

CAPITAL GAINS TAX IN THE NIGERIAN CAPITAL MARKET AND STOCKS INVESTMENT UNDER FINANCE ACT 2021

- Bashir Ramoni, Partner

Introduction

It is now a well-established norm that tax laws are periodically reviewed in Nigeria in compliance with the National Tax Policy adopted by the Federal Executive Council in 2018¹. Starting from 2019, the National Assembly has always accompanied the Appropriation Act with the Finance Act with a view to stir the annual budget performance and control the economy using the fiscal tool. The Finance Act, depending on the macro-economic policy of the federal government in any financial and fiscal year, amends relevant tax laws and related statutes including the Capital Gains Tax Act². The Finance Act (FA) 2021 is not an exception.

Pursuant to his constitutional powers, the Finance Act, 2021 which amended thirteen laws of the federation was assented to by the President of the Federal Republic of Nigeria on 31st December 2021. The amendment took effect from 1st January, 2022³ and shall remain in force as the existing legal order guiding the administration and management of all the provisions of tax laws so amended. For the record, the Finance Act, 2021 amends the following laws:

- i. Capital Gains Tax Act
- ii. Companies Income Tax Act
- iii. Customs, Excise Tariffs, Etc, (Consolidation) Act
- iv. Federal Inland Revenue Service Establishment Act
- v. Finance (Control and Management) Act
- vi. Fiscal Responsibility Act
- vii. Insurance Act
- viii. National Agency for Science and Engineering Infrastructure Act
- ix. Nigerian Police trust Fund (Establishment) Act
- x. Personal Income Tax Act
- xi. Stamp Duties Act
- xii. Tertiary Education Trust Fund (Establishment) Act
- xiii. Value Added Tax Act

The scope of this article is limited to current amendments made to capital gains tax in relation to the capital market, i.e., the financial system involved in raising capital through dealing in

¹ The federal executive Council adopted the National Tax Policy (NTP) on the 7th February, 2018. By the content of the NTP, tax laws are meant to be reviewed in line with the macro-economic reforms of the federal government periodically.

² In 2019, the Finance Act amended pursuant to Section 49 substituted a new section 32 of CGTA to the effect that transfers of shares in any re-organization of companies such as mergers and takeovers shall not be subject to capital gain tax.

³ See Federal Official Gazette No. 10 Vol 109 dated and published 18th January, 2022.

shares, bonds, stocks, saving certificates, securities, and other long-term investments. The following persons and bodies are the major stakeholders in the Nigerian capital market: Nigerian Stock Exchange (NSE), Securities and Exchange Commission (SEC), Individual Local and Foreign Investors and corporate investors. This article will examine the current legal framework of capital gains tax in relation to disposal, acquisition and or sale of shares, bonds, stocks, or securities in Nigeria's capital market.

Capital Gains Tax (CGT) is the levy imposed on the gains arising from the disposal of chargeable assets under the principal legislation i.e., Capital Gains Tax Act (CGTA) at the flat rate of 10%⁴. Chargeable assets include:

- i. options,
- ii. debts
- iii. shares and stocks
- iv. incorporeal property generally;
- v. any currency other than Nigerian currency; and
- vi. any form of property created by the person disposing of it, or otherwise coming to be owned without being acquired,

Putting it in perspective, any form of property created by the person disposing of it, is wide enough to accommodate so many intangible assets such as goodwill and franchise rights. It is important to note that CGT is not enforced as a matter of course by the relevant tax authority. There are three conditions that must be met⁵:

- disposal of a chargeable asset;
- chargeable gains or profit must have been made from the disposal;
- the person that owns the asset or the asset is not exempted by the law.

A disposal of an asset will exist where any capital sum is derived from a sale, lease, transfer, an assignment, a compulsory acquisition or any other disposition of assets, notwithstanding that no asset is acquired by the person paying the capital sum.

CHARGEABILITY OF CGT ON SHARES, STOCKS, BONDS AND SECURITIES UNDER THE OLD LEGAL ORDER

As earlier stated, this article focuses on the application of capital gains tax to the profits or gains made from the disposal of shares of any company in Nigeria or government stocks,

⁴ See Section 2(1) of the CGTA. The same rate is retained for disposal of shares in Section 2(3) of the FA 2021 which amended the provision of Section 30 of the CGTA

⁵ The federal High Court espoused the law in the case of *United Investment Ltd v Attorney General of the Federation (1922 - 2014) 3 All NTC 207 at 221 – 222* to the effect that no capital gain tax is due if there was no disposal of asset under the CGTA.

bonds, or securities. It is essential to examine the old legal order being the CGTA 2004 to gain a proper understanding of the paradigm shift in what constitutes the new legal order on tax liability of investors in the Nigerian capital markets, stocks, and shares. Capital gains tax was first introduced in Nigeria in 1967 as a federal law and has become part of the revenue generating statute till date. This was later compiled into the Laws of the Federation of Nigeria, 1990 and 2004 respectively; hence, the Capital Gains Tax Act (CGTA).

By the combined reading of Sections 2 and 3 of the CGTA, 2004, shares, stocks, and securities (except bonds, stocks and securities issued by the Federal Government) are subject to capital gains tax at the rate of 10%. However, in furtherance of its macro-economic policy, the Federal Government exercised its power under the Companies and Allied Matter Act (CAMA) and issued an exemption order from CGT in favour of duly registered companies in Nigeria. This exemption order⁶, which took effect from 2nd January 2012 expressly suspended the charging of CGT on all disposal of shares of companies duly registered under CAMA for a period of ten years from the commencement date. By effluxion of time, the 10-year exemption automatically lapsed on the 1st of January 2022.

CHARGEABILITY OF CGT ON SHARES, STOCKS, BONDS AND SECURITIES UNDER THE FINANCE ACT 2021

Essentially, the CGT rate remains 10% under the Finance Act 2021 (FA 2021) but the exemption of shares, stocks, bonds, and securities receives new treatment since the “10-year Exemption Order” has lapsed. Upon the commencement of FA 2021, Section 30 of the CGTA is amended to the effect that every disposal of shares in any Nigerian company registered under CAMA is now chargeable to CGT.

EXEMPTED SHARES, BONDS & STOCKS

Under the new legal order, the only exempted shares, bonds, stocks, and securities are the⁷:

- Nigerian treasury bonds;
- Premium bonds;
- Reinvested profits from shares for purchase of other shares within 12 months
- Savings certificates;
- Shares transferred between borrower and lender in a regulated securities lending transaction;

⁶ The exemption is known as *Companies' Income Tax (Exemption of Bonds and Short-Term Government Securities) Order, 2011*.

⁷ See generally section 30(2)(a - c) of the CGTA (as amended)

- Long-terms stocks and securities issued Nigerian government (be it federal, state or local government).
- Gain from disposal of securities in unit trust re-invested⁸

For ease of reference, the amendment made to Section 30 of the CGTA is reproduced for proper understanding below:

30(1) Gains accruing to a person from a disposal by it of Nigerian government securities shall not be chargeable gains under this Act

30(2) Without prejudice to any other applicable law, the gains accruing to a person on disposal of its shares in any Nigerian company registered under the Companies and Allied Matters Act shall be chargeable gains under this Act except where —

a. *the proceeds from such disposal are reinvested within the same year of assessment in the acquisition of shares in the same or other Nigerian companies:*

Provided that tax shall accrue proportionately on the portion of the proceeds which are not reinvested in the manner stipulated in this subsection;

b. *the disposal proceeds, in aggregate, is less than ₦100,000,000 in any 12 consecutive months, provided that the person making the disposals shall render appropriate returns to the Service on an annual basis; or*

c. *the shares are transferred between an approved Borrower and Lender in a regulated Securities Lending Transaction.*

The necessary implication is that where an investor or any person disposes shares and stocks issued by any quoted and/or unquoted companies on the Nigerian stock market at a premium or profit, such disposal is ordinarily chargeable to CGT if it attains the threshold prescribed by law. It suffices to state that there will be no CGT charged on any transfer of shares by a trustee or nominee to the beneficiary since the transfer is done without any consideration or money's worth. By necessary implication and in direct consequence of Section 49 of FA 2019 which amended Section 32 of CGTA, reorganization of companies, acquisition of companies' shares by way of takeover of companies is equally exempted from CGT⁹. Also, the issuance of bonus shares to members of companies would not amount to chargeable asset as there is no disposal¹⁰. This position is logical in that, what the capital gains tax assesses is proceeds

⁸ See Section 33 of CGTA

⁹ See Section 32 of the CGTA

¹⁰ In the case of *Excelsior v FBIR (1922 - 2014) 3 All NTC 245 at 257*, the Federal High Court, held that for tax purposes, bonus shares simply means ploughing back of the company's profit into its business. A bonus share is strictly not a gift nor a purchase. It is not a purchase because no cash or money's worth was paid for it but it is a yield from investment.

of the disposal from the hand of the person disposing it and not the acquisition by the beneficiary of the bonus shares.

THRESHOLD FOR SHARES DISPOSAL

Under the old legal order, capital gains tax was charged once there was a disposal of shares at profit, however with the new legal order, a threshold of N100million annual cumulative worth of shares must have been disposed at a profit to attract CGT¹¹. As a matter of fact, the Act recognizes the computation of the threshold disposal within a period of 12 months thereby recognizing situations where acquisition of shares is done in the middle of the year and disposal is done within 12 months spilling into the subsequent year. An illustration of this new provision is necessary for better understanding.

Treatment of Shares' disposal less than N100million within 12months

It is settled law that where the wording of an enactment is clear and not ambiguous, the literal meaning of the statute shall be interpreted except such literal and ordinary meaning would lead to absurdity or injustice as was decided by the Supreme Court in the case of *Gana v SDP & Ors*¹². A careful consideration of Section 30(2)(b) of the CGTA (as amended) evinces that there shall be no capital gain tax chargeable once a disposal of shares worth in aggregate or cumulative is less than ₦ 100,000,000 in any 12 consecutive months. So, where an investor disposed shares worth of ₦ 98,000,000 at different times in 2022 between January and December, there shall be no CGT chargeable¹³. It is important to note that in determining the threshold requirement for chargeability, reference is made to the proceeds of the sale and not the gain.

Treatment of Shares disposal above ₦100million within 12months

A disposal of shares up to ₦100,000,000 is chargeable but the actual CGT payable depends on the amount of allowable deductions from the gains or profit made from the transaction. For instance, where an investor purchased some shares for ₦ 75,000,000 and disposed in the sum of N125,000,000. In selling the shares, the investor incurred cost for marketing and

¹¹ See Section 30(2)(b) of CGTA (as amended)

¹² (2019) LPELR-47153(SC)

¹³ This provision encourages exemption of gains arising otherwise classified as breakfast - dinner disposal of shares. The concept of breakfast-dinner disposal simply refers to disposal of shares within 24-hours except such transaction hits the threshold of ₦100,000,000.

professional services in the transaction to the tune of ₦5,000,000. The chargeable CGT is computed as follows:

Threshold Disposal not chargeable: ₦ 100,000,000

Expenses & Cost deductible: ₦ 5,000,000

Chargeable Gain: ₦ 20,000,000

10% of CGT of Chargeable gain: ₦ 2,000,000

It is noteworthy to state that the consideration paid for the acquisition of the asset is already included in the threshold disposal requirement. Therefore, it does not need to be deducted separately. That said, it is important not to be oblivious of the possibility of the tax authority contending that the gain is actually ₦ 45,000,000 and not ₦ 20,000,000.

Shares disposal at a loss

It should be noted that disposal of foreign shares by Nigerian resident individuals and companies are also chargeable to CGT, while a non-resident will be liable to CGT where the proceeds are received in, brought into Nigeria or the sale itself is conducted in Nigeria (depending on the double tax relief available to the non-resident).

FILING RETURNS

Section 2 of the principal legislation which regulates the filing of capital gains tax returns has now been amended¹⁴. A careful perusal of FA 2021 reveals that two different regimes apply to filing of returns of CGT for two categories of assets. The filing of returns for shares is done annually which is different from filing returns for other assets which is done twice a year. The first filing shall not be later than 30th June and the second by 31st December¹⁵ of each year.

¹⁴ Pursuant to Section 4 of the Finance Act 2020, new subsection 4 was inserted to the provision of Section 2 of the CGTA. The period of filing capital gains tax returns on any disposal of asset including stocks and shares shall be done twice a year. However, in the FA 2021, different treatment is given to shares and stocks which is now on annual basis as provided in Section 30(2)(b) thereof.

¹⁵ For ease of reference, the Act introduces a new sub-section 4 to Section 2 of the CGTA and provides thus:

Subject to the provisions of Section 31 of this Act, every person having disposed a chargeable asset shall, not later than 30 June and 31 December of that year, compute the capital gains tax, file self-assessment return, and pay the tax computed in respect of the chargeable assets disposed in the periods.

RELEVANT TAX AUTHORITY TO COLLECT & ADMINISTER CGT

The FA 2021 recognizes two different persons that may dispose and/or sell shares and clarifies the relevant tax authority involved in the collection and administration of the CGT. Chargeable gains by individuals are to be collected by various internal revenue service of each state government, while the Federal Inland Revenue Service (FIRS) is empowered to collect chargeable gains made by companies or corporate bodies¹⁶. As such, where shares are disposed, sold, or transferred by an individual person to another individual; or an individual disposes or sells to a company, the relevant tax authority is the State Internal Revenue Service. In the same manner, the FIRS is the relevant authority to collect CGT where a company disposes to another company or an individual.

ROLLOVER RELIEF

For other chargeable assets, roll over relief can be enjoyed on the disposal even where the acquisition of similar assets occurs either 12 months before or 12 months after the disposal, while for disposal of shares, relief will only be enjoyed where the proceeds of disposal are reinvested in acquisition of similar shares within the same year of assessment¹⁷.

COMPUTATION OF CHARGEABLE CGT

In the computation of CGT, the focus is on the gains made from the disposal and not the entire proceed. According to Section 14 of the CGTA, all expenses which are wholly, reasonably, exclusively, and necessarily (WREN) incurred are deductible from the proceeds of the sale before the CGT is charged. The main items which constitute the deductible expenses are exhaustive under Section 13 of the Act. These are:

- Cost of acquisition of the asset
- Cost of enhancing the value of the asset
- Amount of expenditure incurred in preserving or defending the title to the asset
- Incidental cost for making the disposal
- Fees, commission or remuneration paid for professional services such as legal adviser, brokers, auctioneer or accountant
- Cost of advertisement to find a seller or find a buyer during disposal
- Stamp duties paid

In cases of allowable deductions for tax purposes, the items to be allowed must pass the WREN test as was decided in the case of *Shell Petroleum Development Co.Nig. Ltd v. FBIR*¹⁸.

¹⁶ See generally the provision of Section 30(4)(a)(b) of the CGTA (as amended)

¹⁷ See Section 30(2)(a) of the CGTA (as amended)

¹⁸ The Supreme Court examining the meaning of the WREN test has this to say per Uwais JSC as he then was:

DISPUTE RESOLUTION

As previously discussed, not all disposal of shares and stocks are chargeable to CGT. Some shares, stocks and bonds are expressly exempted while some are chargeable but impliedly exempted if they do not meet the threshold disposal. In situations like this, there is likelihood of a dispute arising between the person disposing the asset and the relevant tax authority with respect to the chargeability of the disposal or the exact amount of CGT payable. There could also be dispute between the competing relevant tax authorities, i.e., state tax authority and FIRS with respect to their power to collect the CGT.

Surprisingly, the CGTA does not provide any dispute resolution mechanism. The lack of clarity in this instance would ordinarily lead to recourse to other statute such as the Federal Inland Revenue Service (Establishment) Act, 2007 (as amended). The FIRS (Establishment) Act created a Tax Appeal Tribunal (TAT) as a federal quasi-judicial body which has now been confirmed to be an inferior court¹⁹. The TAT has jurisdiction to interpret and determine any dispute arising from various tax laws including CGTA. One can conveniently assume that the TAT is the adjudicatory body to resolve dispute arising from CGT.

Giving the peculiar circumstance of CGT as both the federal government and state government are empowered to collect, will a federal quasi-judicial body or an inferior court like the TAT competently adjudicate on revenue of a state government? Another possibility of jurisdictional challenge against the TAT is the provision of Section 251 of the 1999 Constitution (as amended) on the recovery of revenue of government of the federation or federal government and relevant provision of CAMA which confer exclusive jurisdiction on companies matter such as shares on the Federal High Court. This issue is left for another discourse.

"According to ordinary dictionary meaning the words "wholly" and "exclusively" have virtually the same meaning. They can be said to mean "solely" or "entirely". The dictionary meaning of the word "necessarily" is the same as that of the words "inevitably" and "unquestionably." Giving this ordinary meaning of these words, the Supreme Court reasoned that the payment of bank charges solely and inevitably incurred for the operation of the transaction involved in the case qualified for deductible expenses under the relevant tax law.

¹⁹ In the case of FIRS v CNOOC & Others in the Appeal No: CA/L/1084/2015 judgment delivered on 5th March, 2021 which the writer prosecuted, the Court of Appeal sitting in Lagos held that TAT is an inferior court with the Federal High Court having supervisory jurisdiction over its proceedings. The Court further held that what the National Assembly intended actually is to provide a range of remedies up to the Tax Appeal Tribunal before an aggrieved person or body can access the Federal High Court for the hearing and determination of their disputes. Accordingly, the Court of Appeal held that the TAT has jurisdiction to determine all disputes arising from the various tax laws identified in the Fifth Schedule to the FIRS (Establishment) Act. Therefore, disputes arising from CGT should be submitted to TAT and any appeal thereat would then lie to the Federal High Court.

CONCLUSION

There has been a paradigm shift in the applicable rules for charging capital gains tax on the proceeds of transfer or disposal of shares, bonds, stocks and securities by investors in Nigeria. Individual and corporate investors alike are at liberty to determine specie of shares to invest and how best to plan their tax affairs for maximizing the proceeds from such investment either in the short and long term. The habit of shares acquisition without necessary payment of relevant capital gain tax is prevalent. The efficiency of the relevant tax authority in ensuring compliance has been regressive. The investors must realize the legal implication of Section 45 of the CGTA which is to the effect that the evidence of payment of CGT is required for effecting change of ownership of such shares and stocks. The activities of Central Securities Clearing System (CSCS) provide relevant information to the tax authorities in conducting tax audit or investigation on quantity of shares disposed. This is possible mostly for quoted companies but somewhat difficult for unquoted private companies. This requires legislative attention. Above all, investors (local and foreign) in the Nigerian capital market and tax authorities should get acquainted with the principal legislation as may be amended on CGT for proper understanding of chargeable shares disposal, deductible expenses, computation of tax liability to avoid needless grievance. Professional assistance is also recommended to assist interested individuals navigate the different CGT considerations.