

NEW LEVY AND PROPOSED INCREASE IN VAT: NIGERIAN BUSINESSES AND CONSUMERS BRACE UP FOR 'NEXT LEVEL' IMPACT



Introduction

The Federal Executive Council at its meeting on 11th September, 2019 approved a proposal to increase the current rate of Value Added Tax (“VAT”) on taxable goods and services in Nigeria from 5% to 7.5%. This proposal comes shortly after President Muhammadu Buhari assented to the Nigeria Police Trust Fund (Establishment) Act (the “Act”) on 24th June, 2019 which imposes a levy of 0.005% on the “net profit of companies operating business in Nigeria”.

We have highlighted below some of the provisions of the Act and our thoughts, comments on the proposed increase in VAT and the possible impacts which these changes could have on companies doing business in Nigeria.

A new levy: Counting the cost

The Act, which establishes the Nigeria Police Trust Fund (the “Trust Fund”) to, among other things, provide funds for the training of personnel and procurement of facilities and security equipment for the Nigeria Police Force, imposes a levy of 0.005% on the “net profit of companies operating business in Nigeria” as contribution towards the Trust Fund (the “Levy”). Companies are required to comply with the requirements of the Act.

It is a laudable objective that the Federal Government of Nigeria (“FGN”) is taking steps to improve the security situation in the country by establishing the Trust Fund to finance the operations of the Nigeria Police Force. However, the imposition of the Levy on companies operating in Nigeria will increase the already cumbersome administrative bottlenecks around doing business in Nigeria. The Levy now adds to the already burdensome list of multiple taxes and levies payable by companies to various governmental authorities in Nigeria.

Not for ever!

One thing to note though is that the Trust Fund is to operate for a period of six years from the commencement date of the Act and will, at the expiration date of the period, cease to exist unless it is extended for a further period by an enactment of the National Assembly. The Act is currently silent on its commencement date which means that the date on which the presidential assent was given will be deemed to be the commencement date of the Act which, in this case, is 24th June, 2019. If the

Trust Fund is wound up, its assets and liabilities will be transferred to the Nigeria Police Force.

Tax deductible expense?

The Act does not contain any provision on the deductibility of the Levy for income tax purposes. Like some other FGN imposed levies which are expressly stated in the enabling statutes to be tax deductible expenses, we see no reason why the Levy should not be a tax deductible expense. The imposition of the Levy also places an additional administrative burden on the corporate tax payers as they have to factor into their compliance processes the remittance of the Levy. The need to comply with the Act will add to the number of existing agencies that are already breathing down the neck of companies for one form of, tax, levy or charge.

Our observations ...

From our review of the Act, we have identified several areas which are likely to affect compliance with, and the administration of, the provisions of the Act. First, the Act does not define what constitute “net profit” on the basis of which the Levy will be calculated to enable companies determine what portion of their profits that the Levy will apply to. In the absence of such definition, the ordinary meaning of the term should be ascribed to it and this could lead to different interpretations by corporate taxpayers. In our opinion, the use of “net profit” suggests that the Levy applies to a company's profit after tax. There is, therefore, a need for the FGN to provide clarity on this.

Secondly, given that the Levy is imposed on “companies operating business” in Nigeria and the term is not defined, it means that the Act applies to every company operating in Nigeria (irrespective of its size and turnover) and could also apply to non-resident companies which have permanent establishments in Nigeria. Thirdly, the Act is also silent on the penalties for non-compliance and this could increase the possibility of non-compliance by companies.

Lastly, although the Act provides that the Nigeria Police Trust Fund Board of Trustee (“Board of Trustees”) (which is responsible for the general maintenance, utilisation and administration of the Trust Fund) must open an account into which all the money accruing to the Trust Fund shall be paid, it is silent on the time within which the Levy must



be paid. In the absence of clarity on this, we believe that the payment of the Levy should be on an annual basis when a company is filing its tax returns – a similar way in which most other levies (imposed on companies by the FGN) are paid.

... plus other issues

Other administrative issues which corporate taxpayers are likely to face regarding the implementation of the Act include whether (a) returns should be filed with the Board of Trustees or the Federal Inland Revenue Service; and (b) the due date for filing such returns should be the same as when a company files its income tax returns etc.

We hope that the Board of Trustees, when it is eventually constituted by the President, will provide guidance generally on the implementation of the Act through the regulations which it is empowered to make (with the prior approval of the President) pursuant to the Act. In the meantime, corporate entities should take steps to ensure that they make provision for compliance with the requirements of the Act regarding the payment of the Levy, going forward.

... Enters VAT debate - Proposed increase in VAT rate

There have been discussions in the past year around FGN's plan to increase the VAT rate in Nigeria but no official position was communicated to the public until 11th September, 2019 when the Minister of Finance, Budget and National Planning (the "Minister") announced that the Federal Executive Council has approved the proposal to increase VAT rate from 5% to 7.5%. The Minister indicated that the increase will come into effect in 2020 and will be captured in the budget for that year. This will be after the National Assembly would have amended the relevant provision of the Value Added Tax Act 2004 (as amended) ("VAT Act"). The Minister further stated that the main rationale for the proposed increase is for the government to raise sufficient tax revenue that will enable State governments and Local Governments to

pay the increase in the new national minimum wage.

... and counting the potential cost of the increase

The proposed change in the VAT rate represents a 44% increase from the current rate. If the National Assembly agrees with the proposal and amends the VAT Act to reflect the increase, this will lead to an increase in the prices of taxable goods and services and would reduce the disposable income of consumers. It will also lead to an increase in the cost of doing business in Nigeria which will put more pressure on companies.

What could happen?

There was a push back when the FGN increased the VAT rate in 2007 to 10% which led to the subsequent reversal to 5% by the government. As such, there could be similar resistance when a proposal is sent to the National Assembly to effect the increase. The VAT Act appears to empower the Minister to, by order published in the federal gazette, amend the rate of VAT. We used the word "appears" because the section that empowers the Minister to increase the rate refers to the First Schedule and the VAT rate is not contained in the schedule but in section 4 of the VAT Act. The law does not empower the Minister to amend that section. It will be interesting to see if the Minister will seek to exercise that power if the National Assembly fails to amend the relevant provision of the VAT Act by 2020.

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