TAX LIABILITIES ON CAPITAL GAINS IN NIGERIA AND OUTLOOK FOR 2023

In Nigeria, taxation of capital gains is governed by the Capital Gains Tax Act Cap C 1 LFN 2004 (CGTA), Finance Act 2019, Finance Act 2020 and the Finance Act 2021. As outlined in the public presentation of the approved 2023 budget, it is expected that the Finance Bill 2022 will receive assent and also govern capital gains alongside existing legislations. The tax is levied on both individuals and corporate persons and is payable to the State Inland Revenue Service and the Federal Inland Revenue Service respectively. Persons employed in the armed forces, the Nigerian Foreign Service and non-resident persons though individuals, make remittances to the Federal Inland Revenue Service. The tax runs on a self-assessment basis with few exceptions, thus placing the responsibility to declare gains and adhere to the provisions of the relevant tax laws on the taxpayers. Between the 1967 Capital Gains Act and the present, different government administrations have made efforts to bring the provisions of the Act in line with prevailing economic and commercial realities. While there are several robust provisions, tax collection continues to fall short as only a very narrow tax net is visible to the government.

OPERATION OF CAPITAL GAINS TAX

The CGTA provides that capital gains tax when arising, shall be at a rate of ten percent of the gain. Gains are basically the difference between the cost of acquisition of an asset and the cost of disposal of the asset less allowable deductions. Consequently, where the historical cost of an asset exceeds the sum received at disposal, no gains arise. Assets subject to the CGTA include options, debts, incorporeal property, currencies, and other forms of property. The Finance Bill 2022 seeks to expand the list of chargeable assets to cover digital assets such as crypto currencies. The CGTA is also applicable over capital sums received even when no physical asset is exchanged. Capital sums contemplated by the CGTA include compensation for loss of office or employment subject to a de minimis rule for Ten Million Naira and below, capital sums received under a policy of insurance, capital sums received in return for forfeiture or surrender of rights and sums received as consideration for the use of exploitation of assets among others. Gains accruing to not-for-profit organisations are exempt where the relevant assets were not acquired for trade or business.

Disposals of assets outside Nigeria may be caught by the CGTA when gains are received in or brought into Nigeria. Ascertaining the location of an asset or its disposal is straightforward with tangible assets. With intangibles, the CGTA specifies how the location of an asset will be determined. Debts are situated in Nigeria if the creditor is resident in Nigeria while judgment debts are situated where the judgment is recorded; rights and licenses to intellectual property are situated in Nigeria if the rights derived from them are exercisable in Nigeria; and securities are located where they are registered (with statutory tiebreakers for instances where more than one register is kept). In line with statutory provisions and international best practice, taxable persons who suffer double taxation on transactions on which capital gains tax arise are entitled to relief under the relevant double tax agreements (if any) between Nigeria and the other state party.

The tax treatment of capital gains on shares and stocks held in Nigerian companies has gone through several changes under different government administrations. Currently, gains from disposal of shares held in Nigerian companies are chargeable with certain exemptions based on the volume of the transaction and re-investment of the gains in qualifying investments.

The CGTA provides for flexibility in the operation of the tax and recognises gains in instalments if payments upon disposal are received in instalments. Single bargains comprising two or transactions of assets disposal are considered single disposals. Creditors acquiring assets in satisfaction of debts are considered to have acquired such assets for a consideration equal to their debt. Transactions between connected persons are expected to be carried out at an arm’s length bargain. This is important as the CGTA empowers the tax authorities to apply the market value sum to acquisitions where the sum is not at arm’s length or is unascertainable.

OUTLOOK FOR 2023

The Finance Bill 2022 makes interesting alterations to the CGTA. Chargeable assets have been expanded to include digital assets. With the ballooning number of Nigerians venturing into the acquisition of and trading in digital assets, it is expected that this will help widen the tax net of capital gains taxes. However, the inclusion of digital assets as a chargeable asset may not be without difficulties. With the nature of digital assets, clarity on several issues concerning its taxation is needed. Such issues include definition of digital assets, classification of digital assets income as either revenue or capital, the location of digital assets, and when a particular tax is considered to arise over a digital asset transaction. It is expected that the administration of the tax would shed light on areas where future tax legislation can aid tax certainty over digital assets for taxpayers. The Finance Bill 2022 also makes capital losses a deductible expense. Previously, the CGTA outrightly disallowed the deduction of capital losses in the computation of capital gains taxes. With the proposed provisions, capital losses are tax deductible and available for carryover into subsequent years, provided that the loss arises from the same asset class. Finally, provisions on the replacement of business assets that provide relief when old assets are disposed of, and the proceeds utilised in acquiring new assets falling under the same class of assets for the purpose of trade have been amended to accommodate shares and stocks. In line with the provisions of the Finance Act 2021, the relief granted to the class of shares and stocks is subject to reinvestment of the proceeds from the sale into the same or other Nigerian companies within the same year of assessment.

CONCLUSION

The CGTA and subsequent Finance Acts cover the taxation of capital gains. While all taxpayers are expected to self-assess and remit their taxes to the appropriate revenue authority, the reality remains that only taxpayers and transactions visible on the very narrow radar of the revenue authorities comply. There are robust provisions on the applicability of the various capital gains tax legislations to local and cross-border transactions. There is also clarity on when gains are chargeable. The Finance Bill 2022 makes digital assets chargeable assets, creates relief for capital losses and provides a new class for shares and stocks under the existing provisions on replacement of business assets. While the provisions for the taxation of gains on digital assets may not carry much certainty, it is expected that the application of the tax will improve an appreciation of how and when gains can be said to arise. This, it is hoped will inform future amendments to the law.

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