



Finance Act, 2021

Impact Analysis

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Glossary

AE – Approved Enterprise

CAMA – Companies and Allied Matters Act

CETA – Customs, Excise Tariff, etc. (Consolidation) Act

CGT – Capital Gains Tax

CIF – Crisis Intervention Fund

CIT – Companies Income Tax

ED – Excise Duty

EMT – Electronic Money Transfer

EODB – Ease of Doing Business

FA – Finance Act

FG – Federal Government

FIRS – Federal Inland Revenue Service

FRA – Fiscal Responsibility Act

FY – Financial Year

GDP – Gross Domestic Product

HMoFBNP - Honorable Minister of Finance, Budget and National Planning

LFN – Laws of the Federation of Nigeria

NBS – National Bureau of Statistics

NRC – Non-Resident Company

OECD – Organization for Economic Cooperation and Development

PIT – Personal Income Tax

QCE – Qualifying Capital Expenditure

RTA – Relevant Tax Authority

SDA – Stamp Duties Act

SEP – Significant Economic Presence

TAT – Tax Appeal Tribunal

VAT – Value Added Tax

WHT – Withholding Tax



Preface

On 31 December 2021, His Excellency, President Muhammadu Buhari, GCFR, signed the Finance Bill, 2021 into law as Finance Act, 2021.

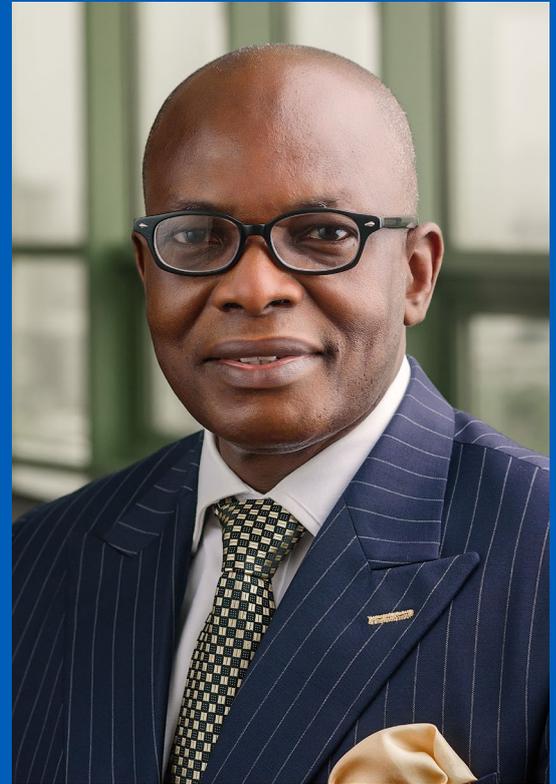
The Finance Bill, 2021 was an Executive Bill prepared by the Honourable Minister for Finance, Budget and National Planning, and presented by His Excellency, President Muhammadu Buhari, together with the 2022 Budget proposals, to the National Assembly of Nigeria. The Bill was subsequently reviewed and passed by the National Assembly on Tuesday, 21 December 2021 prior to assent by the President to culminate into Finance Act, 2021 (hereinafter referred to as “Finance Act”, “FA 2021” or “the Act”).

Finance Act, 2021 introduces changes to the Capital Gains Tax Act (CGTA), Companies Income Tax Act (CITA), Personal Income Tax Act (PITA), Tertiary Education Trust Fund (Establishment, etc.) Act (TETA), Customs and Excise Tariff Etc. (Consolidation) Act (CETA), Value Added Tax Act (VATA), Stamp Duties Act (SDA), Federal Inland Revenue Service (Establishment) Act (FIRSEA), The Insurance Act (IA), Nigeria Police Trust Fund (Establishment) Act (NPTFA), National Agency for Science and Engineering Infrastructure Act (NASENIA), Finance (Control and Management) Act (FCMA) and the Fiscal Responsibility Act (FRA). The changes to these laws became effective on 1 January 2021. Further, the Act amends its predecessors, Finance Acts 2019 and 2020, to modify some of the amendments introduced by these Acts to provide clarity and make them more consistent with the government’s fiscal plans and current economic realities.

The passage of the Act reinforces the Federal Government (FG)’s commitment to making incremental changes to Nigeria’s fiscal framework, and these changes continue to be pivotal to achieving Nigeria’s economic growth and development imperatives.

The amendments made by the Act are intended to signal continuing expansion of the fiscal net and harmonisation with international best practice for the taxation of new areas of the modern global economy, particularly global digital trade, improve administration and mobilise revenue for the government.

This publication contains the analysis of the amendments introduced by the Act and the expected impact of these changes on tax administration, government bodies and taxpayers operating in various sectors of the economy.



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General Implications of Finance Act, 2021 on the Nigerian Economy

2021 Economic Performance

Nigeria's economy witnessed a modest growth in 2021 following the negative effects of the COVID-19 pandemic on the country in 2020. According to reports published by the National Bureau of Statistics (NBS), Nigeria's Gross Domestic Product (GDP) grew by 5.01% and 4.03% (year-on-year) in real terms in Q2 and Q3 2021, respectively, showing a sustained growth since the recession witnessed in 2020. The oil sector contributed 7.49% to the country's GDP as at Q3 2021, which represents a slight decrease from the corresponding period in 2020. However, the contribution from the non-oil sector increased to 92.51% from 91.27% recorded in 2020. This increase was largely driven by trade, information and communication following widespread vaccination against the COVID-19 virus.

Unfortunately, the effects of the pandemic intensified in 2021, as the Delta and Omicron variants of COVID-19 negatively affected oil demand and prices and triggered new restrictions and lockdowns imposed by various countries. Nigeria was unable to meet its Organisation of Petroleum Exporting Countries (OPEC) production quota in the first three quarters of 2021, with daily production in the first 9 months averaging 1.3 million barrels per day (bpd) (excluding daily condensate production of 300,000bpd which does not form part of OPEC quota) compared to average OPEC production quota of 1.5 million bpd.

The purchasing power of Nigerians further deteriorated in 2021 as inflation reached a record high of 18.17% in March 2021, while food inflation hit 22.95% in the same month. Further, the Naira depreciated against the US dollar from ₦379 to \$1 in January 2021 to ₦412 in December 2021.

How Finance Act, 2021 seeks to impact economic recovery and growth

Despite the many challenges faced in 2021, the country has continued on a positive recovery path in the aftermath of the COVID-19 pandemic. Some pieces of legislation, such as the Petroleum Industry Act, were passed by the National Assembly and assented to by the President with the aim of maintaining sustainable growth while attracting relevant investments needed to reposition the oil and gas industry.

Relatedly, Finance Act, 2021 was enacted to stimulate inclusive, diversified and sustained economic growth while ensuring macroeconomic stability. The Act introduces amendments to thirteen laws in Nigeria. These amendments are pivoted on revenue generation, promotion of tax equity and ensuring clarity in the tax laws.

Revenue generation is critical for Nigeria's growth as the country struggles to finance its capital and recurrent expenditure. The Appropriation Act, 2022 budgets expenditure of ₦17.126 trillion against an expected revenue of ₦10.74 trillion, resulting in a budgeted fiscal deficit of ₦6.386 trillion. It is, therefore, imperative that the FG diversifies and increases its revenue to fund critical development expenditure.

Based on the foregoing, the Act amended and introduced provisions in the CGTA, TETA, NASENIA and other relevant pieces of legislation to increase tax revenue. The Act also contains provisions which aid tax equity and promote clarity in the tax laws. This is a welcome development considering that clarity is a fundamental tenet of taxation and is critical to ensuring that investors are confident in our tax system and the economy.

In general, it is expected that the changes introduced by Finance Act, 2021 will improve the country's fortunes, boost investor confidence and continue to lead the country on a path of sustainable growth.



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Direct Taxes

Finance Act, 2021 amends various provisions of the Nigerian tax legislation relating to direct taxes. These changes are discussed under the relevant tax laws as follows:

Capital Gains Tax Act (CGTA), Cap C1, Laws of the Federation of Nigeria (LFN), 2004 (as amended)

Imposition of capital gains tax on share disposals:

Capital Gains Tax (CGT) was first introduced in Nigeria in 1967 and was applicable at 20%, but was subsequently reduced to 10%. Initially, the capital gains from the disposal of most chargeable assets, including shares, options, debts, land and buildings, foreign currencies, etc., were included in the scope of gains liable to CGT. However, in 1998, Nigeria re-characterised gains arising from disposal of Nigerian government securities, stock and shares as non-chargeable gains, effectively exempting such gains from the tax. A number of reasons were adduced for the exemption:

- Attraction of foreign direct investment to Nigeria.
- Development of the capital market to be able to mobilise capital as required for establishing mega industries.
- Very low yield of revenue from stock transactions.

At the time, market capitalisation at the Nigeria Stock Exchange (NSE) was at about ₦3trillion and the All-Share Index (ASI) in mid-1999 was at about 5,000

points. As of date, market capitalisation at the NSE is about ₦25 trillion and the ASI is trending towards 50,000 points. Summarily, the objectives of the Government in introducing the exemption have worked. Whilst we would have liked to see a retention of the policy for a while longer in order to ensure continuing growth and depth of the capital market, the success achieved by this policy must be highlighted as an example of a clear-headed policy that delivered the goods. Nigeria now stands to reap economic returns from activities in a maturing capital market.

Section 2 of the Finance Act, 2021 has now amended the CGTA to subject gains arising on share disposals to capital gains tax where the aggregate proceeds (gross amount received) from such disposal exceeds N100million in any 12 consecutive months. The CGTA, however, provides a proportionate waiver from CGT where the whole or part of the disposal proceeds are reinvested within the same year of assessment (YOA) in acquiring shares in the same or other Nigerian companies. An exception is also created for transfer of shares between



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an approved Borrower and Lender in a regulated securities lending transaction as defined in the CITA. There are two points to note in this regard:

- The reference to any 12 consecutive months is not limited to an accounting period. It is any period of 12 months during any reporting period.
- The reinvestment period for qualification for Share Disposal Relief is the YOA in which the disposal occurred. Thus, both previous and subsequent investments in the same or similar shares would qualify so long as they occur within the same YOA.



Clarification of the taxation of export proceeds of companies engaged in Upstream, Midstream or Downstream petroleum operations

The Petroleum Industry Act (PIA), which was enacted in August 2021, subjects the profits (including the export profits) of companies engaged in Upstream, Midstream and Downstream petroleum operations to CIT and/or Hydrocarbon Tax (HT).

Section 23 of the CITA was designed to encourage export-oriented local trade. Therefore, to align the CITA with the provisions of the PIA and avoid controversy in application of the tax laws, the Finance Act, 2021 seeks to avoid a situation where such companies are inadvertently exempted from CIT on the basis of their products being primarily targeted at the export markets.

Section 7(a) of the Finance Act, 2021 has now amended Section 23 of CITA to exclude companies engaged in Upstream, Midstream, or Downstream petroleum operations from the scope of the CIT-exemption conferred by the Section.

We have discussed the oil and gas specific changes made by the Finance Act, 2021 in the Oil and Gas sectoral analysis Section of this e-book.

Exclusion of educational institutions from income tax exemption

Section 23(1)(c) of CITA previously exempted from income tax, the profits of *“any company engaged in ecclesiastical, charitable or educational activities of a public character in so far as such profits are not derived from a trade or business carried on by such company”*.

In so far as educational institutions are concerned, this had been a difficult provision to interpret as both private and charitable educational institutions could potentially benefit. There have been a number of court cases where the scope, interpretation and application of this section to educational institutions had been in issue. It is important to note that the amendment in Section 7 of the Finance Act, 2021 came on the backdrop of the Court of Appeal judgment in December 2018, in the case between *Best Children International Schools Limited (“BCIS Limited” or “the Company”) and Federal Inland Revenue Service (FIRS)* that an educational institution set up as a “company limited by shares” is a profit-making company and, therefore, liable to CIT. Educational institutions set up as companies limited by guarantee, however, enjoyed the CIT exemption in Section 23 of the CITA. This is because a company limited by guarantee is not expected to distribute its profits to its shareholders in line with Section 26 of the Companies and Allied Matters Act (CAMA), 2020.

It is hoped that the Government will consider extending some comfort to foreign investors who may have to pay CGT despite suffering foreign exchange losses on exit, relative to their initial foreign capital importation into Nigeria. Perhaps some form of indexation can be permitted to alleviate this concern. Permitting Nigerian companies to issue all or some of their share capital in foreign currency and issuance of CCI in foreign exchange without requiring conversion of the imported amount into Naira may also help to mitigate this concern since the CGT would in those circumstances be measured in foreign currency.

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

Clarification of taxation of dividends earned from petroleum profits

Prior to the passage of Finance Act, 2019, dividends distributed by companies which were subject to Petroleum Profits Tax (PPT), were not further subjected to Companies Income Tax (CIT) in the hands of the recipient company. This exemption was provided for in Section 60 of the PPT Act and Section 18(b)(iii) of the CITA.

Section 24 of Finance Act, 2019 deleted Section 60 of the PPTA. However corresponding changes were not made to the CITA. This created some ambiguity in the tax law. Section 6 of Finance Act, 2021 in a bid to correct this ambiguity has now deleted Section 18(b)(iii) of the CITA to clarify that dividend received from a company that is subject to PPTA, will still be liable to tax under the CITA.

In practical terms, what this means is that the company paying the dividend would now be required to deduct withholding tax as prescribed in Section 80 of CITA. Such WHT, when deducted and remitted to the relevant tax authority, would be final tax in the hands of the recipients.



Section 7 of the Finance Act, 2021 has now amended Section 23(1)(c) of CITA to remove reference to educational institutions as a specific category. It is our view that such activities then fall into the general umbrella of “charitable” activities of a public character. As such, an educational institution that is set up as a not-for-profit organisation should benefit from the surviving provisions. Reference would have to be made to the charitable objects of the company in order to evaluate its eligibility for this benefit.

However, educational institutions that are profit-oriented (i.e., that are capable of distributing profits to their shareholders) will no longer benefit from the tax exemption provided under Section 23(1)(c) of CITA.

Grant of powers to the FIRS to assess non-resident digital companies to tax on a percentage of their turnover

According to Section 30 of the CITA, where it appears to the FIRS that the assessable profits reported by a non-resident company are less than should be expected, the FIRS is empowered to assess such non-resident company to income tax based on a fair and reasonable percentage of:

- a. the profits attributable to the fixed base of the non-resident entity;
- b. the profits attributable to a trade or business carried out by the non-resident entity through a dependent agent acting on its behalf;
- c. the profits attributable to a single contract involving surveys, deliveries, installations or construction carried out by the non-resident entity;
- d. the profits attributable to the non-resident entity on the adjustments made by the FIRS on the entity's artificial/fictitious transaction with a related entity.

In January 2020, Section 4 of Finance Act, 2019 introduced provisions to bring into the tax net, profits earned by a non-resident company providing digital services such as those transmitting, emitting, or receiving signals, sounds, messages, electronic commerce, application store, high frequency trading etc. to Nigerian customers, once such company is deemed to have a significant economic presence (SEP) in Nigeria.

Section 8 of Finance Act, 2021 has expanded the FIRS' powers under Section 30 of CITA with respect to the

taxation of non-resident companies, to include non-resident companies that have SEP in Nigeria, where the conditions stipulated are met.

Introduction of provision to restrict capital allowances

Prior to the enactment of Finance Act, 2021, companies were allowed a deduction of capital allowances against their assessable profits, with the capital allowances claimable in a YOA capped at two-thirds of assessable profits for companies other than those engaged in manufacturing and primary agricultural production/agro-allied business. In this regard, companies were at liberty to claim capital allowances on all qualifying capital expenditure (QCE) utilised for the generation of their taxable and non-taxable business income, as there was no specific provision to the contrary.

Section 27 of CITA (as amended by Section 11 of Finance Act, 2019) disallows the deduction by a company of any expense incurred in deriving tax-exempt income. To make matters even clearer, Section 9 of Finance Act, 2021 has extended the application of this matching concept to recovery of capital expenditure. Essentially, the section has introduced provisions to make clear



that QCE used to generate taxable and tax-exempt income will not be fully deductible (in the form of capital allowances) against the taxable income of the company. The amount of QCE that can be allowed as a deduction (in the form of capital allowances) will only be restricted to the proportion of QCE that is used to generate the taxable income of the company.

This implies that, where a company incurs QCE and such QCE is used to generate tax exempt income, then such QCE will not be allowable as a tax deduction (in the form of capital allowances) to the company.

However, this restriction of capital allowance will only be applicable where the proportion of tax-exempt income to the total income of a company is above 20%.

Further, Section 9 of Finance Act, 2021 clarifies that this restriction of capital allowances will not affect companies that enjoy pioneer status incentive.

The illustration below further explains this.

Illustration 1

ABC Nigeria Limited is a company incorporated in Nigeria. The company bought plant and machinery in the 2021 financial year (FY) worth ₦2billion. The company's income in the 2021 FY totalled ₦20billion. ₦100million of this income was tax-exempt while the remainder was earned from income streams that are liable to income tax in Nigeria. Assuming that the capital allowance claimable by the company in the 2021 FY (i.e., in relation to 2022 YOA) is ₦1.25 billion, can the company claim this capital allowance in full following the passage of Finance Act, 2021?

Solution

The tax-exempt income is ₦100million;

Total income of ABC Nigeria Limited is ₦20billion;

*Proportion of tax-exempt income to total income is 0.5% (₦100million/₦20billion * 100);*

Therefore, based on the provision of Section 9 of Finance Act, 2021, the restriction of capital allowances will not apply to ABC Nigeria Limited as the proportion of tax-exempt income (i.e., 0.5%) is less than the threshold provided in the law – 20%. Hence, ABC Nigeria Limited can claim its capital allowance in full.

Illustration 2

ABC Nigeria Limited is a company incorporated in Nigeria. The company bought plant and machinery in the 2021 FY worth ₦2billion. The company's income in the 2021 FY totalled ₦20billion, comprising ₦6billion tax-exempt income and ₦14billion taxable income. Assuming that the capital allowance claimable by the company in the 2021 FY (i.e., in relation to 2022 YOA) is ₦1.25billion, what proportion of this capital allowance can the company claim following the passage of Finance Act, 2021?

Solution

Tax-exempt income is ₦6billion;

Total income of ABC Nigeria Limited is ₦20billion;

*Proportion of tax-exempt income to total income is 30% (₦6 billion and ₦20 billion * 100);*

Given that the proportion of tax-exempt income (i.e. 30%) is higher than the threshold provided in the law (20%), the capital allowance claimable by ABC Nigeria Limited will be apportioned between its taxable and tax-exempt income.

Income from Taxable income of ABC Nigeria Limited is ₦14 billion

Capital allowance claimable by ABC Nigeria Limited is ₦1.25 billion

*Proportion of capital allowance available to ABC Nigeria Limited for claim following passage of Finance Act, 2021 = (14 billion and 20 billion) * ₦1.25 billion = ₦875 million*



Framework for claim of capital allowances by small and medium companies

In 2020, Section 9(a) of Finance Act, 2019 introduced an income tax exemption for small companies (i.e., companies with an annual gross turnover of ₦25million or less) in Nigeria. Similarly, the CIT rate of medium-sized companies (i.e., companies with an annual gross turnover greater than ₦25million but less than ₦100 million) was reduced to 20%. These incentives were aimed at encouraging small and medium enterprises in Nigeria.

Given this exemption, small companies are not required to pay CIT on their profits. Such companies, however, continued to incur capital expenditure for which capital allowances was ordinarily claimable. Medium-sized companies, on the other hand, set off the capital allowances on their QCE against their assessable profits and carried forward unutilised capital allowances to subsequent YOAs.

Section 9 of Finance Act, 2021 has tightened the framework for the claim of capital allowances by small and medium-sized companies under Section 31 of CITA during the period for which they are small or medium-sized.

According to Section 9 of Finance Act, 2021, where a small or medium-sized company incurs QCE on which capital

allowance is claimable, the amount of such capital allowance will be computed in line with the provisions of the Second Schedule to CITA, and that amount together with any unutilised allowances brought forward from previous years would be deemed to have been fully utilised by the company in each

YOAs. In essence, the capital allowance that will be claimable by the company on such QCE after it ceases to be a small or medium-sized company will be the residue of the QCE – that is, the total capital allowance claimable by the company less the capital allowance utilised or deemed to have been utilised by the company during the period for which it was a small or medium-sized company.

The illustration below further explains this.

Illustration 3

ABC Nigeria Limited is a company incorporated in Nigeria. The company was incorporated in 2019 FY. The company's total annual income has remained below ₦25million since incorporation. However, in 2021 FY, the company earned revenue of ₦120million. The company bought plant and machinery at incorporation worth ₦5million.

Assuming that the total capital allowance claimable by the company on the purchase of the plant and machinery is ₦5million and the capital allowance computed (and accumulated) by the company in 2019 FY and 2020 FY are ₦3.125million and ₦625,000, respectively, how much capital allowance will be allowable to ABC Nigeria Limited in 2021 FY (i.e., in relation to 2022 YOA) when it becomes a "large" company?

Solution

The capital allowance computed and accumulated by the company in the years when it was a small company (that is, its annual gross turnover was below ₦25million), is ₦3.75million (i.e., ₦3.125million plus ₦625,000).

The residue of the QCE on which ABC Nigeria Limited would be able claim capital allowance upon becoming a large company (i.e., a company with annual gross turnover of at least ₦100million) in 2021 FY is ₦5million - ₦3.75million = ₦1.25million.

Out of this amount, ABC Nigeria Limited will be entitled to an annual allowance of ₦625,000 in 2021 FY (i.e., in relation to 2022 YOA), while the residue of ₦625,000 will be carried forward to 2022 FY (i.e., in relation to 2023 YOA).

It is therefore advisable for small and medium companies to continue to compute their capital allowances in the normal manner and track what would ordinarily have been consumed on a year-to-year basis but for the tax exemption/incentive enjoyed. That way, determination of the residue to be carried forward would not be onerous on such companies.



Clarification on the claim of reduced minimum tax rate

Section 13 of Finance Act, 2020, in a bid to mitigate the impact of COVID 19 on the Nigerian economy, introduced a reduced minimum tax rate of 0.25% of gross turnover less franked investment income. This reduced rate was declared to be applicable to tax returns prepared and filed for any YOAs falling due between 1 January 2020 and 31 December 2021. This is equivalent to financial periods or years ending between 1 January 2019 and 31 December 2020.

However, Finance Act, 2021, in order to clarify the application of the reduced minimum tax rate, has replaced the minimum tax provision (Section 33) with a new Section 33 to make clear that:

- the reduced minimum tax rate of 0.25% shall be applicable to tax returns prepared and filed with respect to FYs ending on any date between 1 January 2019 and 31 December 2021, both days inclusive (Section 33(2)(b) of CITA as amended by Section 10 of Finance Act, 2021).
- taxpayers have a right of election to decide what periods to claim the reduced minimum tax rate of 0.25%. The two periods provided for in the Act are 1 January 2019 to 31 December 2020 or 1 January 2020 to 31 December 2021

Clarification of the application of the tax holiday incentive available to companies engaged in gas utilisation (downstream operations)

Companies engaged in gas utilization (downstream operations) are typically entitled to tax holiday for a maximum of 5 years according to Section 39 of the CITA. However, this tax holiday is also similar to the pioneer status incentive available in the Industrial Development (Income Tax Relief) Act (IDITRA). The implication of this is that companies may double dip by taking advantage of the tax concessions available in the CITA and IDITRA.

To plug this loophole, Section 11 of Finance Act, 2021 has introduced exceptions to the application of the tax holiday available in the CITA. These exceptions are:

- A company may not claim the tax holiday more than once;
- Any company formed from reorganisation, restructuring, buy-back or other similar schemes out of a company which has already enjoyed this incentive shall not be entitled to such relief;
- A company that has claimed an incentive for trade or business of gas utilization under any law in Nigeria, including the PPTA and the IDITRA, shall not be entitled to the tax relief.

It is expected that this amendment will curb cases of aggressive tax planning by companies engaged in gas utilisation.

Penalties for failure to file CIT returns

Pursuant to Section 55 of the CITA, where a company fails to file tax returns within the statutory timeline provided in the law, a penalty of ₦25,000 arises in the first month where such failure occurs and ₦5,000 for subsequent months where the failure to file continues.

However, Section 12 of Finance Act, 2021 has included provisions in the tax law to make clear that when a company pays its CIT based on the reduced minimum tax rate of 0.25% but fails to file returns in due time, the penalty for failure to file its CIT returns will be an amount equal to the relief sought.

This effectively means that companies that failed or fail to submit timely tax returns for the 2019 to 2021 FYs will be required to pay minimum tax at 0.5% of gross turnover less franked investment income in the affected YOAs, and thus forfeit the minimum tax relief they would otherwise have been entitled to. This should make the affected taxpayers promptly file their tax returns to avoid forfeiture of this tax benefit.

Clarification of the taxability of Unit Trusts

Section 14 of Finance Act, 2021 has amended Section 78 of the CITA to include provisions which clarify that the WHT deducted from interest and royalty payments made to Unit Trusts shall be the final tax on that stream of income. This amendment was necessitated by the need to make Unit Trusts pass-through entities for CIT purposes for certain income streams.

Under the erstwhile framework for the taxation of Unit Trusts, dividends received by a Unit Trust (as franked investment income) were only subject to tax (WHT) once at the level of the investee company. Such dividends were exempt from CIT at the Unit Trust level and also not subject to WHT upon redistribution to investors/unit holders. However, such treatment did not apply to interest and royalty payments received by a Unit Trust. Consequently, collective investors in such schemes were exposed to a greater tax burden, when compared to sole/direct investors in similar underlying financial instruments.

In order to manage the tax profile of Unit Trust investors and improve the attractiveness of Unit Trusts as viable



investment vehicles, Section 14 of Finance Act, 2021 expands the income streams which will enjoy "CIT pass through" status at the level of the Unit Trusts. Going forward, WHT deducted at the level of an investee company (for dividends) or debtor (for interest and royalties) will be the final tax on such payments. This exemption will, however, not apply to other income streams which are not specifically covered under the Act.

This provision completes the laudable decision of the Government to make Unit Trusts fiscally transparent and tax efficient. It is hoped that this will further encourage small investors to pool funds in such Schemes and deepen the capital market.

Expansion of the definition of Real Estate Investment Company

Finance Act, 2021 has now expanded the definition of Real Estate Investment Company (REICOs) to include a Real Estate Unit Trust (REIT). This means that REITs may now enjoy the tax concessions available to REICOs, which include income tax exemption for dividend and rental income received by REICOs (provided that 75% of such income is distributed to the REICO's shareholders and such distribution is made within 12 months of the end of the FY in which the dividend or rental income was earned), exemption from WHT for dividend and rental income received by REICOs etc.

With this amendment, a REIT will be treated consistently for tax purposes, whether it is set up as a REIT Company or a REIT Unit Trust.

Other noteworthy amendments

(a) Correction of numerical errors as well as redundant provisions in the tax law

Finance Acts 2019 and 2020 made several amendments to the CITA which created ambiguity around the numbering of the tax laws and made it difficult for taxpayers to reference the provisions of the amended legislation.

Finance Act, 2021 has corrected these numerical errors by replacing the affected Sections with new and numerically adjusted Sections. The relevant Sections are Section 13(2), Section 16, Section 23(1), Section 77 and Section 81 of the CITA.

Aside from the numerical correction made to Section 77 of the CITA, certain redundant provisions were expunged from the Section. These provisions are:

- (i) reference to provisional tax which had been deleted the Finance Act, 2019;
- (ii) requirement for companies served with a notice of assessment for which an objection has not been raised, to make payment for such assessment by the 14th of December of the YOA in which the assessment was raised etc.





(b) Redefinition of dividend for Securities Lending Transaction purposes

Section 2 of Finance Act, 2019 defines dividend to include *“compensating payments received by a lender from its approved agent or borrower in a Regulated Securities Lending Transaction if the underlying transaction giving rise to the compensating payment is a receipt of dividends by a borrower on any shares or securities received from its approved agent or a lender in a Regulated Securities Lending Transaction.”*

However, the definition above makes it challenging to effectively tax such capital market transactions as the “borrower” in the definition above, may not always be in custody of the shares that gave rise to the dividend when the dividend is due and payable.

Hence, to clarify the taxation of this capital market transaction, the words “if the underlying transaction giving rise to the compensating payment is a receipt of dividends by a borrower on any shares or securities received from its approved agent or a lender in a Regulated Securities Lending Transaction” was deleted.

This is in alignment with the SEC requirements on securities lending transactions, which mandates a time-limited disposal of borrowed securities.

(c) Re-arrangement and clarification of the provision on insurance in the CITA

Section 5 of Finance Act, 2021 also corrects the numerical errors in Section 16 of the CITA caused by amendments introduced by the Finance Acts of 2019 and 2020. Additionally, amendments were made to align the taxation of the insurance sector with current industry realities. Some of these amendments include:

- (i) clarification that an insurance company will be taxed as either a general insurance company (whether proprietary or mutual, other than a life insurance company) or a life insurance company;
- (ii) alignment of the minimum tax provision in the taxation of insurance company with the minimum tax applicable to other companies taxable under the CITA.

We have provided further details in the Financial Services Industry Section of this e-book.



National Agency for Science and Engineering Infrastructure (NASENI) Act

Section 37 of Finance Act, 2021 has amended Section 20 of the NASENI Act to make clear that commercial companies and firms with a turnover of at least ₦100million and above who operate in the banking, mobile telecommunications, ICT, aviation, maritime and oil and gas sectors will be required to contribute 0.25% of their profit before tax (PBT) to the government. This levy is collectible by the FIRS.

The amendment is intended to increase the threshold for application of the tax from ₦4million to ₦100million and limit the range of companies which are required to pay the tax. However, the amendment potentially increases the overall tax profile of companies operating in the selected industries. The applicability of the levy to PBT also creates the potential for companies to be taxed on unearned, unrealised or non-cash profits.

The law also does not provide a timeline for collection of the levy. However, given that the previous provisions were technically impractical to operate, the FIRS should apply the provisions with effect from 1 January 2022.

Administration of the Nigeria Police Trust Fund (NPTF) Levy

The Nigeria Police Trust Fund (Establishment) Act, 2019 was enacted on 24 June 2019 and requires companies operating business in Nigeria to contribute a levy 0.005% of their net profit to the fund. However, the Act did not stipulate the agency responsible for assessing and collecting the levy.

Section 36 of Finance Act, 2021 has now plugged this loophole by specifying that the FIRS shall assess, collect, account for, and enforce the payment of the Nigeria Police Trust Fund levy.

Personal Income Tax Act (PITA), Cap P8, LFN, 2004 (as amended)

Clarification of the tax treatment of life insurance premiums

The erstwhile provisions of the Personal Income Tax Act allowed as a tax deduction, an annual amount of any premium paid by an individual during the year preceding the YOA to an insurance company in respect of his life, the life of his spouse or of a contract of deferred annuity on his life or of the life of his spouse. However, the phrase “or of a contract of deferred annuity on his life or of the life of his spouse” allowed taxpayers to enjoy tax benefit from engaging in varying forms of contracts of deferred annuity, which were outside the intended scope of the erstwhile legislation.

The Finance Act, 2021 seeks to prevent potential abuse and aggressive tax planning by deleting the term “or of a contract of deferred annuity on his life or of the life of his spouse” from Section 33(3) of the PITA. This implies that the premium paid or payable on contract for deferred annuity taken up by an individual will no longer be an allowable deduction for tax purposes.

Other noteworthy amendments

- Finance Act, 2021 modifies the designation in Section 47(2) of the PITA from Chief Inspector of Taxes to “Senior Manager or Grade Level 14 equivalent”. This is to align with the current designations in the State Boards of Internal Revenue (SBIRs); and
- The Act also amends the penalty for failure of a person engaged in banking business in Nigeria to render returns or provide requisite information to the (SBIRs). The new penalty as provided in the Act is ₦1,000,000 for each of the returns not rendered or information provided.

Also, the Act makes clear that the penalty above will only apply to failure by the bank to render quarterly returns to the SBIR

Tertiary Education Trust Fund (Establishment, etc.) Act (as amended)

Increase in the rate of Tertiary Education Tax (TET)

Prior to the passage of Finance Act, 2021, the rate of TET in Nigeria was 2% of the assessable profits of companies registered in Nigeria, other than a small company as defined in the CITA. However, Finance Act, 2021 has now increased this rate to 2.5% which will continue to apply on the assessable profit of a company registered in Nigeria, other than a small company as defined in the CITA.

Timeline for payment of TET

Section 29 of Finance Act, 2021 also amends Section 2(2) of the TETA by changing the timeline within which TET is due and payable from 60 days after the FIRS has served a notice of the assessment on a company to 30 days after the FIRS has served notice of the assessment on the company. This is to align the TETA with the provisions of the CITA.





VAT

Indirect Taxes

Finance Act, 2021 contains amendments to various Nigerian tax laws that impact the indirect tax regime in Nigeria. We have analysed these amendments below:

Customs, Excise Tariffs etc (Consolidation) Act

Imposition of excise duty on non-alcoholic, carbonated, and sweetened beverages

Section 17 of Finance Act, 2021 (which amends Section 21 of the Customs, Excise Tariffs Act) now imposes excise duty at ₦10 per litre on non-alcoholic, carbonated, and sweetened beverages. The imposition of excise duty on these products aims to curb the spread of diseases, such as diabetes and obesity,, which may be triggered by excessive intake of these products, while also improving the revenue generation potential of the Federal Government.

It is expected that the duty will be remitted in line with existing Nigeria Customs Service regulations, which require manufacturers to enter a bond or make cash deposit to pay excise duty on their excisable products based on production volumes. Importers of non-alcoholic, carbonated and sweetened beverages will, however, be required to pay the applicable excise duty at the point of importing the goods into Nigeria.

As an excise tax, it is expected that the cost of the duty will be handed down to the final consumers through varying

pricing mechanisms. We have provided detailed commentary on the potential implications of this provision in our Consumer Markets Impact Analysis in Section 5 of this publication.

Value Added Tax Act (VATA), Cap. V1, LFN, 2004 (as amended)

Grant of power to the Service to appoint tax agents in Nigeria

The VATA requires non-resident entities who make taxable supply of goods and services in Nigeria to charge VAT on their transactions. The VAT charged will typically be withheld by the Nigerian customer and remitted to the FIRS.

However, where the Nigerian customer is an individual, withholding and remitting the VAT may be challenging and, in most cases, the individual may not remit the VAT to the FIRS. This is the major problem with Business to Customer (B2C) operations in the digital economy. This has led to considerable revenue loss to the government.

The government in a bid to bridge this revenue loss, has introduced provisions into the VATA to make clear that the FIRS has the power to appoint any person to “withhold” or “collect” the applicable VAT, and such person so



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appointed shall on or before the 21st of the following month, remit the tax withheld or collected to the FIRS. This therefore means that the FIRS may appoint a VAT aggregator to act as an agent for VAT collection and the agent may then remit the VAT so collected to the government. This amendment will therefore, bridge the revenue loss to the government on B2C transactions.

Other noteworthy amendments

Finance Act, 2021 also made other noteworthy amendments to the VATA; these include:

- i. Correction of referencing error in Section 15(2) of the VATA, which exempts a person who has not met the turnover threshold of ₦25million from carrying out certain VAT compliance requirements. One of these compliance requirements is issuing a VAT invoice.

It is noteworthy that the requirement to issue a VAT invoice is legislated in Section 13A of the VATA and not Section 13 of the VATA as previously referenced in the VATA. Section 32 of Finance Act, 2021 has now made this correction to reference the correct section of the law.

- ii. Clarification that companies engaged in upstream petroleum operations as described in the Petroleum Industry Act (PIA) and the Petroleum Profits Tax Act (PPTA) who have not met the ₦25million turnover threshold will still be required to comply with VAT obligations, such as issuing a VAT invoice, collecting VAT and filing VAT to the FIRS. Please refer to Section 7 of this e-book for further analysis on the impact of these provisions on the Oil and Gas industry.

Stamp Duties Act (SDA), Cap. S8, LFN, 2004 (as amended)

Powers of the Minister to make regulations

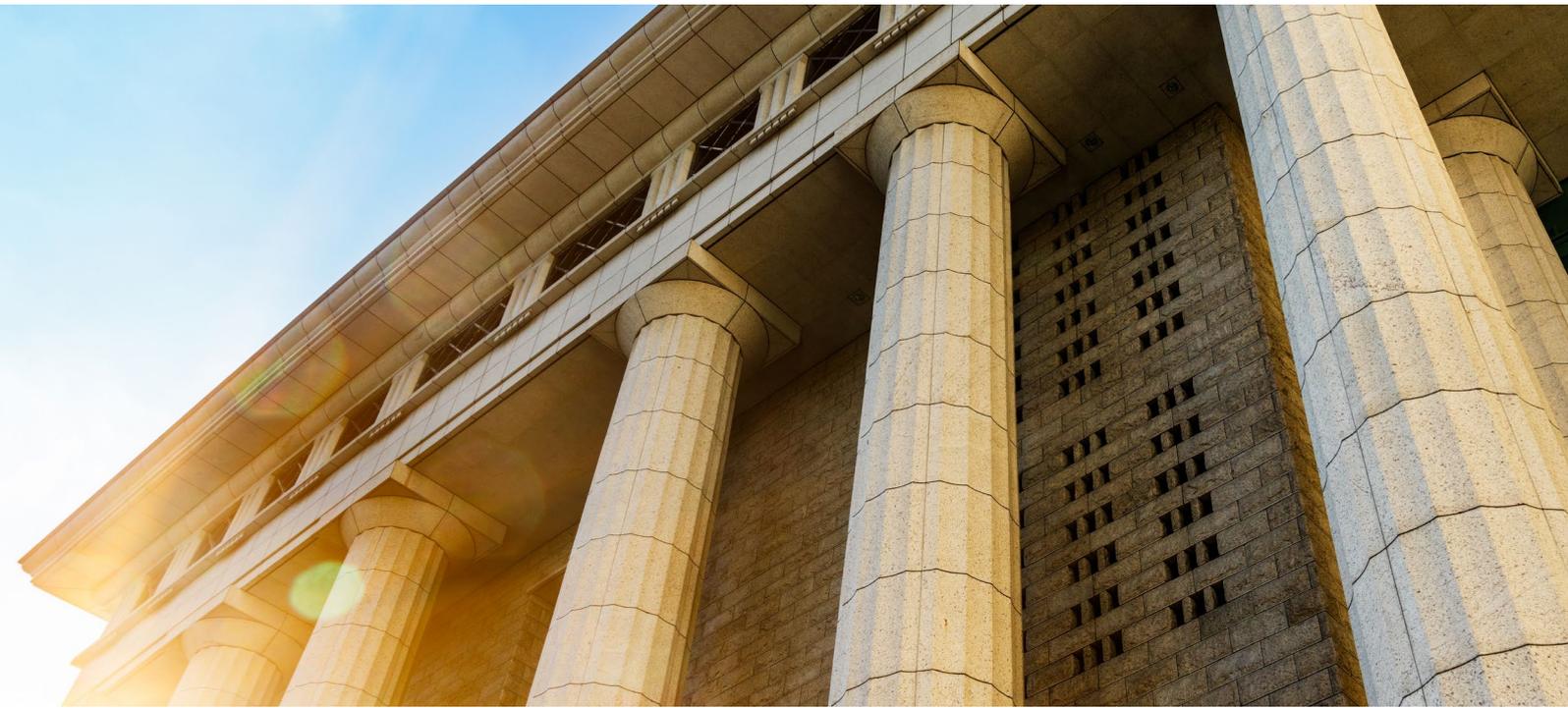
Section 27 of Finance Act, 2021 amends Section 89A(3) of the SDA to clarify that the Minister has powers to make regulations for the imposition, administration, collection and remittance of the Electronic Money Transfer (EMT) levy, subject to approval from the National Assembly.

The Act also grants the Minister powers to make regulations regarding the auditing, accounting, allocation and distribution of arrears of relevant stamp duties and EMT levy collected between 2015 and 2019 fiscal years.

The Act also provides that all subsequent EMT levy collected shall be distributed within 30 days following the month of collection.

The intention of the Finance Act, 2021 to grant the Minister powers to clarify the auditing and treatment of back-duty stamp duties is laudable, though its retrospective application is arguable. Notwithstanding this, we hope it will help address the ongoing dispute amongst the FIRS and SBIRs on the remittance of stamp duties/EMT levy collected on transactions with individuals in their respective States.





Other Non-tax Fiscal Impact

Finance Act, 2021 contains amendments to the FIRS Establishment Act as well as certain non-tax fiscal legislation in Nigeria. We have discussed below, the changes made by FA 2021 to these Acts..

Federal Inland Revenue Service (Establishment) Act (FIRSEA)

Penalty for failure of taxpayers to grant access to the FIRS

Section 51 of Finance Act, 2020 amended Section 25(4) of the FIRSEA to grant the FIRS powers to deploy technology for tax administration and information gathering in Nigeria. However, the FIRS is required to give a notice of 30 days to the taxpayer where the Service will access the taxpayer's information system for the purpose of information gathering.

Finance Act, 2021 has now instituted a daily administrative penalty of ₦25,000 payable by the taxpayer who defaults in granting access to the FIRS. This will accrue each day where the failure continues.

Notwithstanding the above, the Act recognises that for some reason, a taxpayer may not be able to grant the FIRS access to its system. In that case,

the Act requires the taxpayer to write to the Service giving its reason for not granting the FIRS access, and where the FIRS is satisfied that the taxpayer has shown good cause, it may withdraw the notice to the taxpayer.

FIRS as sole agency for tax collection in Nigeria

Section 22 of Finance Act, 2021 has amended Section 68 of the FIRSEA to make the FIRS the agency of the government solely responsible for the administration, assessment, collection accounting and enforcement of the taxes and levies due to the Federal Government. The enabling pieces of legislation for these taxes and levies are listed in the First Schedule to the FIRSEA.

The Act also makes it an offence for any body or agency of government to administer, collect, account and enforce taxes and levies due to the Federal Government unless the Minister of Finance, on approval of the National Assembly, authorises



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Partner



same. Therefore, no other Federal Government body can legally conduct tax compliance (especially audit) exercises on companies in Nigeria.

The Act, however, provides that the Service may collaborate with other Federal Government bodies for the purpose of enforcing compliance with tax and levy collection in Nigeria.

Finance (Control and Management) Act (FCMA) Trust Fund

Legislative control and management of public finance

The Finance Act, 2021 introduces new sections in the FCMA to reinforce the constitutional provisions relating to the management of public finances and the collection and accounting for the revenue due to the Government.

Based on the new sections, all ministries, departments, agencies and other institutions must comply with the provisions of the Constitution in the discharge of their duties to the effect that all money received by the Government of Nigeria as a statutory transfer shall be paid to one Consolidated Revenue Fund (CRF).

In addition, Finance Act, 2021 provides that no withdrawals shall be made from the CRF except to meet expenditure which is approved under the Appropriation Act or Supplementary Appropriation Act or an Act passed pursuant to Section 81 of the Constitution of Nigeria.

Amendments to sections requiring compliance with Minister's instructions

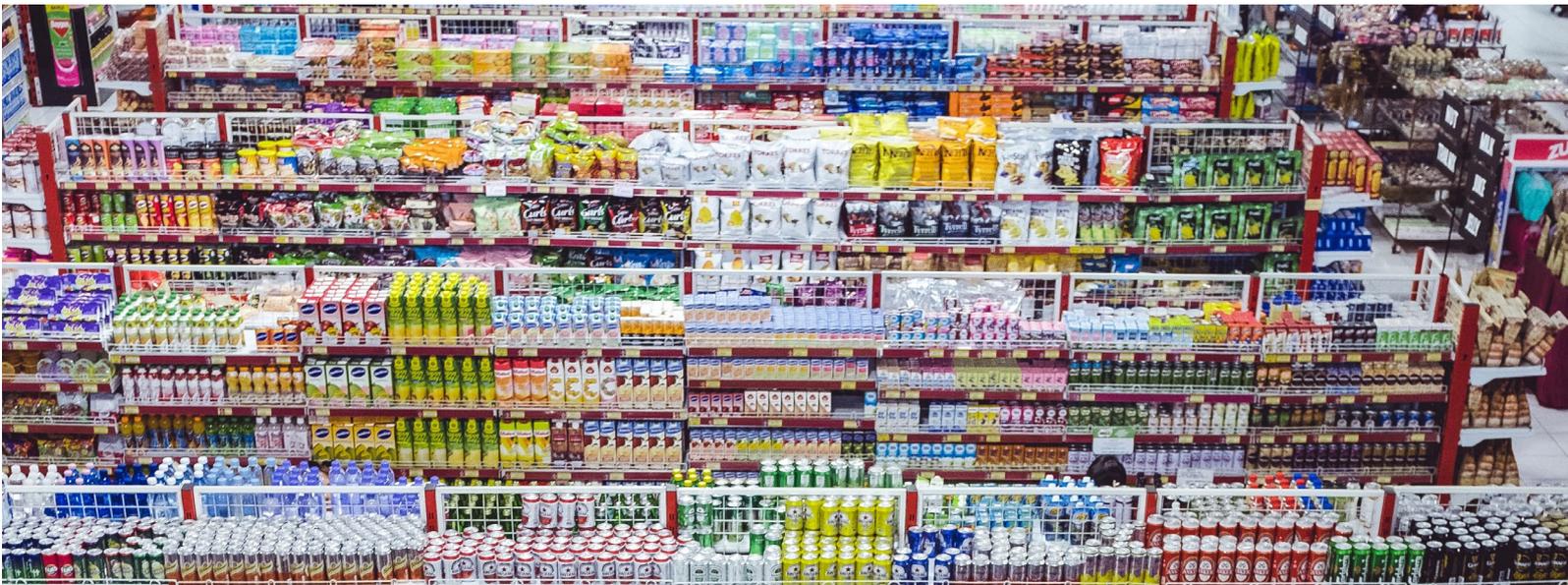
Section 39 of Finance Act, 2021 has amended Section 4 of the FCMA to require all Ministries, Departments, Agencies, or officials of these agencies who are responsible for the collection, receipt, custody, issue, payment of public moneys, stores, stamps, investments, securities, negotiable instruments etc. to comply with all rules, regulations, guidelines and other instructions that may be issued under the direction of the Minister of Finance.

In addition, the Act provides that all taxes and levies collected must be paid in gross into the CRF. A failure in this regard is an offence under the Act liable on conviction to imprisonment for a term of 5 years, a fine of ₦5 million or both.

Fiscal Responsibility Act

Section 40 of Finance Act, 2021 has amended Section 41 of the Fiscal Responsibility Act to clarify the objectives of government borrowing. Under the erstwhile Act, government is to borrow for capital expenditure and human capital development. However, Finance Act, 2021 has expanded these criteria to include borrowing to undertake critical reforms of significant national impact.





Consumer Markets and Infrastructure Industry Impact Analysis

The Consumer Markets and Infrastructure Industry largely comprises the Manufacturing, Trade and Real Estate sectors of the Nigerian economy. Based on the latest statistics from the National Bureau of Statistics (NBS), the Manufacturing, Trade and Real Estate sectors contributed 33.61% in aggregate to Nigeria's total nominal Gross Domestic Product (GDP) in Q3 of 2021. Further, the Manufacturing, Trade and Real Estate sectors grew by 4.29%, 14.84% and 8.63%, respectively, compared to similar figures in Q3 of 2020.

The Federal Government has made considerable efforts in recent years to improve the performance of the Consumer Markets and Infrastructure Industries through the introduction and refinement of policies, such as the Road Infrastructure Development and Refurbishment Investment Tax Credit Scheme, income tax exemption of export profits, and income tax exemption for rental and dividend income earned by Real Estate Investment Schemes.

The tax changes introduced by Finance Act, 2021 are intended to spur economic growth in the Consumer Markets and Infrastructure industries, amongst others. We have, therefore, reviewed the amendments introduced by the Act as they affect companies operating in the two industries.

Consumer Markets Sector

Excise duty on non-alcoholic, carbonated and sweetened beverages

Section 17 of the Finance Act, 2021 introduced excise duty on non-alcoholic, carbonated and sweetened beverages at the rate of ₦10 per litre. According to the Honourable Minister of Finance, Budget and National Planning, the tax is expected to discourage excessive consumption of sugar in beverages which contributes to a number of health conditions, such as diabetes and obesity, and raise revenue for health-related and other critical expenditure in line with the Federal Government's 2022 Budget priorities.



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By introducing an excise on sweetened beverages, which is akin to the “sugar tax,” Nigeria joins over 40 countries including Hungary, France and South Africa, that have opted to implement recommendations by the World Health Organisation (WHO) to combat non-communicable diseases, such as Type 2 diabetes, which are closely linked to excess consumption of sugar rich beverages.

In spite of the positive intent behind this provision, there are concerns as to the likely efficacy of the tax. First, the scope of the tax appears too broad to achieve a significant reduction in sugar consumption. Benchmarking the levy on the quantity of sugar in each litre of drink would perhaps serve a more targeted purpose. Such an approach also provides adequate room for manufacturers of such products to respond appropriately by reducing the sugar contents in their products or developing healthier alternatives, based on consumption patterns.

Secondly, it is not certain that the marginal price increases to the beverages (₦10 per litre) would be sufficient to alter the consumption patterns of excessive consumers of these products. For instance, evidence presented by the WHO estimates that a tax on sugary drinks that increases prices by at least 20% is required to achieve a 20% reduction in consumption of the products. The proposed ₦10 per litre results in a less than 10% price increase.

Notwithstanding the above, if the proposed reduction in sugar consumption reduction is achieved, there could be significant long- term qualitative and quantitative benefits to the Nigerian health sector.

Infrastructure Sector

Real Estate Investment Schemes

Section 16 of Finance Act, 2021 amends the definition of a Real Estate Investment Company (REICO) to mean a company “including a real estate Unit Trust,” duly approved by the Securities and Exchange Commission as a Real Estate Investment Scheme in Nigeria.

This modification allows Real Estate Investment Schemes established as Trust enjoy the tax benefits available to real estate investment companies in the CITA. These tax benefits include income tax exemption for dividend and rental income received by REICOs (provided that 75% of such income is distributed to its shareholders and such distribution is made within 12 months of the end of the financial year in which the dividend or rental income was earned), exemption from WHT for dividend and rental income received by REICs etc.

The expansion of the definition of Real Estate Investment Companies to include Real Estate Unit Trusts highlights the Government’s desire to encourage the development of real estate investment in Nigeria.

¹NBS, Nigerian Gross Domestic Product Report Q3 2020



Financial Services Industry Impact Analysis

The Financial Services Industry (“the Industry”) comprises the following sectors: banking, insurance, capital market, asset and investment management, payment and credit solutions etc. The industry recorded steep growth in the third quarter of 2021, contributing 2.7% of the Gross Domestic Product of the country in Q3 of 2021. Undoubtedly, the performance of this industry was affected by the slow economic recovery from the COVID-19 pandemic shocks and some regulatory policies introduced by Government regulators, such as the Ministry of Finance, Central Bank of Nigeria, National Insurance Commission, Securities and Exchange Commission and other Sector regulators.

Nevertheless, Finance Act, 2021, which introduces some modifications to the tax landscape, is expected to facilitate activities which should culminate in growth for the sector. The specific amendments in the Act impacting the Industry, include provision of additional reliefs and clarification on some of the ambiguous tax provisions to support businesses operating in the Industry and improve their tax compliance. We have summarised the impact of these amendments under the relevant Tax Acts as follows:

Insurance Sector

Amendments to the Insurance Act

Finance Act, 2021 has amended Sections 9 and 10 of the Insurance Act to replace the words “paid-up share capital” with the words “capital requirement”. The new amendment defines capital requirement as follows:

- (a) in the case of an existing company as:
- (i) the excess of admissible assets over liabilities, less the amount of own shares held by the company; and
 - (ii) subordinated liabilities subject to approval by the Commission; and
 - (iii) any other financial instrument as prescribed



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The Admissible Assets over liabilities have been expanded to include Share Capital, Share Premium, Retained Earnings, Contingency Reserves, and any other admissible assets subject to the approval of the Commission.

(b) in the case of a new company, *capital requirement consists of government bonds and treasury bills, cash and bank balances and cash and cash equivalent.*

Prior to this amendment, the National Insurance Commission (NAICOM) had introduced new capital requirements for insurance and reinsurance companies in 2019. This had led companies operating in the sector to jostle for means of meeting the capital requirements, which has been quite challenging. One of the major issues for the sector is the restriction on what constitutes share capital for insurance companies. The Insurance Act had specified "paid-up share capital" only, which had severe limitations. Given the above issue, insurance companies would have been required to convert other forms of capital to paid-up share capital, as part of the avenues to meet the new capital requirements. This could have had far reaching tax consequences, such as potential Excess Dividend Tax (EDT) exposure and the resulting Withholding Tax (WHT) on bonus dividend distribution, which would have led to erosion of shareholder value for companies in the Industry.

The expansion in the definition of capital requirement introduced by the amendment is a major win for the industry as it will aid the speedy achievement of the recapitalisation policy. It is expected that this will give insurance companies some latitude in meeting the capital requirements mandated by NAICOM and will consequently reposition the sector for sustainable growth.

Renumbering and amending the Insurance Section of the CITA

- (a) Section 5 of Finance Act, 2021 has also corrected numbering errors introduced by Finance Acts 2019 and 2020 in the previous amendments made to Section 16 of the CITA. This will aid proper referencing of the law and provide clarity.
- (b) In addition to the above, the Act also makes amendments to Section 16 of the CITA to bring the taxation of the Insurance industry in line with current realities. Some of the changes are:

- (i) Clarification that an insurance company will be taxed as either a general insurance company (whether proprietary or mutual, other than a life insurance company) or a life insurance company.
- (ii) The introduction of the term "other income" in the definition of gross turnover in relation to non-life businesses for the purpose of minimum tax calculation. Other income is defined as "all other income of the non-life insurance business other than gross premium (excluding franked investment income).
- (iii) The deletion of phrases such as "Notwithstanding anything to the contrary contained in this Act", to ensure that insurance businesses are not taxed differently from other Nigerian companies, and that other provisions of CITA applicable to other companies will also apply to insurance businesses.

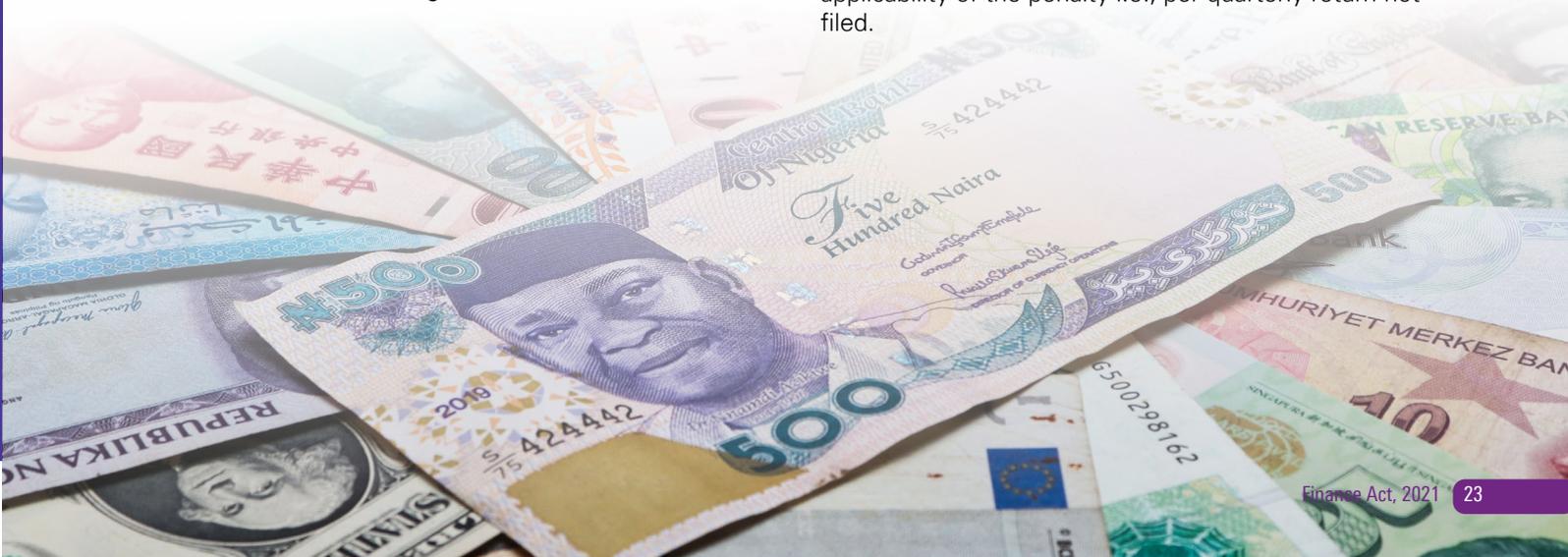
Banks and other financial institutions

- i. Section 28 of the FIRSEA imposes an obligation on Nigerian banks to deliver information to the FIRS in the form of quarterly returns, specifying transactions involving the sum of ₦5,000,000 and ₦10,000,000 for individual or corporate customers, respectively. Banks that contravened this provision were liable on conviction to a fine not exceeding ₦50,000 for individual customers or ₦500,000 for corporate customers, respectively.

Section 19 of Finance Act, 2021 has now amended the penalty regime to provide for an administrative penalty for non-filing or filing of incorrect quarterly returns of ₦1,000,000 per quarterly returns.

- ii. Similar to the above, the Act also amended PITA to state that banks will pay a penalty of ₦1,000,000 for every quarterly returns not filed. These returns relate to information requested by the FIRS or State Board of Internal Revenue, including certain information about the customers of the Bank.

The amendments enhance the framework for filing of returns by banks as they eliminate the requirement for a conviction as precondition for administration of a fine for non-compliance and impose an administrative penalty instead. It also provides the much-needed clarity on the applicability of the penalty i.e., per quarterly return not filed.





Oil and Gas Industry Impact Analysis

The changes introduced by Finance Act, 2021 amend the extant tax laws to provide alignment with the recently enacted Petroleum Industry Act (PIA) as well as Finance Acts 2019 and 2020. We have discussed below the amendments introduced by the Act as they affect companies operating in the oil and gas industry.

Clarification of the application of the tax holiday incentive available to companies engaged in gas utilisation (downstream operations)

Section 39(1)(a) of the CITA provides a tax holiday (subject to a maximum period of 5 years) for companies engaged in gas utilisation (downstream operations) activities. This tax holiday is available for a period of 3 years and can be renewed for an additional period of two years subject to the satisfactory performance of the business. Similar tax incentive is also available to companies under the Industrial Development (Income Tax Relief) Act (IDITRA). This has resulted in the possibility for taxpayers to claim same incentive under the provisions of the CITA and the IDITRA thereby creating an opportunity for double dipping and thus, reducing tax revenue to the government.

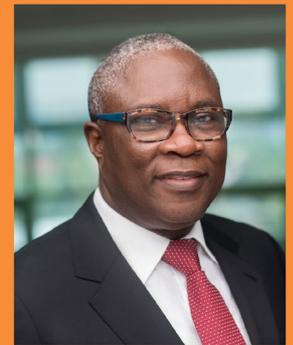
Finance Act, 2021 has plugged this loophole by clarifying and restricting the application

of this incentive. According to the Act, companies engaged in gas utilisation (downstream operations) may only claim this incentive provided that:

- a. such company has not claimed the incentive before;
- b. such company was not formed from any form of reorganization, restructuring, buy-back or other similar schemes out of a company that has already enjoyed this incentive;
- c. such company has not claimed an incentive for trade or business of gas utilisation under any law in Nigeria, including the Petroleum Profits Tax Act, or the incentives under the IDITRA.

Furthermore, subsection 3 has been deleted since the provision of the subsection is already embedded in the new subsection 1.

It is the intention of the government that this amendment will reduce the incidence of double dipping and increase revenue to the government.



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Clarification on taxation of dividends earned from petroleum profits

Prior to the passage of Finance Act, 2019, dividends distributed from companies liable to PPT were not subject to CIT in the hands of the recipient company. However, Section 24 of Finance Act, 2019 deleted Section 60 of the PPTA to give effect to the fact that dividend distributed from the petroleum profits of companies will now be liable to CITA in the hands of the recipient company.

Following this amendment, corresponding changes were not made to Section 18(b)(iii) of the CITA as this section continued to provide that dividends distributed by a company chargeable to tax under the provision of the PPTA will not be chargeable to tax under the CITA. This, therefore, created controversy in the tax law as, on one hand, the PPTA deleted the provision that exempts dividend distributed from petroleum profits of companies from CIT and on the other hand, the CITA continued to maintain the provision that exempts the dividend distributed from petroleum profits of companies from CIT.

To clarify this controversy, Section 6 of Finance Act, 2021 has now deleted Section 18(b)(iii) of the CITA to align the policy directive of the government with the provisions of the CITA. Hence, this amendment clarifies that dividend distributed by a company chargeable to tax under the provision of the PPTA will be liable to CIT in the hands of the recipient company

Clarification of the taxation of export proceeds of companies engaged in Upstream, Midstream, or Downstream Petroleum operations

Section 23 of the CITA exempts the profits of all Nigerian companies in respect of goods exported from Nigeria provided that the proceeds of such exports are used to purchase raw materials, plant and equipment and spare parts. This could be interpreted to extend eligibility for the tax exemption to companies engaged in Upstream, Midstream or Downstream petroleum operations, who

are subject to Hydrocarbon Tax (HT) and/or CIT under the provisions of the recently enacted PIA. This could lead to ambiguity in application, with regards to the taxability of export proceeds of companies engaged in petroleum operations.

Accordingly, Section 7 of Finance Act, 2021 in order to resolve this ambiguity has included a provision in the CITA to make clear that the export proceeds of companies engaged in Upstream, Midstream or Downstream Petroleum operations will not be exempt from CITA. Hence the profits of such companies will be liable to HT and/or CIT in accordance with the provisions of the PIA.

VAT compliance requirement for companies engaged in upstream petroleum operations

Prior to the Finance Act, 2019, companies engaged in upstream petroleum operations were required to register for VAT, issue a VAT invoice, collect and file the VAT from their customers with the FIRS. However, Finance Act, 2019 introduced a VAT compliance threshold which excludes companies with annual turnover lower than ₦25 million from the above VAT compliance obligations. This effectively means that upstream petroleum companies were not required to register for VAT nor issue a tax invoice where they have not met the VAT threshold in Nigeria. However, such companies, in their preparatory activities, mobilise billions of Naira of capital and incur significant expenditure much above the VAT threshold. Thus VAT provisions inadvertently resulted in an absurdity where such transactions may not be properly accounted for by such companies.

Section 32 of Finance Act, 2021 has now amended Section 15 of the VATA to clarify that companies engaged in upstream petroleum operations will continue to comply with the VAT obligations in Nigeria, such as registration, issuing a tax invoice, collecting and remitting the VAT etc. This is notwithstanding the fact that such companies might not have met the VAT turnover threshold of ₦25 million.





Digital Economy Impact Analysis

The digital economy is a crucial part of the Nigerian economy. The sector has continued to grow even amidst the COVID 19 pandemic. The sector has also contributed significantly to the Nigerian economy with reports from the Nigerian Bureau of Statistics showing that the ICT sector contributed about 9.22% in the third quarter of 2021, to the total nominal GDP of Nigeria.

The Federal Government has also shown commitment in growing the sector through initiatives such as the launch of the Strategic Roadmap and Action Plan (SRAP) targeted at improving the Nigerian digital economy etc. We have analysed the impact of the amendments introduced by Finance Act, 2021 on the digital economy.



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Partner & Head of Tax

FIRS' power to assess non-resident digital service providers to tax on turnover

Section 30 of CITA empowers the FIRS to assess the turnover of any company to income tax if *"it appears to the Service that for any year of assessment, the trade or business produces either no assessable profits or assessable profits which in the opinion of the Service are less than might be expected to arise from that trade or business or, as the case may be, the true amount of the assessable profits of the company cannot be ascertained."*

The section has now been amended to include non-resident digital service providers that are liable to tax based on their "significant economic presence" in Nigeria. Thus, where the digital service company has reported a loss in its global financial statement or profit below the expectation of the FIRS, the latter is empowered to assess the income derived from Nigeria to tax at a *"fair and reasonable percentage."*

The FIRS has a longstanding practice of assessing the turnover of non-resident companies that is attributable to Nigeria to tax at 6%. It can, therefore, be safely assumed that FIRS will apply this rate to affected non-resident digital service providers. It is, however, possible for companies to challenge this deemed tax rate, if they can demonstrate that it is not fair and reasonable based on their peculiar situation.

FIRS' power to appoint non-resident service providers as VAT aggregators

The VAT Act (as amended by Finance Acts of 2019 and 2020) requires non-resident persons who make taxable supplies to Nigerian customers to register and account for VAT on their invoices where they make or expect to make a singular or cumulative supply of N25million in any calendar year.

Under the erstwhile provisions, a non-resident supplier, in addition to registering for VAT, was also required to charge VAT on invoices to Nigerian customers. The Nigerian recipient, by extension, is required to deduct the VAT charged at source, which allowed easy administration of VAT by the FIRS. However, these protocols also created a gap in the administration of VAT on supplies made via digital platforms to individual customers as such customers would not typically comply with the VAT deduction and remittance requirement. To address these gaps, Section 30 of Finance Act, 2021 empowers the FIRS to appoint any person to withhold or collect and remit output tax in the currency of transaction, on or before the 21st day of the following month [Section 14(3) of the VAT Act].

The Finance Act, 2021 also empowers the FIRS to issue guidelines for the purpose of giving effect to the provisions of Section 10 of the VAT Act with regards to the form, timing and procedure for filing of tax returns and payment of VAT by non-resident suppliers.



Conclusion

Finance Act, 2021 introduced significant tax, fiscal and other reforms to drive domestic revenue mobilization, in line with the FG's strategic revenue generation initiatives. This is commendable considering the expected fiscal deficit of ₦6.386 trillion in the 2022 FG budget. Notwithstanding, the economy is gradually recovering from the effects of the COVID-19 pandemic due to relaxed lockdown restrictions, and improvement in public immunity with about 12 million citizens having received at least one dose of the COVID-19 vaccine.

It is expected that the amendments made by the Finance Act will result in an increase in the FG's domestic revenue and improve the country's economic performance during the year. Taxpayers should, therefore, carefully evaluate how the Act impacts them and their business. We hope this publication helps taxpayers achieve this purpose.

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