sources in the year immediately before the year of assessment except in abnormal cases. Peculiar cases are when the basis period is more than or less than 12 months. A typical example is that a different basis period will apply when a business begins operations, changes accounting date or ceases trade. However, the Finance Act 2019 removed the cessation and commencement rules in corporate tax effective 13th January, 2020.

Critical Analysis of the Fiscal Provisions (*contd.*)

PART III - deals with ascertainment of Chargeable Tax

SECTION 267 (*Chargeable Tax*)

According to the section, chargeable tax is a percentage on chargeable profit for the aggregated period. However, location and types of upstream operations determine applicable percentages. Thus, 42.5% goes for profit from crude oil for onshore areas for petroleum mining Leases ; 37.5% is the percentage with respect to the profit from crude oil for shallow water areas for petroleum mining. This however affects petroleum mining Leases selected pursuant to sections 93(6)(b) and 93(7)(b) of the PIA

SECTION 268 (*Additional chargeable tax payable in certain circumstances*)

This section provides for additional chargeable tax payable in certain circumstances. The circumstances are where the amount of the chargeable tax for an accounting period is less than the amount of the chargeable tax for crude oil for that period in the case of crude oil exported from Nigeria by the company.

Critical Analysis of the Fiscal Provisions (*contd.*)

PART IV - provides for ascertainment of chargeable profits and consolidation for tax purposes

SECTION 269 (Artificial Transactions)

This provision makes against artificial transactions. It is a replication of section 15 of the PPTA. The provision seeks to curb any transaction which reduces or would reduce the amount of any tax payable.

SECTION 272 (Consolidation of costs and taxes)

This provision borders on consolidation of costs and taxes. It appears to be new. Companies in upstream petroleum operations in all terrains are allowed to consolidate costs for the purpose of Companies Income Tax. Also, companies engaged in upstream petroleum operations related crude oil are allowed to consolidate costs and taxes for the purposes of Hydrocarbon Tax only across assets in which it holds Licences and leases.

Critical Analysis of the Fiscal Provisions (*contd.*)

PART V - provides for persons chargeable to Hydrocarbon Tax

SECTION 273 (Partnership)

This provision relates to tax liabilities of partners engaged in upstream operations, and criminalizes operations in the sector for profits by any person other than a company. Where a person has benefited from engaging in upstream operations without being a company, he will be subject to Hydrocarbon Tax and Companies Income Tax. It stipulates procedures for assessing tax liabilities of entities in partnerships or joint ventures with regard to upstream operations.

SECTION 276 (Indemnification of representative)

It makes provision for indemnification of any person engaged by a company for the purpose of payment of companies' income tax or Hydrocarbon Tax. The person is mandated to retain out of any money in or coming to his hands or within his control on behalf of such company so much as shall be sufficient to pay the tax and shall be indemnified against any person for payments made by him in accordance with the provisions of the Act. This provision protects tax practitioner in line of representation.

Critical Analysis of the Fiscal Provisions (*contd.*)

PART VI - provides for applicability, accountants and particulars

SECTION 277 (preparation and delivery of accounts and particulars)

This provision relates to information or particulars and accounts by required by companies engaged in upstream operations for submission for assessment of hydrocarbon tax. The provision equally makes it an offence for a company to fail to submit its accounts and particulars as at when expected. The provision is substantially new because of Hydrocarbon Tax introduced. Section 30 of PPTA ought to be the corresponding section but it differs. The penalty is huge but it has effect of making commitment of the affected companies. Information about particulars and account information to supply with respect to companies income tax which the Act further subjects upstream operations companies are contained in Subsection (1) (a-i) of this Section.

SECTION 283 (Additional Assessment)

This section provides for additional assessment of a company's Hydrocarbon Tax liability where the Service discovers or is of the opinion at any time that, with respect to any company liable to Hydrocarbon Tax, tax has not been charged and assessed upon the company or has been charged and assessed upon the company at an amount less than that which ought to have been assessed and charged for any accounting period of the company.

Critical Analysis of the Fiscal Provisions (*contd.*)

PART VII - provides for appeals against assessments

SECTION 288 (Appeals to Tax Appeal Tribunal)

This provision allows an aggrieved company to tax assessment to approach Tax Appeal Tribunal established pursuant to the Federal Inland Revenue Act 2007. See section 59 of the Act.

SECTION 289 (Assessment to be final and conclusive)

This section deals with the consequence of failure to file a valid appeal or objection within the period preserved by the Act. Where no valid appeal objection or appeal has been lodged within the time limited by section 285 of the Act or the rules of the relevant tribunal or court, as the case may be, against an assessment as regards the amount of the Hydrocarbon Tax assessed; the amount of the tax has been agreed to under section 285(5) of this Act; or the amount of the tax has been determined on objection or revision under section 285(6) of this Act or on appeal, the assessment as made, agreed to, revised or determined on appeal, as the case may be, shall be final and conclusive for all purposes of this Act as regards the amount of such tax.

Critical Analysis of the Fiscal Provisions (*contd.*)

PART VIII - provides for collection, recovery and repayment of tax

SECTION 291 (Time within which payment is to be made)

This section provides for timeframe when Hydrocarbon Tax becomes due under the new Act. By the provision of the Act, the Hydrocarbon Tax shall become payable on monthly basis and the first payment is expected to be offset by the “third month of the accounting period and shall be in an amount equal to one-twelfth or where the accounting period is less than a year, in an amount equal to equal monthly proportion, of the amount of tax estimated to be chargeable for such accounting period...”

SECTION 292 (Penalty for nonpayment of tax and enforcement of payment)

This is a punitive provision for failure to pay Hydrocarbon Tax within the time prescribed by the Act. For failure to pay the tax due, a sum equal to 10% of the amount due shall be added. Besides 10% of the amount due, interest rate based on prevailing LIBOR (the basic rate of interest used in lending between banks on the interbank market) or a successor to such rate shall be added. Recovery of the punitive cost is expected to be pursued by the FIRS as applicable to collecting and recovery of tax assessed. LIBOR means London Interbank Offered Rate.

Critical Analysis of the Fiscal Provisions (*contd.*)

PART IX - provides for offences and penalties arising from making incorrect accounts, making false statements and returns.

SECTION 297 (Penalty for defaults)

This section makes provision for penalties with respect to defaults under the Act of which there is no specific provision for penalties. It appears to provide two regimes for such circumstance. First, a person who fails to comply with the provisions of Chapter 4 (Petroleum fiscal regime framework) or any regulation made under this Act of which there is no specific penalty provided is liable to pay administrative penalty of N10, 000, 000 and where default continues beyond the timeframe to comply with any provision under the chapter or regulation made pursuant to the Act, a payment of sum of N2, 000, 000 per day. The second regime of penalty relates to conviction where a person is found guilty of an offence under this same Chapter 4 (Petroleum fiscal regime framework) or in a regulation made under this Act of which no other penalty is specifically provided. The fine upon conviction is N20, 000, 000 or other sum as may be prescribed by the Minister of Finance and where default continues, the convict will pay N2, 000, 000 per day of defaults or imprisonment for 6 months.

SECTION 298 (Penalty for making incorrect accounts)

This section provides penalty against making incorrect accounts, incorrect schedule or statement required to be prepared under section 277 of the Act, false or misleading information in relation to any matter or thing affecting his liability to hydrocarbon tax and other misrepresentation in order to evade tax liability.

Critical Analysis of the Fiscal Provisions (*contd.*)

PART X - provides for application of Companies Income Tax to Petroleum Operations.

SECTION 302 (General requirements of companies in petroleum operations to pay companies income tax Cap. C 21.,LFN 2004

This provision is about Companies Income Tax (CIT) operations (concessionaire, licensee, lessee, contractor or subcontractor) in upstream, midstream and downstream sectors.

The provision further states that income tax applicable to entities in upstream, midstream and downstream must be determined separately. This means a company operating in integrated sectors may need to form a completely new company, though an upstream company can be consolidate wholesale gas and wholesale petroleum liquids supply operations. See subsection (3) of the section expressing providing that a company that seeks to operate in more than a sector must register a different company.

When determining CIT, Hydrocarbon Tax will not be deductible. The implication of this is that a variety of items not subject to deduction under hydrocarbon tax assessment may not also be subjected for deduction under CIT. This therefore raises multiple taxation syndromes and it fosters a theoretical, other than real, approach to realizing revenues.

Critical Analysis of the Fiscal Provisions (*contd.*)

PART XI - provides for general provisions including payment of royalty, details of which provisions continues in the Seventh Schedule to the Act.

SECTION 304 (Regulations, Rules and Forms)

This section provides for two regimes of regulation under this Act. It provides for matters that the Minister of Finance could make regulation for and matters that the Commission established pursuant to enactment of this Act can make regulations for. The former makes regulation for hydrocarbon tax and companies income tax, while the Commission makes regulation on administration of the Act, fees, rents, royalties and payments to Government. Notwithstanding, the Act makes room for the FIRS as a strategic agency for the implementation of the fiscal regime. It allows FIRS to make rules and specify the form of returns, claims, statement and notices under the Act. From the wording of the subsection (1), it apparent that Rules the FIRS is provided to make must be done pursuant to the Regulation made by the Minister.

Critical Analysis of the Fiscal Provisions (*contd.*)

THE RELEVANT SCHEDULES

i. Fifth Schedule: Capital Allowances (Interpretation)

This Schedule provides relevant explanations to Sections 263(d), 266(1)(a), 270, 271(2)(b) and (c), 277(1)(c), 280 (1)(b) and 302(10)(a) of the PIA Act. The Schedule provides supplementary explanations on Capital Allowance which the preceding sections, 263(d), 266(1)(a), 270, 271(2)(b) and (c), 277(1)(c), 280 (1)(b) and 302(10)(a), are hinged on.

ii. Sixth Schedule: Production Allowances and Cost Price Ratio Limit

This Schedule supports Sections 264(q), 266(1)(b)n and(2), 277(1)(d) and 280(1)(c) of the Act. The subject matter addressed by the Schedule is “Production Allowance and Cost Price Ratio Limit”

iii. Seventh Schedule: Petroleum Fees, Rents and Royalty

This Schedule is made pursuant to Sections 268(3), 303(1), 306 and 318 of the Act. The Schedule addresses questions petroleum fees, rents and royal respectively.

3.0 Emerging Issues

SECTION 259 (Administration)

First, Section 259 restricts to and reserves administration and collection of the government revenues for Federal Inland Revenue Service and “Commission”. Commission has been interpreted in Section 318 to mean “Nigerian Upstream Petroleum Regulatory Commission established under this Act”. However Section 259 (c) equally references “Authority” as a body given function to determine and collect gas flare penalty arising from midstream operations and its enforcement under the Act. Section 318 defines “Authority” as Nigerian Midstream and Downstream Petroleum Regulatory Authority. A careful reading of Section 259 shows express mention of the Service (FIRS) and Commission as bodies saddled with responsibility to administer and collect government revenues under the Act. Having restricted and reserved the function of administration and collection of revenues for the Service and Commission, it appears untidy that Nigerian Midstream and Downstream Petroleum Regulatory Authority was introduced in 259(c) to determine and collect gas flare penalty arising from midstream operations and its enforcement under the Act. If the draftsman had desired three agencies to assess and collect revenues and penalty, that should have been mentioned in Section 259 other than inserting Nigerian Midstream and Downstream Petroleum Regulatory Authority in paragraph (c) of the Section.

Second, we do not see why Service alone is not allowed to at least be allowed to collect all revenues under the Act. Segmenting or limiting Service to only assess and collect Hydrocarbon Tax, companies income tax and tertiary education tax under the Act while allowing Commission to determine and collect royalties, signature bonus, and related payments means nothing other than promoting culture of bureaucratic bottlenecks. As matter of fact, the draftsman agrees that all these payments are revenues accruable to the government regard being to the wording of Section 259. We are so of the opinion that accrued penalty for gas flaring given to the Authority to determine and collect is also revenue.

3.0 Emerging Issues (*contd.*)

SECTION 261 (Charge of Hydrocarbon)

What is not clear about the PSC is that it is not mentioned in section 92 of the Act as one of contracts that may be converted. The contracts or agreements expressly mentioned under that provisions are oil prospecting licence and oil mining lease.

SECTION 268 (Additional chargeable tax payable in certain circumstances)

The departure from the extant provision on additional chargeable tax is that arriving at the additional chargeable tax is no longer based on posted price applicable to that crude oil reduced by such allowances (if any) as may from time to time be agreed in writing between the Government of Nigeria and the company but rather an exclusive determination by the Commission established pursuant to the Act.

SECTION 272 (Consolidation of costs and taxes)

It seems this section seeks to create a form of tax relief for the spectrum of transactions of entities covered by this section. It is another win for the investors.

SECTION 273 (Partnership)

What appears to be an ambiguity is that “profit” is the only qualifying factor for not engaging in upstream operations without being a company. This means an individual can engage in the sector in as much he can prove that it is not for profit.

3.0 Emerging Issues (*contd.*)

SECTION 283 (Additional Assessment)

The additional assessment must be done by the FIRS within 6 years after the expiration of that accounting period when discovery was made.

SECTION 289 (Assessment to be final and conclusive)

The legal effect of the above provision is applicable to amended or revised assessment. An overpaid tax assessment may either be repaid or treated as credit in favour of the assessed company. This section of the Act is a reenactment of section 44 of the PPTA.

SECTION 292 (Penalty for nonpayment of tax and enforcement of payment)

The discretion allowed by the provision for the FIRS to remitting all or part of 10% and interest incurred over unpaid tax will hardly be exercised. Sociological reality indicates that the discretion may be abused thereby turning “good reason” to “bad reason”. “Good reason” supplied by an affected company ought to be relatively measurable or testable by some objective indicia. A provision like subsection (3) seems not to reflect current social realities within the context of Nigeria.

SECTION 298 (Penalty for making incorrect accounts)

Unlike section 297, the provision allows compounding any offence under the Act by accepting a sum of money not exceeding the maximum fine specified for the offence and shall issue an official receipt for any money so received. The provisions of the two identical penalty regimes suffer the same pitfall already raised with respect to section 297 and as such recommendations made for section 297 should consequently apply.

3.0 Emerging Issues (*contd.*)

SECTION 302 (General requirements of companies in petroleum operations to pay companies income tax Cap. C 21.,LFN 2004

Considering the tenor of this provision, it appears upstream sector may find business environment hostile to certain extent. There is also a concern with respect to disjointed provisions of laws. This Act provides that section 24 and 27 of the CITA should be read in conjunction with sections 302 (10) and (11) respectively. It is therefore recommended that CITA should be amended to accommodate section 302 (10) and (11) of the Act other than leaving it in its current fragmented characters.

SECTION 304 (Regulations, Rules and Forms)

In law, both Regulation and Rules are derived from a principal Act. The Act empowers Minister to make Regulation while the FIRS should make Rules pursuant to such Regulation. By this provision, three tier of legal reference is created to wit: the PIA, Regulation and Rules. Considering the volume of the principal Act, provision for Regulation should be enough. By law, FIRS is under the auspices of the ministry of finance. A situation where minister of the ministry makes Regulations while FIRS waits to make Rules pursuant to the Regulation creates complexity, and undermines ease of access to positions of law as an ordinary businessperson cannot make a simple judgment of a provisions bordering on Hydrocarbon tax and companies income tax in the principal Act in isolation of the Regulation and Rules made pursuant to it.

4.0 Recommendations

SECTION 259 (Administration)

1. If it is the intention of the legislators that Service, Commission and Authority are to separately involved in administering, determining and collecting revenues due to the government under the Act, express mention of that is desirable in Section 259 other than mention of Service and Commission alone only to have Authority injected in paragraph (c) of the same section. This is inelegant.
2. Since the legislators regard all payments to the government under the Act are revenues, it efficiency and effective implementation of the Act is better promoted by having only the Service determining, assessing and collecting the revenues. Technical judgments of the Commission and Authority may be relevant in view of the revenues. They can render such technical expertise to the Service where desirable but we do not see basis for extending fiscal administration of the Act to them.

SECTION 261 (Charge of Hydrocarbon)

Production Sharing Contracts should be included, by way of amendment of section 92 of the Act, as one of the contracts that may be converted just like OPLs and OMLs.

4.0 Recommendations (*contd.*)

SECTION 273 (Partnership)

It is recommended that the Act should be absolute in its attempt to make upstream operations are sole preserve of registered companies.

Secondly, the Act should not be ambiguous apportionment of tax liabilities, profits, outgoings, expenses, liabilities, deductions, and qualifying expenditure of companies in partnerships, joint venture or concert under any scheme or arrangement in upstream operations by holding parties to equity interest on one hand and empowering FIRS to make Regulations on the same matter on another hand.

SECTION 283 (Additional Assessment)

It is recommended that recovery of concealed tax when connected with fraud and willful default should be provided as an economic crime reportable to anti-crime agencies.

4.0 Recommendations (*contd.*)

SECTION 292 (Penalty for nonpayment of tax and enforcement of payment)

It is recommended that since revenue law is always construed strictly, its provisions should be certain with defined parameters. Wide discretion to FIRS, or any other government agency for that matter, in determining when a good reason is made for defaulting to pay tax when due is an over-trust in a society where Government institutions, ministries, departments and agencies are battling with financial indiscipline, lack of transparency and accountability.

SECTION 304 (Regulations, Rules and Forms)

Regulations for the administration of matters bordering on Hydrocarbon tax and companies tax should be ordinarily made by FIRS subject to approval of the Minister. This will ordinarily prevent the conflicts of the regulations and rules to be made pursuant to thereof.