

## A COMMENTARY ON KEY AMENDMENTS INTRODUCED BY THE FINANCE ACT 2023



### Introduction

Nigeria's tax laws and regulations have undergone various amendments in the past, with the Finance Act 2023 ("the Act or "FA") being the most recent amendment. The Act, which became effective on 1 May 2023 though assented to on 28 May 2023 modified certain sections of the Capital Gains Tax Act, Companies Income Tax Act, Customs Excise Tariff etc. (Consolidation) Act, Personal Income Tax Act, Petroleum Profits Tax Act, Stamp Duties Act, Value Added Tax Act, Corrupt Practices and other Related Offences Act, the Public Procurement Act, the Tertiary Education Trust Fund (Establishment e.t.c) Act and the Ministry of Finance (Incorporated) Act. The objective of the Act is the amendment of existing tax laws in line with the macroeconomic policy reforms of the Federal Government. This article highlights the key amendments introduced by the Act to the existing tax laws and regulatory framework, and the significance of such amendments.

### Amendments to the Capital Gains Tax Act (CGTA)

**Taxation of gains on digital assets:** The Act has made changes to the treatment of digital assets and

capital gains and losses. Section 3(a) of the CGTA has been amended to include digital assets as items subject to capital gains tax<sup>1</sup>. While this provision will help widen the tax net, it remains to be seen how the tax authorities will implement the provision in relation to defining digital assets and classifying digital assets income as revenue or capital.

**Deduction of losses from capital gains:** Section 5 of the CGTA has been substituted. The new section 5 outlines rules for deducting losses from gains accrued on the disposal of assets<sup>2</sup> and allows carrying forward of losses for up to five years for deduction against chargeable gains arising from the disposal of the same type of asset. Prior to this amendment, losses arising from disposal of any asset were treated as non-deductible.

**Roll-over relief for stock and shares:** Section 31(6) of CGTA has been amended to include "Stocks and Shares - Class 5" for the application of roll-over relief for shares. However, proceeds from qualifying disposals must be reinvested in the acquisition of eligible shares in the same or other Nigerian companies within the same year of assessment.<sup>3</sup> This provision can encourage companies to reinvest their profits back into the Nigerian economy which may ultimately lead to increased economic growth, job creation and development of local industries by ensuring that profits stay within Nigeria.

### Amendments to the Companies Income Tax Act (CITA)

**Compliance obligation for non-resident shipping and air transport companies:** Section 14 of CITA now requires companies to submit detailed gross revenue statements of their Nigerian operations when filing tax returns if they do not provide a separate financial statement. The Act further modifies the

<sup>1</sup> Section 2 of the FA.

<sup>2</sup> Section 3 of the FA.

<sup>3</sup> Section 4 of the FA.

provision of section 14 of CITA by inserting a new subsection 6 which mandates non-resident companies to present evidence of income tax filing for the preceding tax year, and tax clearance certificates showing income taxes paid for the preceding three years to appropriate regulatory authorities before relevant approvals and permits can be granted.

**Withdrawal of Investment Allowance:** Sections 32, 34, and 37 of the CITA which previously provided for investment allowances have been deleted, but companies that have already incurred any expenditure on plant equipment, qualifying capital expenditure or set aside reserved funds in accordance with the deleted sections are permitted to enjoy the allowances/exemptions until fully utilized or expired.

**Restriction of deductible capital allowance:** The second schedule to the CITA was also amended to restrict the amount of capital allowances that can be deducted from assessable profits to sixty-six and two thirds percent for most companies, except for those engaged in upstream and midstream gas operations or in the agro-allied industry or manufacturing<sup>4</sup>. It is our view that this restriction may result in higher tax liabilities for affected companies.

### **Amendments to the Customs, Excise, Tariff ETC (Consolidation) Act (CETA)**

**Introduction of new import levy:** In addition to existing customs duties and other charges, a levy of 0.5% has been imposed on goods imported into Nigeria from outside Africa.<sup>5</sup> This levy is to be utilised towards payments for subscriptions, and other financial obligations to multilateral institutions like the African Union, African Development Bank etc.<sup>6</sup> This provision is noteworthy as it may discourage foreign importation and encourage patronage of regionally produced goods. Notably, there remains a likelihood that this will increase the cost of imported goods and purchasing power as

Nigerians tend to import more goods from outside the continent due to standardisation.

**Imposition of excise duties on telecommunication services:** The Act amended section 21 of the CETA by categorising goods liable to excise duty to comprise of all services, including but not limited to telecommunication services, provided in Nigeria and subjects them to excise duties at rates to be specified via a Presidential Order. This will inevitably increase the financial burden of consumers of these services as service providers would pass on the cost to customers to reduce the cost of doing business.

**Ministerial oversight of the minister of finance:** Section 22 has been amended to provide definitions for "Minister" and "Tariff Review Board," clarifying that the Minister of Finance has oversight functions over the Tariff Review Board which is responsible for reviewing customs and excise tariffs under the CETA.

### **Amendments to the Personal Income Tax Act (PITA)**

**Personal relief for individuals and spouses:** The Act substituted section 33(3) of the PITA and provides for a deduction of the annual amount of any premium paid by an individual to an insurance company during the year before the assessment year.<sup>7</sup> This deduction applies to insurance on the individual's own life or the life of their spouse, or to a contract for a deferred annuity on their own life or the life of their spouse. However, if any portion of the deferred annuity is withdrawn before five years from the date the premium was paid, it will be subject to tax at the point of withdrawal. It is pertinent to note that claims for relief on premium paid on contract for deferred annuity was deleted from the PITA by the Finance Act 2021. This has now been re-introduced with a proviso on the period within which withdrawal of any portion of the annuity may trigger tax implications.

<sup>4</sup> Section 9 of the FA.

<sup>5</sup> Section 10 of the FA.

<sup>6</sup> The Principal Act is amended by inserting after subsection (3) a new subsection (4).

<sup>7</sup> Section 13 of the FA.

## Amendments to the Petroleum Profit Tax Act (PPTA)

**Applicable regulator for upstream sector:** Section 2 of the PPTA has been amended to include a new definition of "Commission" as the Nigerian Upstream Petroleum Regulatory Commission ("NUPRC"), which was established under the Petroleum Industry Act, No. 6, 2021 ("PIA").<sup>8</sup> This amendment is to harmonize the PPTA with the PIA. It is pertinent to note that the petroleum industry currently operates two legal regimes. Holders of the Oil Mining Lease (OML) and Oil Prospecting License (OPL) are subject to the PPTA and are liable to pay tax at the rate of 85% or 65.75% of the chargeable profits<sup>9</sup>. Whereas under the PIA, the holders of the new Petroleum Prospecting License ("PPL") and Petroleum Mining Lease ("PML") are liable to pay hydrocarbon tax<sup>10</sup> at the rate of: (i) 30% of profits from crude oil for a PML<sup>11</sup> in onshore and shallow water areas; and (ii) 15% of profits from crude oil for a PPL in onshore and shallow water areas. The PIA allows the conversion from OPL to PPL and from OML to PML<sup>12</sup>. Upon conversion, the holder of the PPL or PML will benefit from the new fiscal provisions and tax rate under the PIA.

**Allowable deductions and additional chargeable taxes:** Section 10 of the PPTA was amended to include a provision that allows for tax deductions for amounts contributed to a fund, scheme, or arrangement approved by the Commission for the purpose of decommissioning and abandonment.<sup>13</sup> This amendment is in order to bring the PPTA in line with the provisions of section 233(12) of the PIA, which provides that any excess monies contributed a fund will be given back to the licensee or lessee<sup>14</sup>.

Section 23 of the PPTA was also amended to include provisions for calculating additional chargeable tax when the amount of chargeable tax is less than a

certain amount. It also includes a provision for determining the total value of chargeable oil (which is the sum of the multiplications of volume and fiscal oil price as established by the Commission at the measurement point) as well as a provision for deeming a particular company to have exported or sold its chargeable oil.<sup>15</sup> This amendment is to make the provisions of the PPTA essentially align with the PIA<sup>16</sup>.

**Preparation and delivery of accounts and particulars for petroleum operators:** Section 30 of the PPTA was substituted with a new provision which now includes requirements for companies engaged in petroleum operations to make up accounts of their profits or losses for each accounting period and to deliver them to the Federal Inland Revenue Service ("FIRS"), along with evidence of payment of the final installment. Companies that fail to comply with these requirements are subject to penalties. Additionally, new companies and those that have not yet commenced bulk sales or disposal of chargeable oil must file their audited accounts and returns within a certain timeframe – within 18 months from the date of its incorporation for a newly incorporated company and within five months after any period ending on 31 December of the following year in the case of any other company. These alterations are in line with section 277 of the PIA. The PIA in section 277(1)(d) and (g) mandates a holder to provide a schedule showing total production allowance from every field of its upstream operations relating to crude oil and the computation of chargeable tax for that period, but these provisions are not reflected in the Act.

**Penalties for offences:** The Act modifies the provisions of sections 51, 52 and 53 of the PPTA. The new sections 51 and 52 outline administrative penalties and fines for non-compliance with the PPTA or Regulations, as well as penalties for making

<sup>8</sup> Section 14 of the FA.

<sup>9</sup> Section 21 (1) & (2) of the PPTA.

<sup>10</sup> Hydrocarbon tax applies to crude oil, field condensates and natural gas liquids derived from associated gas and produced in the field upstream of measurement points.

<sup>11</sup> Section 267 (a) of the PIA.

<sup>12</sup> Section 92 (1) of the PIA.

<sup>13</sup> Section 15 of the FA

<sup>14</sup> Section 233(12) of the PIA.

<sup>15</sup> Section 16 of the FA

<sup>16</sup> Section 268 of the PIA

incorrect accounts or giving false or misleading information. Section 53 was amended to increase penalties for false statements and returns from ₦1,000 or 6 months imprisonment to ₦15,000,000 and 1% of the amount of tax which had been undercharged as a result of the incorrect account.

### **Amendments to the Stamp Duties Act (SDA)**

**Distribution formula for Electronic Money Transfer Levy (“EMTL”):** The Act substituted the provisions of section 89A (4) of the SDA with a new provision outlining a distribution ratio for revenue generated from EMTL<sup>17</sup>. The distribution will be based on derivation, and it mandates that 15%, 50%, and 35% of the revenue is accruable to the Federal Government and the Federal Capital Territory, State Governments, and Local Governments respectively. Prior to this amendment, revenue from EMTL were shared between the Federal Government and State Governments in the proportion of 15% and 85% respectively. With this amendment, Local Governments now have sharing participation in revenues generated from EMTL.

### **Amendments to the Value Added Tax Act (VATA)**

**Powers of the FIRS to investigate artificial transactions:** The Act amends section 7 of the VATA by adding new subsections (3)-(5) empowering the Service<sup>18</sup> to disregard a disposition<sup>19</sup> it believes not genuine or is an attempt to reduce or avoid tax liabilities; or direct appropriate adjustments be made to tax liability to counteract the reduction of taxes in such instances. The taxpayer concerned has the right to appeal against such directions.<sup>20</sup>

**Power to appoint tax agents:** Section 14 (3) of the VATA has also been amended to allow the Service to appoint any person to withhold or collect taxes and remit the taxes collected on or before the 14<sup>th</sup> day of the following month. This provision is a modification of the 21 days remittance period by an agent provided

by the Finance Act 2021. Section 16 of the VATA has also been amended by adding a new subsection (3). This subsection requires importers of taxable goods purchased through an online platform operated by a non-resident supplier, who has been appointed as an agent of the service for tax collection, to provide proof of registration and other required documents at the point of clearing the goods. It is our view that coordination between the tax authority and the Nigerian Customs Service is necessary to avoid double taxation.

**VAT on items excluded from building:** Section 46 of the VATA amended the definition of "building" to include any structure permanently affixed to land for all or most of its useful life, such as houses, hospitals, factories, warehouses, and excludes any fixtures or structures that can be easily removed from the land, such as transmission lines, vehicles, and mobile homes.

### **Amendments to the Tertiary Education Trust Fund (Establishment e.t.c) Act (TET Fund Act)**

**Increment in education tax rate:** The Act has amended section 1(2) of the TET Fund Act which mandates companies to pay 2.5% of their annual assessable profit as tertiary education tax, by increasing the percentage payable to 3%. While this provision has the potential to greatly benefit education in Nigeria, the increase in the tax rate from 2.5% to 3% creates additional financial burdens for companies.

### **Amendments to the Corrupt Practices and other Related Offences Act (CPORO Act)**

**Penalty for bribery for giving assistance in regard to contract:** The Act has substituted section 22 (4) of CPORO Act to create an offence for public officers signing or awarding contracts without proper budget provision, administrative approvals, and procurement plan. The penalty for such offence is three years imprisonment or a fine of ₦10,000,000.

<sup>17</sup> This levy is generated on electronic receipts or electronic transfer for money deposited in any deposit bank or financial institution.

<sup>18</sup> Federal Inland Revenue Service

<sup>19</sup> trust, grant, covenant, scheme arrangement, transaction

<sup>20</sup> Section 22 of the FA

This amendment appears to be aimed at deterring public officers from arbitrarily authorizing or incurring unjustified expenditures and would ensure greater accountability in the award of governmental contracts.

### **Amendments to the Public Procurement Act (PPA)**

**Fundamental principles for procurement:** Section 16 (1) of the PPA was amended by the addition of a new paragraph "(b)" which indicates that procurement plans must be based only on budgetary appropriations, and no procurement proceedings should take place until the procuring entity obtains a "Certificate of 'No Objection' to Contract Award" from the Bureau. This amendment is aimed at addressing bureaucratic impediments in procurement laws to accelerate procurement processes and to promote, accountability, efficiency, transparency, and fairness in the procurement processes of the government which may ultimately bring about reform in public finance management.

### **Amendments to the Ministry of Finance (Incorporated) Act (MOFA)**

New subsections "(3)", "(4)" and "(5)" have been added to section 3 of the MOFA, to establish a Governing Council, an Executive Board, and a Management Team appointed by the President for good governance, administration, strategic direction, and day-to-day management of the corporation. The Act requires the Corporation to develop, adopt and amend regulations, codes, internal guidelines, and procedures consistent with the MOFA, and consult with the minister of finance prior to the adoption of any initial regulations, internal guidelines and procedures. The provision for consultation with the minister of finance prior to the adoption of any initial regulations, internal guidelines, and procedures ensures that the Corporation's actions align with government's financial policies and objectives.

### **Conclusion**

The government's plan to bring Nigerian tax laws in line with global standards is quite commendable as this demonstrates a strong commitment to creating a fiscal framework that can meet its revenue targets and budget objectives. However, looking forward, it is critical to review some of the ambiguous and excessive provisions in the FA that could negatively affect businesses. While the government aims to raise revenue to meet budget objectives, it would be beneficial to simplify the numerous taxes payable by companies to ensure tax compliance and management.

Another key issue which may likely generate controversy is the effective date of the FA. The consistent view of the courts is that every statute is prospective unless it is expressly stated that it is retrospective. The Federal High Court sitting in Abuja in a recent decision in *Accugas Limited v FIRS & Anor*<sup>21</sup> held that the FA 2019 cannot retrospectively apply to periods, transactions and activities and income earned prior to 13 January 2020 when the Act was assent to. However, it will be interesting to see how the FIRS would apply these changes introduced by the FA.

### **Disclaimer**

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<sup>21</sup> FHC/ABJ/CS/1289/2020 delivered on 27 June 2022 per Hon. Justice N.E Maha

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