

**AN EXAMINATION OF THE LEGAL FRAMEWORK FOR ELECTRONIC COMMERCE
TAXATION IN NIGERIA: THE FINANCE ACT 2019 IN PERSPECTIVE***

Abstract

Electronic commerce is the marketing, selling and buying of products and services on the internet. Prior to the enactment of the Finance Act 2019, the Nigerian Tax law and regime did not envisage the emergence of electronic commerce and online transactions of economic nature. The reality however is that there has been advancement in Information and Communications Technology (ICT) worldwide thus making the world a global village. The rate of transactions of taxable nature that are carried out virtually is increasing by the day and as without the legal framework for its taxation, they escape taxation by the Nigerian Government and this is a revenue loss to the Government. This paper examined how e-commerce was taxed prior to the enactment of the Finance Act 2020 and how the Act has brought e-commerce into the Nigerian tax net whether it is transactions between Nigerians or non-Nigerian residents and a Nigerian resident. This paper examined the framework for taxation of electronic commerce under four major tax laws, that is, Personal Income Tax Act, Companies Income Tax Act, the Value Added Tax Act and the Finance Act. The authors adopted the doctrinal research methodology. Theorizing with the aid of laws, books and case laws the paper highlighted the position of these tax laws on e-commerce taxation and made suggestions on how these laws can be improved to ensure that Nigeria as a developing economy does not lose out on the revenue that e-commerce generates.

Keywords: E-commerce, taxation, digital economy, value added tax, non-resident companies.

1. Introduction

Electronic commerce alternatively known as e-business, e-commerce or internet commerce is generally considered to involve the use of electronic systems such as the Internet and other computer networks to facilitate the production, distribution, sale, and delivery of goods and services¹. The World Trade Organization (WTO) defines e-commerce as performing production, advertisement, selling, and distribution of goods and services over telecommunication networks². The Organization of Economic Cooperation and Development (OECD)³ defines e-commerce activities as those transactions that associations and individuals perform, that are related to trade, and grounded in transmission of digitized data, such as text, audio, or video, over open or closed networks⁴. United Nations Commission on International Trade Law (UNCITRAL) defines e-commerce as exchange of every kind of data message in the scope of commercial activities.⁵ The Chartered Institute of Taxation of Nigeria (CITN)⁶ made a distinction between e-commerce which was generally defined as the marketing, selling and buying of products and services on the internet, and e-business which was defined as the use of electronic information to improve performance, create value and enable new relationships between businesses and customers.

E-commerce therefore is the conduct of commercial transactions whether buying or selling of goods and services or entering into other transactions of commercial nature, carried out through the instrumentality of the internet. There is a shift from a physically-oriented commercial environment to a technology-driven electronic environment; this shift poses serious and substantial issues in relation to taxation and taxation regimes.⁷ Tax administrators throughout the world face the formidable task of protecting their revenue base without hindering

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¹CE McLure, Jr., *Taxation of Electronic Commerce in the European Union* (California USA: Hoover Institution, Stanford University 2001) www.citeseex.ist.psu.edu/down accessed 12 January 2020.

²WTO General Council, Work Programme on Electronic Commerce, adopted by the General Council on 25 September 1998, 30 September 1998 WT/L/274, retrieved from http://www.wto.org/english/tratop_e/ecom_e/wkprog_e.html accessed 30 January 2020.

³The Organization is dedicated to economic development and consists of 35 member nations e.g. Australia, Canada, Germany, France, United Kingdom, United States e.t.c, Nigeria is not a member but recently, on 14 June, 2017 the Federal Executive Council (FEC) approved a memo submitted by the Minister of Finance seeking inclusion as a signatory to the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting. <http://investadvocate.com.ng/2017/06/29/nigeria-sign-oecd-multilateral-instrument-will-automatically-amend-existing-tax-treaty/> accessed 12 January 2020.

⁴OECD, 'Update of the OECD Statistical Definition of E-commerce', Report DSTI/ICCP/IIS(2009)5/FINAL(2010).

⁵The United Nations Commission on International Trade Law, Model Law on Electronic Commerce, GA/Res/51/162, 30 January, 1997 Article 1.

⁶ CITN, 'Taxation within the context of Globalization' (2001) *Tax Planning International E-commerce Journal*, VOL.3 Number 7, 2.

⁷ Richard Jones & Subhajit Basu, Taxation of Electronic Commerce: A Developing Problem, (2002) Vol. 16 No. 1, *International Review of Law Computers & Technology*, p.35

the development of new technologies⁸. In Nigeria, e-commerce presents enormous challenges to the tax regime, which focuses on territorial and personal bases of tax jurisdiction. These challenges stem from the very basic character of e-commerce as global, borderless, virtual, and anonymous.⁹

In Nigeria, a person can conveniently start an internet business by getting a domain name and hosting a website, this does not require a physical place of business. The tax implication is that the tax authority is oblivious of the quantum of taxable transactions conducted and they escape taxation. At this stage tax identification of this business and person can only be possible with the cooperation of National Information Development Agency. This agency is empowered by their Act¹⁰ to register domain names, online businesses operate through the registration of a domain name hosted on a website, thus, if at the point of registration it is ascertained that the it is for a business, at that point a tax identification number can be generated for the website and thereafter the tracking of the quantum of e-commerce carried out thereat would be facilitated and same will aid their taxation. The functions of the agency are stated in section 6 of the Act.¹¹

2. Companies Income Tax and E-commerce

Companies pay tax for income or profit derived from, accrued in, received in or brought into Nigeria¹². These words used in the charging provision of the CITA are to define tax payable by companies in Nigeria. The expression ‘accruing in’ occurs in many tax enactments of common wealth countries and this has always been construed to mean ‘becoming due and payable’¹³ Any income due and payable in Nigeria is therefore subject to taxation except they are exempted. Companies in keeping in touch with global trends have taken their businesses online. Some have introduced new products to their customers that were at the time of their incorporation not contemplated. An example is internet banking, this is e-commerce, and the practice is that these companies are taxed for their profits cumulatively whether accrued as an e-commerce transaction or not. For companies already paying their company tax, the extent to which e-commerce taxation will be relevant to them is for the purpose of ascertaining the profits they derived from e-commerce specifically. The bigger challenge lies with companies established solely for the purpose of carrying out e-commerce, most of them are without a physical address that the taxing authority can locate for the purposes of remitting companies income tax. This latter category can only be brought into the tax net through the collaboration of the taxing authority and NITDA.

Section 13 (1)¹⁴ provides that the profits of a Nigerian Company shall be deemed to accrue in Nigeria wherever they have arisen and whether or not they have been brought into or received in Nigeria. Prior to the enactment of the Finance Act¹⁵ the extent to which the profit of a non Nigerian company is liable to taxation in Nigeria is if they have a fixed base in Nigeria. The requirement of a fixed base in itself excludes profit generated through e-commerce, given the virtual nature of e-commerce. To remedy this, section 4 of the Finance Act amended Section 13 of the CITA by adding a new paragraph (c) which brings the profit of a non Nigerian company under the Nigerian tax net if transmits, emits or receives signals, sounds, messages, images or data of any kind by cable, radio, electromagnetic systems or any other wireless apparatus to Nigeria in respect of any activity including electronic commerce (emphasis ours), application store, high frequent 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 profit can be attributable to it. E-commerce between Nigerians, Nigerian Company and non Nigerian companies are taxable in Nigeria. Such company’s profits as highlighted above are also subject to tax as long as it has significant economic presence. Although the Act does not define what constitutes significant economic presence, the Minister of Finance is however empowered under the Act to establish guidelines as to what constitutes significant economic presence, certainly it will involve quantum of transactions that confers some economic benefit or lead to profit.

3. Personal Income Tax and E-commerce

Personal Income Tax is regulated by Personal Income Tax Act¹⁶ and it subjects to tax income of every taxable person whether individuals, communities, or income arising or due to trustee or estate, which shall be determined

⁸R Jones, et al, Taxation of Electronic Commerce: A Developing Problem, (2002) Vol. 16 No. 1, *International Review of Law Computers & Technology*, p.55

⁹R Azam, ‘E-Commerce Taxation and Cyberspace Law: The Integrative Adaptation Model (2007)’ Vol.12, (No. 5) *Virginia Journal of Law & Technology*, p.3.

¹⁰National Information Technology Development Act, 2007

¹¹ National Information Development Agency Act, 2007.

¹²Section 9 of the Companies Income Tax Act, Cap C21, Laws of the Federation 2004

¹³JN Elegido ‘Income Taxable in Nigeria’ *The British Tax Review* No. 1 (London: Sweet and Maxwell, 1990) 39

¹⁴ CITA op cit S.13

¹⁵ The Finance Act, 2019 which was gazette and the commencement date 13 January 2020.

¹⁶ Cap P8 2004 as amended by Act No.20 2011 (subsequently referred to as PITA)

under and be subject to the provisions of the Act¹⁷. Section 3 is the charging provision of the Act and enacts as follows: 3(1) Subject to the provisions of this Act, tax shall be payable for each year of assessment on the aggregate amounts each of which is the income of every taxable person, for the year, from a source inside or outside Nigeria, including, without restricting the generality of the foregoing-

- (a) gain or profit from any trade, business, profession or vocation, for whatever period of time such trade, business, profession or vocation may have been carried on or exercised;
- (b) any salary, wage, fee, allowance or other gain or profit from employment including compensations, bonuses, premiums, benefits or other prerequisites allowed, given or granted by any person to any temporary or permanent employee other than so much of any sums as or expenses incurred by him in the performance of his duties, and from which it is not intended that the employee should make any profit or gain.
- (c) gain or profit including any premiums arising from a right granted to any other person for the use or occupation of any property;
- (d) dividend, interest or discount;
- (e) any pension, charge or annuity;
- (f) any profit, gain or other payment not falling within paragraphs (a) to (e) inclusive of this subsection.

The wording of the charging provision of PITA clearly made no provision nor alluded to profits or gain realised from e-commerce. Since the Act was made before e-commerce came on board it can be argued that gain/ profits made from any trade or business not being that contemplated in the Act should not be subjected to tax. The Finance Act although made changes to PITA, none relates to revenue generated by individuals through e-commerce. This notwithstanding, gains or profits made in trade or business by an individual whether traditional trade methods or through e-commerce is still subject to personal income tax.

4. Value Added Tax (VAT) on Electronic Commerce

VAT is a consumption tax payable on all goods and services except those exempted under the VAT Act¹⁸ consumed by any person whether government agencies, business organizations or individuals. Prior to the enactment of the Finance Act, Section 2 of the VAT Act did not make mention of the method in which the supply of goods and services should be carried out and therefore there was no obligation, at least not by the construction of the VAT Act for e-commerce businesses to charge and pay VAT¹⁹ So, Nigerian companies that received supply of goods and services from non Nigerian resident companies always contended that VAT should not be paid on those transactions. These issues were contended in *FIRS v Gazprom*²⁰, Gazprom received consultancy and advisory services on an on-going basis with respect to their business interest in different African Countries from non-resident companies and they paid the non-resident companies. Gazprom did not remit VAT on the transactions to FIRS and when FIRS alleged VAT liabilities they contended that it was not liable to pay VAT on the transaction since the non-resident companies were not doing business in Nigeria and as such they cannot be liable to pay VAT on their transactions with non-resident companies. The Tax Appeal Tribunal agreed with them and gave judgment in their favour. On appeal to the Federal High Court by the FIRS, the court up turned the judgment of the Tribunal and held that parties did not contest that the services were supplied to a Nigeria company and that since Section 12 of the VAT Act to imposes VAT on the final consumer, the company, Gazprom, should bear the VAT liability.

Similarly, in *Vodacom v FIRS*²¹ a Netherlands based company supplied bandwidth capacities to Vodacom and Vodacom contended that it was not liable to pay VAT on the service mainly on the ground that they received the services through its transponders which conducted the bandwidth from the orbit without any physical presence. The Court disagreed with their submission and held that Section 2 and 10 of the VAT Act, 'supplied in Nigeria' does not only mean physical presence but can be extended to circumstances that supply is made in Nigeria without physical presence. It is worthy of note that the courts were being proactive in these decisions as the VAT Act itself was not explicit on the nature of supply that should be subject to VAT. This lacuna has been corrected by the amendment of section 2 of the VAT Act by section 33 of the Finance Act. The said section enacts:

2(1) The tax shall be charged and payable on the supply of all goods and services in Nigeria other than those listed in the First Schedule to this Act

¹⁷Section 1 PITA

¹⁸First schedule of the Value Added Tax Act, LFN, 2004 exempts 9 items e.g. all medical and pharmaceutical products, basic food items, books and educational materials, baby products etc.

¹⁹ M Ndajiwo, ' E-commerce Taxation: A Framework to broaden the Tax Base in Nigeria, African Tax Research Working Paper 16, May 2016.

²⁰ Federal Inland Revenue Service vs Gazprom Oil and Gas Nigeria Limited (Suit No. FHC/ABJ/TA/1/2015)

²¹ Vodacom Business Nigeria Limited vs Federal Inland Revenue Service (Appeal No. CA/L.556/2018)

- (2) For the purposes of this Act, goods and services shall be deemed to be supplied in Nigeria if-
- (a) in respect of goods-
 - (i) the goods are physically present in Nigeria at the time of supply, imported into Nigeria for use by a person, assembled in Nigeria or installed in Nigeria, or
 - (ii) the beneficial owner of the rights in or over the goods is a taxable person in Nigeria and the goods or right is situated, registered or exercisable in Nigeria;
 - (b) in respect of services-
 - (i) the services are rendered in Nigeria by a person physically present in Nigeria at the time of service provision , or
 - (ii) the services are provided to a person in Nigeria, regardless of whether the services are rendered within or outside Nigeria..

Nigeria has therefore by the Finance Act, like several nations have made provision for the taxation of e-commerce within their borders relying on the place of supply principle²² and efficiently surmounted the challenge of taxation where e-commerce is conducted between Nigerian resident and non- resident²³. Consequently, when service is supplied and enjoyed by a customer based in Nigeria, such service is subject to VAT. There is an argument however that Circumstances may arise where services start in Nigeria and conclude outside Nigeria or where a service is entirely carried-out outside Nigeria. In any case once commercial activities encroach into another jurisdiction such activity becomes liable to taxes of that jurisdiction. If Nigerian VAT would apply to services rendered outside Nigeria, this may lead to double taxation and extension of the Nigerian VAT Act. The author expressed the view that the Nigerian VAT should focus more on capturing services carried out in Nigeria whether the services are carried out physically in Nigeria or without physical presence but supplied within the Nigerian space or cyberspace²⁴.

5. Conclusion and Recommendations

The enactment of the Finance Act 2019 with specific provisions for the taxation of digital economy among other things is a step in the right direction, its implementation has tremendous prospects for revenue generation in Nigeria. It behooves the Federal Inland Revenue Service to ensure that it strengthens its tax administration and implementation policies. For Non- resident Companies, involved in e-commerce, they should be required to register and file tax returns as provided under section 55 of the Companies Income Tax Act. Where the Non-resident Company fails to include VAT in their invoice, the Nigerian recipient of a service that is VATable has a duty to withhold VAT and account for it to the taxing authority. The Minister of Finance as mandated under the Finance Act 2020 should issue guidelines as to what constitutes the threshold of Strong Economic Presence. This will aid in determining Non-residents Company's liability to tax in Nigeria. It is also recommended that the Federal and States' Inland Revenue Services partners with governmental and non-governmental agencies like National Information Technology Development Agency (NITDA), the Nigerian Internet Association (NIRA), The Economic and Financial Crimes Commission (EFCC), Banks, E-payments companies such as Interswitch and Quickteller, all Internet Service Providers (ISP), Telecommunications Networks and all E-commerce stakeholders to track e-commerce transactions for the purpose of taxing them.

²² UK, European Union and South Africa, collects tax for transactions where supply is made to their residents. The EU collects VAT for supply of goods and services made within the EU, Non-EU Companies register under a special scheme and remit appropriate VAT.

²³ This is because the issue of jurisdiction to tax will no longer arise.

²⁴Nnachi Dickson Okoro, 'Application of Nigerian Value Added Tax on services: Judicial Interpretations' <https://ssrn.com/abstract=3495876> accessed on 13 February 2020.