

**THE INTERVENTION OF FINANCE ACT ON TAXATION
OF NON-RESIDENT COMPANIES IN NIGERIA: AN
APPRAISAL**

Anushiem, Uchenna Maryjane Esq.*

Abstract

Tax is legal civil responsibility imposed by the government to her citizens, either individuals or corporate bodies with a view to raising funds to finance its responsibilities economically, socially and politically. Non- resident companies are companies or entities that are not registered or incorporated in Nigeria but derives income or profits from persons resident in Nigeria in any kind of business it ventures into. The aim and objective of this work is to discuss the intervention of Finance Act on taxation of non-resident companies in Nigeria. Prior to the Finance Act, the basis for taxation of non-resident companies is that the company must have a fixed base or permanent establishment in Nigeria before the company will be liable to pay companies income tax in Nigeria. The Finance Act 2019 and 2021 amended the Companies Income Tax Act (CITA) by introducing new sections which subjected digital transactions of non-resident companies to tax in Nigeria. The Finance Act provides that the profit of a company other than a Nigerian company from any trade or business shall be deemed to be derived from and taxable in Nigeria

* **Anushiem, Uchenna Maryjane Esq., B.A (Hons), LLB (Hons), BL, LL.M** Doctoral student, Faculty of Law, Chukwuemeka Odumegwu Ojukwu University, Igbariam Campus, Anambra State, Nigeria. TEL: 08062139786 Email: uchennamaryjaneanushiem@gmail.com.

where the company transmits, emits or receives signals, sounds, messages, images or data of any kind by cable, radio, electromagnetic systems or any other electronic or wireless apparatus to Nigeria in respect of any activity including electronic commerce, applications store, high frequency trading, electronic data storage, online adverts, participative network platform, online payments and so on, It also extended to furnishing of technical, management, consultancy or professional services outside of Nigeria to a person resident in Nigeria. The widening of the scope of taxation of non-resident companies in Nigeria will no doubt create a lot of tax opportunities for the Federal Inland Revenue Service and government of the Federal Republic of Nigeria. This is because taxing the income of these non-resident companies will generate adequate revenue for the government of the Federal Republic of Nigeria, widen the tax net and move the Nigerian economy from an oil-based economy to a tax based economy. Having seen the provisions of the Act before and after the enactment of the Finance Act and the advantages that are abound in taxing the income and profit of these non –resident companies, this paper went further to make the following recommendations which are adequate implementation of the use of digital technology to ensure tax compliance, recruitment of IT experts, mandatory use of Tax Identification Number (TIN) for Non-Resident Companies, identification of the income of these non-resident companies.

Keywords: taxation, finance act, non-resident companies and nigeria

ANUSHIEM: The Intervention of Finance Act on Taxation of Non-Resident Companies in Nigeria: An Appraisal

1. Introduction

Tax as a compulsory levy which a government imposes on its citizens to enable it obtain the required revenue to finance its activities. There is no government that can do without imposition of tax, this is because tax boost revenue generation. Non- resident companies are companies or entities that are not registered or incorporated in Nigeria but derives income or profits from persons resident in Nigeria in any kind of business it ventures into.

Prior the Finance Act, the basis for taxation of non-resident companies is that the company must have a fixed base or permanent establishment in Nigeria before the company will be liable to pay companies income tax in Nigeria. However, by the intervention of the Finance Act¹, which amended the Companies Income Tax, the Act widened the scope of taxing non-resident companies in Nigeria by providing that,² where a non-resident company engage in digital activities where it transmits, emits, or received signals, sounds, messages, images, or data of any kind of cable, radio, electromagnetic system, or any other electronic or wireless apparatus to Nigeria in respect of any activity, including electronic commerce, application store, high frequency trading, electronic data storage, online adverts, such non- resident company has significant economic presence in Nigeria and such profit will be chargeable to tax³ in Nigeria.

¹ Finance Act 2019; Finance Act 2021

² Finance Act 2019 s. 4 (a) (i) Finance Act 2021 s. 4

³ Finance Act 2019 s. 4 (a) (ii)

The Companies Income Tax Act amended by the Finance Act 2021 further expands the scope to include non – resident companies that provides digital services, or technical, management consulting or professional services through digital platforms to have established significant economic presence in Nigeria through the provision these digital services.

The Act provides that a company, other than a Nigerian company, shall have a significant economic presence in Nigeria in any accounting year, where it thus:

- a. It derives gross turnover or income of more than ₦25 million or its equivalent in other currencies in that year, from any or combination of the following:⁴
- b. Streaming or downloading services of digital contents, including but not limited to movies, videos, music, applications, games, and e-books to any person in Nigeria
- c. Transmission of data, affected about Nigerian users which has been generated from such user’s activities on a digital interface including website or mobile application.⁵
- d. Provision of goods and services directly or indirectly through a digital platform to Nigeria, or provision of intermediation services through a digital platform, website or other online applications that link suppliers and customers in Nigeria;⁶
- e. Uses Nigerian domain name (.ng) or registers a website address in Nigeria, or

⁴ Companies Income Tax (Significant Economic Presence) Order 2020 s.1 (1) (2)

⁵ *Ibid.*.

⁶ *Ibid.*.

ANUSHIEM: The Intervention of Finance Act on Taxation of Non-Resident Companies in Nigeria: An Appraisal

- f. Has a purposeful and sustained interaction with persons in Nigeria by customizing its digital, page or platform to target persons in Nigeria, including reflecting the prices of its products or services in Nigerian currency or providing options for billing or payment in Nigerian currency.
- g. For the purpose of the provisions of sub-paragraph (1) of this paragraph, “any other electronic or wireless apparatus referred to in this section of the Act, includes digital or related activities carried on through satellite.”⁷

From the above it means that where non-resident company engages in any economic digital activities with persons and companies’ resident in Nigeria, the company will be liable to pay Company’s Income Tax (CIT) in Nigeria if it derives gross turnover or income of up to ₦25 million or its equivalent in other currencies. It will be deemed that the company has significant economic presence in Nigeria and as such will be chargeable to income tax in Nigeria.

2. Meaning of Tax

Tax is defined as a compulsory monetary charge imposed by government on persons, entities, transactions or properties to yield public revenue, embracing all governmental imposition on the person, property, privileges, occupations and enjoyment of the people and includes duties, levies and imports, but excluding penalties,

⁷ *Ibid.*

administrative fees and direct user charges.⁸ It is a compulsory exaction of money by a public authority or other prescribed authority for public purposes, enforceable by law and is not a payment for service rendered.⁹ It is legal civil responsibility imposed by the government to her citizens, either individuals or corporate bodies with a view to raising funds to finance its responsibilities economically, socially and politically.¹⁰

The Black's Law Dictionary defines tax as monetary charge imposed by government on persons, entities, transactions, or properties to yield public revenue.¹¹ It goes on to broadly define it as embracing all governmental impositions on persons, properties, privileges, occupations and enjoyment of the people, including duties, import and excises.¹²

Adesola in his book¹³ defines tax as a compulsory levy which a government imposes on its citizens to enable it obtain the required

⁸ O Obayemi, 'Tax Legislation in Nigeria and A Review of Recent Nigeria Court Decisions on Taxation' [2014] (5) (24) *Research Journal of Finance and Accountancy* 162.

⁹ O Animashaun, 'Contentions in the Allocation of Taxing Powers in Nigerian Federation: Lessons From Other Jurisdiction' (Ethiopia)', *LASU Law Journal*, [2018] (1) 71.

¹⁰ O C Nwachukwu and C J Okongwu, An Expository Review of checking Incidence of Tax Evasion and Tax Avoidance: Nigerian experience', *Chukwuemeka Odumegwu Ojukwu University Law Journal (COOUJ)* [2019] 5 (1) 230.

¹¹ B. Garner, *Black's Law Dictionary* (8th edn, St Paul MN, Thomson West, 2007) 1496.

¹² *Ibid.*.

¹³ S.M Adesola, *Tax Law and Administration in Nigeria: An Introduction*, (1st edn, Ile Ife, Obafemi Awolowo University press, 1998) 1.

ANUSHIEM: The Intervention of Finance Act on Taxation of Non-Resident Companies in Nigeria: An Appraisal

revenue to finance its activities. There is no government that can do without imposition of tax, this is because tax boost revenue generation. Tax is also defined under the Act¹⁴ to include any duty, levy or revenue accruable to the government in full or part under this Act or any other enactment or law. In *Fargo v wetz*¹⁵, the court stated that tax is any payment exacted by the state or its municipal subdivisions as a contribution towards the cost of maintaining governmental functions where the special benefit derived from their performance is merged in the general benefits.

It is an obligatory fee payable by members of a state from his income, property, and or business, to the government of the state for various state uses. It is mandatory, compulsory, obligatory and not discretionary. It is based on residency and not citizenship.¹⁶ Tax can also be defined to mean a compulsory levy imposed by the government or any of the recognized authority of a state on property, goods, services and people living in a given geographical area for the purpose of generating revenue to defray the expenses incurred by the government or authority on behalf of the people¹⁷ There is no doubt looking at the essential characteristics of tax, one can see that tax is compulsory, it is imposed by government or sovereign authority and the proceeds generated are usually intended for public purposes

¹⁴ Federal Inland Revenue Service (Establishment) Act 2007 S.69.

¹⁵ 5 ALR 731.

¹⁶ I.U Ibe, 'An Appraisal of the Legal and Institutional Framework for Tax Administration Nigeria', (PhD thesis Faculty of Law, Nnamdi Azikwe University, Awka, July 2021) 10

¹⁷ O.S Obatola, *The Rudiments of Nigerian Taxation*, (1st edn, Lagos, ASCO Publishers, 2014) p.1

however, if the primary purpose of tax is not to raise money but to encourage social justice within a community.^{18 19} Furthermore, taxation has been seen as a universally accepted contrivance for financing government services, whether in peace, war, depression or prosperity. It is also the process by which a government transfers resources from the private sector to the public sector. The government, whether at the federal, state, or local level has the responsibilities to meet the yearnings of the governed. This need of meeting the expectations of good governance in a modern society is the rationale for levying taxes.²⁰ It could also be seen tax is an enforceable monetary contribution backed by Legislative authority. As a result of the essential and obligatory nature of tax, it is a responsibility which every taxable person is obliged to render. The issue of tax is not a matter of choice, rather it is a legislative demand by government which is mandatory for all citizens who have attained a taxable age. Therefore, to have a complete definition of tax it must have the following characteristics:

- i) It is an imposition by Government
- ii) It is compulsory
- iii) It must have Legislative backing and

¹⁸ A Ipaye, *Nigeria Tax Law & Administration. A critical Review*, (1st edn London: Asco prime publications Ltd, 2014) P. 2.

¹⁹ C Okeke-Ogugua, "Legality of the privatization of Personal Income Tax Collection in Nigeria Appraised' *The Gravitas Review of Business and property Law Journal*, [2020] (11) (2) 112.

²⁰ M.J Goetz, and D.H Schen, *Federal Income Taxation: Principle and Policies* (4th edn, Fsn of Press, 2001) l.

ANUSHIEM: The Intervention of Finance Act on Taxation of Non-Resident Companies in Nigeria: An Appraisal

iv) It is for the support of Government²¹

While the Nigerian tax statute did not give a clear meaning of tax, some scholars clearly highlighted the characteristics of a tax viz:

- a) Tax is an imposition by a public authority by it federal, state or local government.
- b) Tax is mandatory and not conditional. Once a citizen falls under the category of taxable persons, the payment becomes compulsory and failure to do so is an offence.
- c) Tax usually is payment of money particularly cash or cheques. The tax system in most country does not allow for payment of any kind or set off but a direct payment.
- d) Tax is usually imposed by a sovereign within his jurisdiction and also for example Nigeria cannot impose tax on Gambian citizen and vice visa²²

3. Nature of Non-Resident Companies

A non-resident company can be defined as a company or an entity that is not registered or incorporated in Nigeria but derives income or profit from persons resident in Nigeria in any kind of business it ventures into.²³ Every company in Nigeria whether resident or non-resident company is liable to pay tax in Nigeria. Non-resident

²¹ 1.U Ibe, 'An Extermination of the Legal Regime for Taxation under the Nigeria Jurisprudence', *Chukwuemeka Odumegwu Ojukwu University, Journal of Private and public law (COOU JPPL)* [2019] 2 (1) 268.

²² A.M. Sani, 'An Appraisal of the Legal Framework for Taxation in Nigeria, *Journal of Law, Policy and Globalization*, [2022] 9 (1) .84.

²³ S. Queeva, 'Non-Resident Companies Taxation in Nigeria,' Queeva Advisory (2022) (1) (1) <Queeva.com/2022/07/14/resident-companies-taxation-Nigeria/ accessed on 3rd November 2022.

companies are liable to pay Companies Income Tax (CIT) in Nigeria on the aspects of their profits derived from Nigeria.²⁴ The Companies Income Tax Act²⁵ provides that the profit of a non-resident company shall be deemed to be derived from Nigeria in the following instances:

- i. Where the non-resident company has a fixed base in Nigeria to the extent that the profit is attributable to the fixed base.²⁶
- ii. If it does not have such a fixed base in Nigeria but habitually operates a trade or business through a person in Nigeria authorized to conduct on its behalf or on behalf of some other companies controlled by it or which have a controlling interest in it; or habitually maintains a stock of goods or merchandize in Nigeria from which deliveries are regularly made by a person on behalf of the company, to the extent that the profit is attributable to the business or trade or activities carried on through that person;²⁷
- iii. Where the profits of the non-resident company is derived from a turnkey contract.
- iv. Artificial transaction between related parties.²⁸

Having seen the above provisions of the Act, it is clear that where a non-resident company fulfills any of the following requirements such non-resident company would be liable to pay tax in Nigeria. Also, a non-resident company is liable to pay tax

²⁴ Blackwood stone; 'Basic Tax Compliance Requirements for non-resident entities,' Blackwood stone (2022) (1) www.blackwoodstone.com accessed on 3rd November 2022

²⁵ Companies Income Tax Act (Amended) 2007

²⁶ Companies Income Tax Act (Amended) 2007 (s. 13/2)

²⁷ *Ibid.*

²⁸ *Ibid.*

ANUSHIEM: *The Intervention of Finance Act on Taxation of Non-Resident Companies in Nigeria: An Appraisal*

in Nigeria on its profit attributable to the business or trade carried out in Nigeria. What it means is that where there are other branches of the company in other countries, profits made outside Nigeria will not be subjected tax in Nigeria.²⁹

More so, regarding payment of tax, the Company Income Tax did not discriminate between the residents and non-residents in the allowance of expenses for the purpose of determining the taxable income. It therefore follows that all rent, interest, royalties, expenses, etc are deductible if proved that they are wholly, exclusively, necessarily and reasonably incurred for the purpose of the trade or business.³⁰

3.1 Taxation of Non-Resident Companies before Finance Act

Prior to the enactment of the Finance Act,³¹ the basis for taxation of non-resident companies is that a non- resident company must have a fixed base in Nigeria before the company will be liable to pay companies income tax in Nigeria. The court in *JGC Corporation v Federal Inland Revenue Service*³² gave the meaning of fixed base to mean a “definite address” and to establish a fixed base in Nigeria within the meaning of statutory provision or any significant territorial connection to Nigeria will suffice if the Nigerian location is a place of regular resort for the foreign company for business purposes.³³ Also in *Shell Petroleum International Mattscgappij B.V. v Federal Inland*

²⁹ Blackwood stone, *op cit*.

³⁰ *Ibid*.

³¹ Finance Act 2019; Finance Act 2021

³² TAT/LZ/021/2012.

³³³³ A. Sanni, ‘A Compendium of Nigeria Tax Cases’ (1st edn, Lagos, Unilag Press 2019) 133.

*Revenue Service*³⁴, the court gave the meaning of fixed base under the Companies Income Tax Act (CITA) to connote residence or ordinary residence. The court went further to state there is no clear definition of fixed based, it must not be equated to residence or ordinary residence. The fact that a company is non-resident company and therefore not resident in Nigeria is not a sufficient excuse that it does not have a fixed base in Nigeria. Therefore, a foreign will be liable to Nigeria Company's Income Tax in so far it derives its income or profit in Nigeria. In *Offshore International S.A v Federal Board of Inland Revenue*,³⁵ the court held that a non-resident company is not exempted from paying company's income tax because it is not incorporated in Nigeria or not resident within Nigeria or because it has no office, fixed base or place of business in Nigeria, from the wordings of CITA, it is patent that the provision is very wide an all- embracing and it confers an almost unlimited power upon the revenue authority (Federal Inland Revenue Service) to charge to tax the profit of any company accruing in or derived from Nigeria, wherever in the world such profits are paid and for whatever kind of services that may have been rendered. In *Saipem Contracting (Nig) Ltd. v F.I.R.S.*,³⁶ the court held on when profits of a company other than Nigerian company from any trade or business deemed to be derived from Nigeria relying by the provisions of section 13 (2) of the Companies Income Tax Act. The profits of any company other than a Nigerian company from any trade or business shall be deemed to be derived from Nigeria.

³⁴ CA/L147/2000

³⁵ FRC/L/36/175

³⁶ [2019] 5 NWLR (Pt. 1664) 87

ANUSHIEM: *The Intervention of Finance Act on Taxation of Non-Resident Companies in Nigeria: An Appraisal*

- a. If that company has a fixed base in Nigeria to the extent that the profit is attributable to the fixed based.
- b. If it does not have such a fixed base in Nigeria but habitually operates a trade or business through a person in Nigeria authorized to conduct on its behalf or on behalf of some other companies controlled by it or which have a controlling interest in it; or habitually maintains a stock of goods or merchandise in Nigeria from which deliveries are gradually made by a person on behalf of the company, to the extent that the profit is attributable to the business or trade or activities carried on through that person and;
- c. If that trade or business or activities involves a single or contracts or surveys, deliveries, installations or construction the profit from the contract.³⁷

From the above provisions of the Act, the prior to the enactment of the Finance Act makes it mandatory for every non-resident companies doing business in Nigeria to have a fixed base in Nigeria. Meaning that these non-resident companies must have a permanent establishment before they can be liable to pay companies income tax and other taxes payable by them in Nigeria. What it means is that non-resident companies carrying out businesses to persons resident in Nigeria through digital platforms were not to pay income taxes in Nigeria.

³⁷ *Ikent Best (Nig) Ltd v A.G Rivers State* (2008) 6 NWLR (Pt. 1084) 612; *A.C.B Plc v Nwanna Trading Stores (Nig) Ltd* [2007] NWLR (Pt. 1016) 596; *Ajikawo v Ansaldo (Nig) Ltd* [1991] 2 NWLR (Pt. 173) 359.

3.2 Intervention of Finance Act on Taxation of Non-Resident Companies in Nigeria

On the issue of taxation of non-resident companies, the Finance Act 2019 amended the Companies Income Tax Act³⁸ and expanded the scope of taxation of non-resident companies in Nigeria, through various interventions.

The Finance Act 2019 amended the Companies Income Tax Act (CITA) by introducing new sections which subjected digital transactions of non-resident companies to Companies Income Tax in Nigeria. The Finance Act 2019, specifically provides that a non-resident company will be deemed to have derived profits from Nigeria and so taxable to tax in Nigeria if the company engages in any of these digital activities:

- i) If the company transmits, emits or receives signals, sounds, messages, images or data of any kind by cable, radio, electromagnetic systems or any other electronic or wireless apparatus to Nigeria in respect of any activity including electronic commerce, applications store, high frequency trading, electronic data storage, online adverts, participative network platform, online payments and so on, to the extent that the company has significant economic presence in Nigeria and profits can be attributed to such activity.³⁹
- ii) If the trade or business comprises the furnishing of technical, management, consultancy or professional services outside of

³⁸ Companies Income Tax Act (Amended) 2007.

³⁹ Finance Act 2019 S. 4 (a) (c)

ANUSHIEM: The Intervention of Finance Act on Taxation of Non-Resident Companies in Nigeria: An Appraisal

Nigeria to a person resident in Nigeria to the extent that the company has significant economic presence in Nigeria.⁴⁰

Provided that the withholding tax applicable to income under this paragraph shall be final tax on the income of a non-resident recipient who does not otherwise fall within the scope of subsection (2) (a) – (e)⁴¹.

The amendment of section 13 of the Companies Income Tax Act (CITA) by the Finance Act 2019 deals *inter alia* with taxation of non-resident companies in Nigeria, and it has introduced remarkable changes to the CITA. Other than the requirement that the non-resident company must have a fixed base in Nigeria through which it carries on business to be liable to tax in Nigeria with respect to that income, the Act has introduced other grounds or basis of liability especially as regards digital business transactions. From the above provisions of the Finance Act, it is clear that the profit of any non-resident company that transmits, emits or receives signals, sounds, messages, images or data of any kind by cable, radio, electromagnetic systems or any other electronic or wireless apparatus to Nigeria in respect of any activity including electronic commerce, application store, high frequency trading, electronic data store, online adverts, online payments and so on, are deemed derived from Nigeria and therefore liable to pay tax in Nigerian to the extent that the company has significant economic presence in Nigeria and the profit can be attributable to such activity. More so, the principle of having significant economic presence in

⁴⁰ Finance Act 2019 S.4 (e)

⁴¹ *Ibid.*

Nigeria as the basis for liability of the profits of non-resident companies to Nigerian tax has also been extended to any trade or business that comprises the furnishing of technical, management, consultancy or professional services outside of Nigeria to a person resident in Nigeria. This is to the extent that the company has significant economic presence in Nigeria and the profits can be attributable such activity. The Finance Act empowers the Minister of Finance to determine by an order what constitutes significant economic presence of a non-resident company in Nigeria.⁴²

The Finance Act 2019⁴³ mandates every company to have a Tax Identification Number (TIN) which shall be displayed by the company on all business transactions with other companies and individual and on every document, statement, returns, audited account and correspondence with revenue authorities including the Federal Inland Revenue Service, Ministries and all Government Agencies. It is clear from the above provision, that the Act makes it mandatory for every company both resident and non-resident companies operating or doing business in Nigeria to obtain a Tax Identification Number (TIN) from the Federal Inland Revenue Service (FIRS). This Tax Identification Number (TIN) must appear on every business transaction carried out by the company, every documents of the company, its audited account and annual its returns filed to FIRS. The economic benefits of this amendments under the Finance Act 2019 is that Nigeria can now tax online and digital business transactions and it will to great extent curb tax avoidance by these non-resident companies who take advantage

⁴² Companies Income Tax (Amended) Act 2007 S.13 (4); Finance Act 2019 S.4 (c)

⁴³ Finance Act 2019 S.10 (1)

ANUSHIEM: *The Intervention of Finance Act on Taxation of Non-Resident Companies in Nigeria: An Appraisal*

of the lacuna in our tax laws to avoid paying tax to the government of the Federal Republic of Nigeria.

The Finance Act 2020⁴⁴ provides that every company filing its annual return shall compute the tax payable by the company for the year of assessment; and forward with the tax return, evidence of payment of the tax due.⁴⁵ Where by a deliberate and dishonest act, the returns filed fail to declare the true and correct amount of profits or tax payable by the company, the company will be liable to pay any outstanding tax so identified and assessed.⁴⁶ The outstanding tax shall be subject to penalty and interest, in accordance with the provisions of this Act or any other relevant law, and the penalty and interest shall accrue from the date the incorrect return was filed.⁴⁷

From the above provision, the Finance Act 2020 mandates every company including non-resident companies carrying out online digital transactions to persons and companies' resident in Nigeria to file its annual return with the Federal Inland Revenue Service (FIRS). They are also mandated to compute the tax payable by these non-resident companies and forward the tax returns and evidence of payment of the tax due to FIRS. However, where these non-resident companies intentionally or deliberately files a return which does not declare the true and correct amount of profits made or tax payable by them. The

⁴⁴ Finance Act 2020

⁴⁵ Finance Act 2020 S.53 (1) (a) – (b)

⁴⁶ *Ibid.* S.53 (2)

⁴⁷ *Ibid.* S. 53 (3)

non-resident company will be liable to pay for the outstanding tax with an interest which serves as a penalty.

The Finance Act 2021⁴⁸ provides that the profit of a company other than a Nigerian company from any trade or business shall be deemed to be derived from or taxable in Nigeria where –

- a) The company has a fixed base of business in Nigeria to the extent that the profit is attributable to the fixed base;
- b) It does not have such a fixed base in Nigeria but habitually operates a trade or business through a person in Nigeria authorized to conduct on its behalf or on behalf of some other companies controlled by it or which have a controlling interest in it ; or habitually maintains a stock of goods or merchandise in Nigeria from which deliveries are regularly made by a person on behalf of the company to the extent that the profit is attributable to the business or trade or activities carried on through that person;⁴⁹
- c) It transmits, emits or receives signals, sounds, messages, images or data of any kind by cable, radio, electromagnetic systems or any other electronic or wireless apparatus to Nigeria in respect of any activity including electronic commerce, application store, high frequency trading, electronic data storage, online advertisements, participative network platform, online payment and so on to the extent that has significant economic presence in Nigeria and profit can be attributable to such activity, such non-resident company will be assessed and charged for that year of

⁴⁸ Finance Act, 2021 s.4.

⁴⁹ Finance Act, 2021 s.4 (b)

ANUSHIEM: The Intervention of Finance Act on Taxation of Non-Resident Companies in Nigeria: An Appraisal

assessment on such fair and reasonable percentage of that part of the turnover attributable to that presence⁵⁰

- d) The trade or business or activities involves a single contract for surveys, deliveries, installations or construction, the profit from that contract.
- e) The trade or business comprises the furnishing of technical, management, consultancy or professional services outside Nigeria to a person resident in Nigeria to the extent that the company has economic presence in Nigeria⁵¹.

Provided that the withholding tax applicable to the income under this paragraph shall be the final tax on the income of a non-resident recipient who does not otherwise fall within the scope of subsection 2 (a)-(d). From the above provision of the Act, it is very clear that where a non-resident company derives profit or income through engaging in any of the digital activities listed above, the non-resident company will be liable to pay tax in Nigeria.

However, what constitutes a significant economic presence was provided for under the Significant Economic Presence Order⁵² which amended section 13 (2) (c) of Companies Income Tax Act (CITA) by providing that a company, other than a Nigerian company shall have a significant economic presence in Nigeria where it –

⁵⁰ *Finance Act 2021* ss 4 (c) & 8

⁵¹ *Finance Act*, 2021 s.4 (d)&(e)

⁵² *Companies Income Tax (Significant Economic Presence) Order*, 2020.

- a. Derives gross turnover or income of more than ₦25 Million Naira or its equivalent in other currencies, in that year, from any or combination of the following:
 - i. Streaming or downloading devices of digital contents including but not limited to movies, videos, applications, games and e-books to any person in Nigeria⁵³.
 - ii. Transmission of data collected about Nigerian users which has been generated from such users' activities on a digital interface including website or mobile applications.
 - iii. Provision of goods or services other than those under sub-paragraph (5) of this paragraph, directly or indirectly through digital platform to Nigeria or.⁵⁴
 - iv. Provision of intermediate service through a digital platform, website or other online applications that link supporters and customers in Nigeria;
- b. Uses Nigerian domain name (.ng) or registers a website address in Nigeria; or⁵⁵
- c. Has a purposeful and sustained interactions with persons in Nigeria by customizing its digital page or platforms to target persons in Nigeria including reflecting the prices of its products or services in Nigeria currency or providing options for billing or payment in Nigerian currency.⁵⁶ For the purpose of provisions sub-paragraph (1) of this paragraph, any other electronic or wireless apparatus referred to in section 13 (2) (c)

⁵³ *Companies Income Tax (Significant Economic Presence) Order 2020 S.1 (1)*

⁵⁴ *Ibid.. S.1 (1) (a) (i) (ii) (iii)*

⁵⁵ *Ibid.. s.1 (1) (a) (iv) (b)*

⁵⁶ *Ibid.. s.1 (1) (C)*

ANUSHIEM: The Intervention of Finance Act on Taxation of Non-Resident Companies in Nigeria: An Appraisal

of the Act, includes digital or related activities carried on through the satellite.

It is also clear from the above provisions of the law that a non-resident company will be deemed to have significant economic presence where it derives gross turnover or income of more than ₦25 Million Naira or its equivalent in other currencies, through the downloading of digital contents like movies, videos, music, applications, games and e-books to persons resident in Nigeria. Also, where it derives income from provision of goods and services through digital platform to persons resident in Nigeria. By using a Nigerian domain name (.ng) or registering a website address in Nigeria and making a digital supply through a satellite.

More so, where a non-resident company makes a digital supply through the satellite to a company or persons resident in Nigeria it is expected that such company or person resident in Nigeria shall make tax deductions of value Added Tax or withholding tax where necessary and remit to Federal Inland Revenue Services (FIRS). This was illustrated in the case of *Vodacom Businesses Nigeria Ltd v Federal Inland Revenue Service*⁵⁷ The Appellant is a telecommunication company registered in Nigeria. The Appellant entered into a contract with New Skies Satellites [NSS], a company base in Netherlands for the supply of bandwidths capacities for the Appellant's use. Paragraph 3 of the contract of service between NSS and the Appellant states that the Appellant is solely responsible for any tax which may be assessed by local authorities. The Appellant did

⁵⁷ [2019] 44 TLRN 1 VOL 13 ALL NTC; I N.R.L.R 127

not remit VAT to the Respondent in respect of the contract. The Respondent, after tax audit, assessed the Appellant to VAT in respect of the transaction. The Appellant objected to no avail and appealed to the Tax Appeal Tribunal Lagos Zone.

The Appellant argues that since the bandwidth capacities were not supplied inside Nigeria, they were not vatatable. The Appellant pointed out that transmission of the bandwidth capacities to and from the satellite is done by the Appellant's transponder located in Nigeria. A satellite in an orbit which does not form part of Nigeria territory under international law and cannot constitute a fixed base for NSS in Nigeria. The NSS does not carry on business in Nigeria and not liable to register with the Respondent for tax purposes. Since obligation under section 10 VAT Act arises from the issuance of a tax invoice, it has no VAT to remit as NSS did not invoice it for VAT in respect to the transaction. The Appellant relied on *Gazprom Oil v. F.I.R.S.*⁵⁸

The respondent argued that any goods or services supplied in Nigeria is liable to VAT. Since the bandwidth could only be utilized once it is received at an earth-based station in Nigeria, the transaction qualifies as imported services and taxable in Nigeria. NSS meets the requirements of doing business in Nigeria by having a contract with the Appellant. Section 10 [2] of VAT Act places the burden of remitting VAT on the person to whom goods and services are supplied, hence it is the Appellant who is liable to remit tax not NSS and this duty is not dependent on NSS's registration with the Respondent or its duty to issue a tax invoice. The Respondent referred

⁵⁸ [2020] 3 N.R.L.R 128

ANUSHIEM: The Intervention of Finance Act on Taxation of Non-Resident Companies in Nigeria: An Appraisal

to paragraph 3 of the contract of service between NSS and the Appellant and argued that the Appellant is solely responsible for any tax which may be assessed by local authorities. The Respondent concludes that Gazprom's case is a good persuasive authority for holding that the destination principle under the International VAT / GST Guidelines applies to transactions such as this.

The court gave judgment in favour of the Respondent (F.I.R.S) and held that bandwidth is liable to VAT not being exempted goods or services. The court states that bandwidth is not exempted from VAT. VAT shall be charged and payable on the supply of all goods and services [in this Act referred to as "taxable goods and services"] other than those goods and services listed in the First Schedule to this Act. The 1st Schedule to the VAT Act lists goods [Part I] and services [Part II] exempted from VAT. That list does not include bandwidth capacities, the subject matter of the case.

The Finance Act⁵⁹ also amended the Federal Inland Revenue Service (Establishment) Act ⁶⁰by providing that the Federal Inland Revenue service (FIRS) may deploy proprietary or third party technology to automate the tax administration process including tax assessment and information gathering provided it gives 30 days' notice to the taxpayer.⁶¹

⁵⁹ Finance Act 2021

⁶⁰ Federal Inland Revenue Service (Establishment) Act 2007 s 25.

⁶¹ Finance Act, 2021 s. 1 8

The Federal Inland Revenue Service is a federal tax authority empowers to collect taxes payable by these non-companies who engage in economic digital transactions with persons resident in Nigeria and these taxes are collected ,the service remits to the Federal government. These digital transactions by its nature does not require having a fixed base or permanent establishment in Nigeria. That is why the act empowers the Federal Inland Revenue Service to deploy proprietary or third party technology to automate the tax administration process including tax assessment and gathering of information and data of these non-resident companies. This will enable the Federal Inland Revenue Service achieve an effective tax administration and ensure adequate compliance among these non-resident companies.

4. Conclusion

In conclusion hitherto, having a fixed base or a permanent establishment in Nigeria was the requirement for subjecting non-resident companies to pay companies income tax in Nigeria. However, by the intervention of the Finance Act, the Act widen the scope of taxing these non-resident companies by providing that a non-resident company will be deemed to have significant economic presence where it derives gross turnover or income of more than ₦25 Million Naira or its equivalent in other currencies, through the downloading of digital contents like movies, videos, music, applications, games and e-books to persons resident in Nigeria. Also, where it derives income from provision of goods and services through digital platform to persons resident in Nigeria. By using a Nigerian domain name (.ng) or

ANUSHIEM: The Intervention of Finance Act on Taxation of Non-Resident Companies in Nigeria: An Appraisal

registering a website address in Nigeria and making a digital supply through a satellite.

The Finance Act⁶² went further to provide that the profit of a non-resident company from any trade or business shall be deemed to be derived from or taxable in Nigeria where if the non-resident company transmits, emits or receives signals, sounds, messages, images or data of any kind by cable, radio, electromagnetic systems or any other electronic or wireless apparatus to Nigeria in respect of any activity including electronic commerce, application store, high frequency trading, electronic data storage, online advertisements, participative network platform, online payment and so on

By expanding the scope of taxation of non-resident companies in Nigeria, no doubt will create a lot of tax opportunities for the Federal Inland Revenue Service and government of the Federal Republic of Nigeria. This is because taxing the income of these non-resident companies will generate adequate revenue for the government of the Federal Republic of Nigeria. Taxing the income of these non-resident companies will widen the Nigerian tax net by bringing more non-resident digital taxpayers into the Nigerian tax net. And it will also move the Nigerian economy from an oil-based economy to a tax based economy.

Having seen the provisions of the Act before and after the enactment of the Finance Act and also the advantages that are abound in taxing

⁶² Finance Act 2019; Finance Act 2020.

the income and profits of non –resident companies, this paper has gone further to make the following recommendations.

5. Recommendations

This paper makes the following recommendations:

i) Adequate Implementation of the use of Digital Technology to ensure Tax Compliance

There is need for the Federal Inland Revenue Service (FIRS) to make adequate use of technology to increase tax compliance among non-resident companies carrying out digital economic activities with persons resident in Nigeria. This is because these digital activities are done through the internet and does not require physical presence. The Federal Inland Revenue Service should use different technology tools to ensure tax compliance among these non-resident companies.

ii) Recruitment of IT experts

There is need for the Federal Inland Revenue Service (FIRS) and the government to employ Information technology experts who have the requisite skills to manage the technology migration and also working with IT experts will ensure maximum use of technology tools.

iii) Mandatory use of Tax Identification Number (TIN) for Non-Resident Companies

There is need to mandate these non-resident companies to obtain Tax Identification Number (TIN) with the Federal Inland Revenue Service(FIRS). This is because for Federal Inland Revenue Service to effectively tax these non-resident companies, every taxable non-resident company must be identified with the Federal Inland Revenue

ANUSHIEM: The Intervention of Finance Act on Taxation of Non-Resident Companies in Nigeria: An Appraisal

Service. In order to achieve this, every taxable non-resident company must obtain a Tax Identification Number with the Federal Inland Revenue Service (FIRS).

iv) Identification of the Income of these Non-Resident Companies

There is need to identify the income of these non-resident companies in Nigeria. In order to achieve an effective tax administration and enforcement in Nigeria, proper identification of these non-resident companies' income must be done by Federal Inland Revenue Service (FIRS).