



FINANCE ACT, 2021: IMPLEMENTATION FOR LEGAL FRAMEWORK

PRESENTED BY

CHUKWUEMEKA EZE,

CHAIRMAN, TAX APPEAL TRIBUNAL, SOUTH EAST ZONE, AND LEAD LEGAL ADVISER,

CITN

OUTLINE

1. Structure of the Legal Framework;
2. Inelegant legal drafting;
3. Operationalisation of Action Plans I and XV of BEPS through the introduction of Digital Services Tax through CITA and VATA, and the rejection of the Global Corporate Minimum Tax Agreement;
4. Constitutionality of section 27 of the Finance Act, 2021;
5. Reform Pillars of the Finance Act, 2021, and
6. Conclusion

1. Structure of the Legal Framework

Section I of the Finance Act, 2021 ("FA") listed the various statutes amended in their full citations. This is commendable.

Part I, s.2 Finance Act deals with CGT, which amended only one section (section 30).

Part II, sections 3-16 FA amended 14 sections of CITA, namely sections 9, 13, 16, 18(b)(iii), 23, 30, 31, 33, 39, 55, 77, 78, 81, and 105. The new subsection (2) of section 13 CITA (see section 4 FA) when read in combination with the new section 30(ii)(a) CITA (see section 8 FA) has effectively brought digital services into the tax loop.

The new section 16 CITA (see section 5 FA) has tightened the tax noose on the insurance sector, whether it is general insurance, life insurance or re-insurance. More revenue will be generated from the taxation of the insurance sector as the areas of tax avoidance have been blocked in the 15 subsections. Ambiguities have been drastically reduced and the provisions are more specific.

Section 7 FA has amended section 23 CITA introducing a new section. Henceforth, profits of companies operating as educational institutions, cooperatives, religious bodies, trade unions are liable to CIT unless the profit is derived solely from the purpose of establishing the body.

Section 77 CITA, amended by section 13 FA provides:

"(1) Tax charged by any assessment which is not or has not been the subject of objection or appeal by the company shall be payable (after the deduction of any amount to be set-off for the purposes of collection under any provision of this Act) at the place stated in the notice of assessment within 30 days after service of such notice upon the company: p

Provided that the Service, in its discretion, may extend the time within which payment is to be made.

(2) Subject to the provisions of section 69(3) of this Act, collection of tax in any case where notice of objection or appeal has been given by the company shall remain in abeyance until such objection or appeal is determined, save that the company shall have paid the tax which is not or has not been the subject of an objection or appeal as provided in subsection (1)."

The quoted provisions have effectively settled the controversy in the interpretation of Order III rule 6 of the Tax Appeal Tribunal (Procedure) Rules, 2021, which provides:

"For an appeal against the Service or relevant tax authority under rules 1 and 2 of this Order, the aggrieved person shall -

(a) pay 50% of disputed amount into designated account of the Tribunal before hearing as security for prosecuting the appeal;

(b) file the Notice of Appeal as in Form TAT 1 (A), along with a deposition as in Form TAT 1 B."

I am strengthened in my position by virtue of section 22 FA, which has introduced a new section 68 of the FRS Act. Subsection (1) of the said section 68 provides

that where there is inconsistency between the provision of any other enactment and that of the FIRS Act relating to the administration, assessment, collection, accounting and enforcement of taxes and levies due to the Federal Government or Federation in Nigeria, the provisions of the FIRS Act shall prevail and the provisions of that other law shall, to the extent of inconsistency, be void.

Part III: section 17 FA amended one section 21 of the Customs, Excise Tariffs, Etc. (Consolidation) Act by charging N10 excise duty per litre on non-alcoholic, carbonated and sweetened beverages.

Part IV: sections 18-22 FA amended 5 sections of the FIRS (Establishment) Act, namely sections 25, 28, 35, 50, 68.

The amendment effected in section 68 of the Act has transformed the FIRS Act to a super legislation. In categorisation of tax statutes in Nigeria, it will be wise to follow this pattern:

- i. The Constitution,
- ii. The FIRS Act including FIRS subsidiary legislations and Regulations of the Minister of Finance,
- iii. Acts listed in the First Schedule to the FIRS Act,
- iv. Any other tax law.

Part V: section 23-26 FA amended 4 sections of PITA, viz.: sections 33, 47, 49, 94.

Part VI, section 27 FA expanded the power of the Minister and FIRS with regards to the operation of the STAMP DUTIES ACT, including Stamp Duties collectible by States under section 4(2) SDA as amended by section 53(b) of the Finance Act, 2019. Section 27 FA has substituted the former subsection (3) and introduced a

new subsection (3) of section 89A. The constitutionality of this provision will be analyzed later in this piece.

Part VII, sections 28, 29 FA amended sections 1 and 2 of the TERTFUND (ESTABLISHMENT, ETC.) ACT. By this amendment, the tax chargeable is 2.5% of assessable profit of a company registered in Nigeria, excluding a small company. Certainly, companies registered outside Nigeria are excluded from this charge.

Part VIII, sections 30-32 FA amended the VAT Act in sections 10, 14 and 15. By the new section 10 VATA, non-resident persons, whether they are companies or not, are obligated to collect VAT and remit the same to FIRS. The new section 14 VATA empowers FIRS to appoint "any person" to withhold or collect the tax, and the person so appointed shall, on or before the 21st day of the following month, remit the tax so withheld or collected to the Service in the currency of the transaction.

While section 30 FA amended section 10 VATA, section 31 FA has amended section 14 VATA. By virtue of the new section 10 VATA, digital services companies such as Meta (a.k.a. Facebook), Netflix, Amazon, Twitter, are all liable to collect and remit VAT to FIRS.

Part IX: sections 33-35 FA amended sections 9, 10(3), and 102 of the INSURANCE ACT.

Part X: section 36 FA amended section 4 of the

NIGERIA POLICE TRUST FUND (ESTABLISHMENT) ACT by inserting a new subsection (3) empowering the FIRS to assess, collect, account and enforce the payment of the levy imposed by section 4(1)(b) of the NPTF Act.

It should be recalled that since the enactment of the NPTF Act in 2019, this provision has been lying prostrate as no collection could be done without statutory authority to that effect. The lacuna has been filled now and we hope that with the collection, the Nigerian Police will have sufficient funds to secure Nigerians.

Part XI: section 37 FA amended section 20 of the NATIONAL AGENCY FOR SCIENCE AND ENGINEERING INFRASTRUCTURE ACT. With this amendment, NASENI Tax will henceforth become payable, at the rate of 0.25% of profit by companies with turnover of N100,000,000 and above covering the banking, telecommunication, ICT, aviation, maritime, oil and gas sectors.

Part XII: sections 38, 39 FA amended sections 3 and 4 of the FINANCE (CONTROL AND MANAGEMENT) ACT.

Part XIII: section 40 FA amended section 41 of the FISCAL RESPONSIBILITY ACT.

Commentary

Sections 41 and 42 of the Finance Act, 2021, although under the title of FISCAL RESPONSIBILITY ACT (FRA), are not part of the FRA but independent of it. In this regard, the Finance Act, 2021 has followed the pattern of the Finance Act, 2020, where sections 80 and 81, dealing with commencement date and citation, which ought to have stood alone under a Miscellaneous title, were lumped together with other unrelated provisions under Part XV, titled: Establishment or Crisis Intervention Fund and Unclaimed Funds Trust Fund. This ought not to be so.

In all, 39 sections of various laws were amended:

31 sections, covering 7 parts (Parts II-VIII) are tax or tax-related legislations, while 8 sections, covering 5 legislations in Parts IX-XIII, are not tax legislations.

Part I, which contains only one section, merely listed the 13 statutes amended in the Finance Act, 2021. Three sections (section 1 forming Part I, and sections 41 and 42 being part of Part XIII) are miscellaneous provisions that did not actually amend any legislation.

Out of the 39 sections bearing the amendments, the following statutes have the corresponding number of amended sections:

CITA: 14 ; FIRSEA : 5;

PITA : 4 ;

VATA : 3; Insurance Act: 3; TERTFUND Act: 2; Finance (Control and Management) Act : 2;

CGT :1;

Customs, Excise Tariffs, Etc. (Consolidation) Act: 1;

Stamp Duties Act: 1;

Nigeria Police Trust Fund (Establishment) Act : 1;

NASENI Act : 1; and Fiscal Responsibility Act: 1.

2. INELEGANT LEGAL DRAFTING

Part XIII of the Finance Act, 2021

1. Section 40 FA:

The new subsection (1) of Section 41 of the Fiscal Responsibility Act violates the RULE AGAINST AMBIGUITY by its use of the following:

(a)

- (i) "critical reforms of significant national impact";
 - (ii) "relatively low interest rates";
 - (iii) reasonably long amortisation period";
- (b) "sustainable level".

These phrases, in real terms, are measurable and could have been quantitatively addressed instead of leaving them at large, and ambiguous. It is highly arguable whether these interest rates of 4%, 7%, 10% or 14% should be regarded as relatively low. This is a situation where all the answers may be correct.

Similarly, what level of reforms can be regarded as critical reforms of significant national impact? What amounts to national impact? Is it when the reforms are felt in 4 or 6 geo-political zones of the country, or in 19, 22 or 30 States in the country?

On the other hand, when will amortisation be said to be reasonably short or long?

Finally, what level of public debt as a proportion of national income will be sustainable, and which level will be unsustainable?

The above ambiguities make the current provision of Section 41(1) of the Fiscal Responsibility Act susceptible to abuse leading to what Nigerians say in distorted English, "all correct sir".

2.

Section 41 of the Finance Act, 2021:

"The provisions of this Act shall take effect from 1st January 2022 or such other date that shall be indicated by the National Assembly by law (or by the President of the Federal Republic of Nigeria by assent or order)."

From the draft, the effective date has been provided for disjunctively, that is without certainty, namely:

- i. 1st January, 2022, or
- ii. such other date that shall be indicated by the NA by law, or
- iii. by the President by:
 - assent or
 - order.

This means that the effective date is either the date stated by the National Assembly, which is 1st January 2022 or the date the President signed the Bill, which is 31st December, 2021.

In my view, the NA ought to have added the phrase, "whichever date is later" to end the sentence, so as to limit the effective date to only one date of 1st January 2022.

In law, one day makes a lot of difference. Thus, the EFFECTIVE DATE ought to have been certain rather than swing it between two dates.

3. Sections 41 and 42 of the Finance Act

Lumping section 41, dealing with the effective date, and section 42, which provides for the citation of the Act, with section 40 that amended the Fiscal Responsibility Act, under Part XIII of the Finance Act, 2021, is obfuscating. It is a rule of legislative drafting that provisions forming part of an Act should be interrelated. The arrangement may mean that the effective date and the citation are applicable only to the Fiscal Responsibility Act, which is not the case.

In my view, Part XIV ought to have been created with the title of "MISCELLANEOUS" to accommodate sections 41 and 42 of the Act instead of the current arrangement where non-related items or provisions have been lumped together.

3. OPERATIONALISATION OF BEPS ACTION PLAN 1 AND REJECTION OF ACTION PLAN 15

Base Erosion and Profit Shifting ("BEPS") relates chiefly to instances where the interaction of different tax rules leads to double non-taxation or less than single taxation. It also relates to arrangements that achieve no or low taxation by shifting profits away from the jurisdictions where the activities creating those profits take place. In order to solve this problem, the G20 called on the Organisation of Economic Cooperation and Development (OECD) to develop an action plan to address BEPS issues in a coordinated and comprehensive manner. OECD eventually developed 15 Action Plans, two of which I will consider briefly.

ACTION PLAN 1 sought to address the TAX CHALLENGES OF THE DIGITAL ECONOMY:

"Identify the main difficulties that the digital economy poses for the application of existing international tax rules and develop detailed options to address these difficulties, taking a holistic approach and considering both direct and indirect taxation. Issues to be determined include, but are not limited to, the ability of a company to have significant digital presence in the economy of another country without being liable to taxation due to the lack of nexus under the current international rules, the attribution of value created from the generation of marketable location-relevant data through the use of digital products and services, the characterisation of income derived from new business models, the application of related source rules, and how to show the effective collection of VAT/GST with respect to the cross-border supply of digital goods and services."

ACTION PLAN 15 was intended to develop a MULTILATERAL INSTRUMENT to address the problem of taxation of the digital economy, among other issues. This was what the Global Corporate Minimum Tax Agreement achieved in October 2021, where about 136 countries agreed to accept Pillars 1 and 2, which was negotiated by the OECD/G20 INCLUSIVE FRAMEWORK. It is no longer news that

out of 140 countries, Nigeria, Kenya, Pakistan and Sri Lanka rejected the Agreement. Nigeria has now gone solo to amend its tax laws to implement BEPS Action Plan 1. This can be seen in the various amendments to section 13 CITA as represented in section 4 of the Finance Act, 2019, Companies Income Tax (Significant Economic Presence Order), 2020, section 7 of the Finance Act, 2020, and sections 4 and 8 Finance Act, 2021. Sections 30 and 31 of the Finance Act, 2021, which amended sections 10 and 14 VATA are also intended to address BEPS Action Plan 1.

4. Constitutionality of section 27 of the Finance Act, 2021, which has amended section 89A of the Stamp Duties Act and conferred on the Minister of Finance enlarged powers to regulate, subject to the approval of the National Assembly, the imposition, administration, auditing, accounting, collection and remittance of stamp duties on electronic receipts involving individuals, and accruable to the to the States, pursuant to section 4(2) of the Stamp Duties Act.

A recap of some relevant provisions of the Constitution and the Stamp Duties Act, as amended by the Finance Acts of 2020 and 2021 will be helpful.

Section 163 of the Constitution of the Federal Republic of Nigeria, 1999

Allocation of other revenues:

"Where under an Act of the National Assembly, tax or duty is imposed in respect of any of the matters specified

in item D of Part II of the Second Schedule to this Constitution, the net proceeds of such tax or duty shall be

distributed among the States on the basis of derivation and accordingly –

(a) where such tax or duty is collected by the Government of a State or other authority of the State, the net proceeds

shall be treated as part of the Consolidated Revenue Fund of that State;

(b) where such tax or duty is collected by the Government of the Federation or other authority of the Federation, there shall be paid to each State at such times as the National Assembly may prescribe a sum equal to the proportion of the net proceeds of such tax or duty that are derived from that State."

Section 48 of the Finance Act, 2020 inserted a new section 89A of the Stamp Duties Act, with a marginal note: Insertion of a new section 89A.

"48. Insert, after section 89 of the Act, a new section "89A":

89A. (1) There is imposed a levy, to be referred to as the Electronic Money Transfer Levy, on electronic receipts or electronic transfer for money deposited in any deposit money bank or financial institution, on any type of account, to be accounted for and expressed to be received by the person to whom the transfer or deposit is made.

(2) The levy shall be imposed as a singular or one-off charge of N50 on electronic receipts or electronic transfer of money in the sum of N10, 000 or more.

(3) The Minister of Finance shall, subject to the approval of the National Assembly, make regulations for the imposition, administration, collection and remittance of the Levy.

(4) Notwithstanding any formula that may be prescribed by any other law, the revenue accruing by virtue of the operation of this section, shall, on the basis of the derivation, be distributed as follows:

(a) 15% to the Federal Government and the Federal Capital Territory, Abuja ; and

(b) 85% to the State Governments."

From the above

section 89A of the Stamp Duties Act as contained in section 48 of the Finance Act, 2020, section 27 of the Finance Act, 2021 has amended and introduced a new subsection (3) thus:

'Section 89A of the Stamp Duties Act is amended by substituting for subsection (3), a new subsection "(3)" -

"(3) The Minister of Finance shall, subject to the approval of the National Assembly, make regulations for the imposition, administration, collection and remittance of the Levy, including regulations relating to the auditing, accounting, allocation and distribution of arrears of the relevant stamp duties and Electronic Money Transfer Levies collected 2015 and 2019 fiscal years within 30 days of the date when this Act became effective:

Provided that Electronic Money Transfer Levies subsequently collected shall be distributed within 30 days following the month of collection.'

Commentary:

The Constitution contemplates a situation where the Federal Government may collect stamp duties on behalf of States and share the net proceeds based on derivation formula. The Constitution used the word, "collected" but section 27 of the Finance Act, 2021 has given the Minister not only the power to make regulations with respect to collection but also to make regulations for the imposition, administration and remittance of the Levy including auditing, accounting, allocation and distribution of arrears.

One wonders what the Minister will be imposing on the amount already in arrears between 2015 and 2019. My understanding is that the powers conferred on the Minister in this regard is wider than the one contemplated by the Constitution.

One gets the impression that section 27 of the Finance Act, 2021 is intended to emasculate and render inoperative the provision of section 4(2) of the Stamp Duties Act, and also to pre-empt the outcome of the suit on this subject-matter filed by the 36 States against the Federal Government at the Supreme Court in 2021.

Pending Supreme Court case between the 36 States and the Federal Government

In Suit No. SC/CV/690/2021 between A.G. ABIA & 35 ORS. V. A.G. FEDERATION dated 19th August but filed on 24th August, 2021, the States had sued the Federal Government demanding for about N176 billion as amount due to them from electronic receipts on instruments executed between individuals between 2015 and 2019. The suit is still pending at the Supreme Court.

The 36 States under the auspices of the Nigerian Governors Forum had earlier done a letter dated 16th September, 2020 to the Attorney-General of the Federation demanding that FIRS should stop collecting stamp duties due to the States under section 4(2) of the Stamp Duties Act. The A.G. Federation ignored the letter hence the States headed to the Supreme Court.

It is trite law that the express mention of one thing means the exclusion of another. This is represented in the Latin maxim of *expressio unius est exclusio alterius*.

In the meantime, the provisions of section 27 of the Finance Act, 2021 is very wide. If the National Assembly proceeds in due course to approve the Regulations to be made by the Minister, the extrapolation of the powers of the Minister beyond the power of the Federal Government may get the judicial hammer as section 1(3) of the Constitution is clear that any law inconsistent with the provisions of the Constitution will be null and void to the extent of the inconsistency.

5. REFORM PILLARS OF THE FINANCE ACT, 2021

"We prepared this draft bill (2021 Finance Act Bill) along five reform areas:

the first is domestic revenue mobilisation;

the second is tax administration and legislative drafting;

the third is international taxation;

the fourth is financial sector reforms and tax equity and

the fifth is improving public financial management reform."

- Source: Hajia Zainab S. Ahmed,

Hon. Minister of Finance, Budget and National Planning, on 13th December, 2021, during the Public Hearing organised by the House of Representatives Committee on Finance.

The vital question is whether the legal framework of this Act, when implemented will achieve the various reforms highlighted above by the Minister of Finance.

6. CONCLUSION

I am of the view that from the analysis so far made, the reforms will substantially achieve the purpose under the legal framework, notwithstanding the minuses identified herein. The third reform on international taxation is a novel one. From the Finance Act, 2019, we have been trying to key into BEPS 1. We seem to have finally reached the Promised Land considering the comprehensive nature of the provisions in the Finance Act, 2021. Other factors that will impact negatively on the realisation of the reforms will actually be outside the legal framework.

I look forward to the "Finance Act, 2022" having a better legal framework than that of 2021.

PREPARED for CITN SEMINAR holding virtually on 17th January, 2022.

CHUKWUEMEKA EZE,

CHAIRMAN, TAX APPEAL TRIBUNAL, SOUTH EAST ZONE, AND LEAD LEGAL ADVISER,

CITN