

©KY PUBLICATIONS  
RESEARCH ARTICLE  
Vol.3.Issue.2.2016  
Apr-June.



ISSN:2349-4638

<http://www.ijbmas.in>

**INTERNATIONAL JOURNAL OF BUSINESS, MANAGEMENT  
AND ALLIED SCIENCES (IJBMAS)**  
A Peer Reviewed International Research Journal

**IMPACT OF TAXATION ON NIGERIAN BANKING SECTOR**

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**ABSTRACT**

As a result of the recent global financial crisis, governments around the world are altering the way banks carry out their business. From the banking reforms in America to financial pollution and bail out tax in Europe, it is no longer business as usual. Here in Nigeria, many people believe that the financial crisis was homegrown while some are of the view that it was due to the global financial crisis, but maybe, it is a combination of a global dosage with local flavor.

The events of the past few years have undoubtedly changed the financial landscape across the globe and Nigeria is no exception. This development has led to various reforms and new financial regulations being introduced by government to restore investors' confidence, protect the banking public and ensure sustainable economic growth and development.

The banking system in Nigeria has undergone several reforms.<sup>1</sup> The Central Bank of Nigeria (CBN), which is the apex bank in the country, regulates all other banks. The Banks and Other Financial Institutions Act, 1991 (BOFIA) requires all banks to be locally incorporated<sup>2</sup> and to publish their balance sheets on their Nigerian banking businesses.<sup>3</sup> There are also other regulations, which are aimed at stabilizing the indigenous banks for their long-term existence and commit the foreign banks more into the country's economic improvement. Ghosh<sup>4</sup> notes that the statutory transfer of 25% of profit after tax and after deducting bad debt provisions to general reserve and the increase in the minimum paid up capital, which presently is two hundred billion naira, are indicators of control of the Central Bank of Nigeria to inject control in the banking arena of the country. In responding to the changing situations, the Central Bank of Nigeria (CBN) embarked on a number of other reforms in the banking sector, one of which is the transition from the universal banking model introduced in 2000 to a bank holding company business model.<sup>5</sup>

**Key Words:** Excess Profit, holding companies, tax.

<sup>1</sup> Nnadi, M.A., *The Effect of Taxes on Dividend Policy of Banks in Nigeria*. International Research Journal of Finance and Economics. Issue 19, 2008 pp. 50-51.

<sup>2</sup> Section 2(1) BOFIA.

<sup>3</sup> Section 15 and 16 BOFIA.

<sup>4</sup> Ghosh, D., (1990) *Money and Economic Growth in Nigeria*. Ph.D Thesis to University of Leicester. Also see Central Bank of Nigeria Revised Regulatory Guidelines for Microfinance Banks (MFBs) in Nigeria (2012). Available at [www.cenbank.org/.../](http://www.cenbank.org/.../)

<sup>5</sup> Section 61 of the Federal Inland Revenue Service (Establishment) Act, 2007 empowers the Board, with the approval of the Minister to make rules to deal with taxation of Bank holding companies and their subsidiaries.

## 1.1. INTRODUCTION

The taxation of banks in Nigeria fall under Companies Income Tax Act.<sup>6</sup> This is because persons wishing to carry out banking business in Nigeria must be incorporated in Nigeria under Section 2 of the Companies and Allied Matters Act in compliance with BOFIA Section 2.

The Nigerian tax is structured to reflect the nature of the business. Depending on the type of business, taxes are levied on businesses on an annual basis. This implies that all businesses, organizations and taxable persons are obliged to make a tax returns to the Inland Revenue in respect of their businesses.<sup>7</sup> Profits arising from transactions of companies constitute taxable income following their assessment to tax. This also includes personal income tax, which is duly imposed on individuals by the relevant tax authority in the territory where the company has its principal office, or the place of business on the first day of the year of assessment or year of commencement of business. The State Board of Internal Revenue is responsible for the administration and collection of the relevant tax from individuals residing in the State in question, while the Federal Inland Revenue is charged with the responsibility of the companies and other related taxes.<sup>8</sup> Any person wishing to carry out banking business in Nigeria must first be incorporated.<sup>9</sup>

Apart from companies' income tax, the following taxes therefore cannot be ruled out; Capital Gains Tax, Value Added Tax, Potential loss of tax assets especially tax losses and capital allowances, the impact of commencement and cessation provisions, Stamp duty payable on restructuring, excess profit levy, withholding tax on dividends, etc.

Any bank with a universal banking license is essentially a "one-stop shop" for all financial services, ranging from the traditional deposit money banking to investment banking, asset management, project finance and insurance, etc. The CBN has by its regulation of 2010 repealed universal banking.<sup>10</sup> The general legal structure of most banks under the universal banking regime was that a bank will be an operating company for banking services and at the same time a holding company for non bank subsidiaries. The major danger in this structure was that, in addition to the inherent risk in the bank's own operations, the bank as a holding company is unduly exposed to the risks of its subsidiaries which could in turn mean higher risks for the banking public. This would allow a company to operate a bank and non bank subsidiaries at the same time.

## 1.2 Definition of Terms

**1.2.1 Definition of tax:** Tax has been defined variously as follows;

The New Oxford Dictionary of English defines tax as

**A compulsory contribution to the support of government levied on persons, property, income, commodities, and transactions at a fixed rate mostly proportionate to the amount on which the contribution is levied.**<sup>11</sup>

The Chambers Dictionary defines it as a

**Contribution to revenue exacted by the state from individuals, or business; a burden, drain or strain.**<sup>12</sup>

New Webster's Comprehensive Dictionary defines tax as

**A charge on a person's income or property; a heavy demand made upon one's strength.**<sup>13</sup>

This is similar to the definition provided by Black's Law Dictionary<sup>14</sup> which says,

**It is a charge by the government on the income of an individual, corporation or trust, as well as the value of an estate or gift.**

<sup>6</sup> Taxation of Banks at [www.researchfaculty.com/.../taxation-of-banks-...](http://www.researchfaculty.com/.../taxation-of-banks-...)

<sup>7</sup> Section 9 CITA.

<sup>8</sup> These structures are governed by the Personal Income Tax Act (PITA, 2004) as amended and Company Income Tax Act (CITA, 2004) as amended respectively.

<sup>9</sup> Section 2 BOFIA.

<sup>10</sup> CBN Regulations on Scope of Banking Activities and Ancillary Matters, No. 3, 2010 (Regulation 3 of 2010).

<sup>11</sup> The Oxford Advanced Learner's Dictionary of English (1998) Oxford University Press, 7<sup>th</sup> Edition, 2006, p. 1516.

<sup>12</sup> The Chambers Dictionary, Chambers Harrap Publishers Ltd. (1993) p. 1771

<sup>13</sup> The New Webster's Comprehensive Dictionary of English Language; Delux Edition, 1993. American International Press, New York, p. 3331.

<sup>14</sup> Garner, B.A., Black's Law Dictionary, Ninth Edition, Thomson Reuters Publishing Co. 2009

It is deducible from these definitions that tax is a compulsory contribution exacted on persons, (natural or corporate) by government for the purpose of supporting the government or state. The limitation inherent in these dictionary definitions is that the objective of a tax may not necessarily be to support the government as suggested, but to discourage certain unwarranted activities or bridge the gap between the rich and the poor.

As Hart observed,

**Taxes may be imposed not for revenue purposes, but to discourage the activities taxed, though the law gives no express indication that these are to be abandoned as it does when it makes them criminal.**<sup>15</sup>

Secondly, the purpose of some taxes may be to reduce the level of inequality in the society if properly administered. In modern commercial relations, taxes on certain imports are essentially aimed at reducing the imbalance between imports and export or even discourage the import of such goods thereby encouraging the local industries to produce or manufacture. For instance, the heavy import duties on the importations of foreign fabrics and foreign fruit drinks are to discourage such importation and encourage local production. Therefore if one is to rely on the dictionary definition, the impression may be that the sole purpose of tax is to raise money for the state.

**1.2.2 Excess Profit Levy:** The peculiar aspect of the taxation of banks is that in addition to the company tax payable at the rate of 30%, banks are required to pay the excess profit levy. This is a levy of 10% on the excess profit of the bank, which was introduced in 1978.<sup>16</sup> However, with effect from 1989-tax year, the excess profit levy tax became 15%.

Excess profit is the difference between the total actual profit of the bank and the normal profit of the bank computed by applying the following specified percentages as stipulated by S. 40(3)(i) CITA.<sup>17</sup>

At the end of the accounting year: 40% of paid up capital; 20% of capital reserves, 20% of general reserves and 20% of long-term loans. The total is regarded as the normal profit of the bank. The various components of the capital employed may have their divergent meanings.<sup>18</sup>

Thus, paid up capital may comprise of the bank's paid up ordinary and preference shares where applicable. The capital reserves will also include the share premium account, surpluses on revaluation of fixed assets and amounts set aside out of profit for the issue of share capitals. While the general reserves are undistributed profit apart from the statutory reserves, the long-term loans are those with repayment periods in excess of five years by virtue of the Banks and Other Financial Institutions Decree, 1991.<sup>19</sup> According to the World Bank, there is no gain saying that capital market is a critical pillar to long term fund mobilization.<sup>20</sup>

**1.2.3 Holding Company:** A holding company also referred to as HoldCo, can be defined as a parent company that controls enough voting stocks in a subsidiary to dictate its policy and make management decisions.<sup>21</sup> This is generally done through the influence of the company's board of directors. This does not necessarily mean that the holding company owns all of the subsidiary's stock but a majority of it. A holding company that controls more than half of the subsidiary's voting stock may obtain the benefits of tax consolidation in some jurisdictions; which include tax-free dividends for the parent company and the ability to share operating losses. A holding company can simply be described as a conglomerate or parent company that owns other firms by owning their stock. In most cases the company does not have any operations, activities or other active business. It maintains a special position in that it does not do any business itself.<sup>22</sup> Instead, it merely owns assets which usually can be in form of shares or stocks in other corporations, limited liability companies, limited partnerships, private equity funds, hedge funds, publicly traded stocks, bonds, real estate, brand names, patents, trademarks, copyrights, or virtually anything else that has value.<sup>23</sup>

<sup>15</sup> Hart, H. L. A., *The Concept of Law*, culled from Whitehouse C., *Revenue Law and Practice*, 13<sup>th</sup> Edition, Butterworth's, London, Dublin & Edinburgh 1995 p. 6

<sup>16</sup> Nigeria Tax Reform available at [resourcedat.com/.../Nigeria\\_Tax\\_Reform](http://resourcedat.com/.../Nigeria_Tax_Reform)

<sup>17</sup> Aguolu, O., (2000) *Taxation and Management in Nigeria*. Enugu Meridian Associates.

<sup>18</sup> Titilayo Fowokan. *Tax Incentives and Reforms – CITN MPTP*, Abeokuta [www.academia.edu/.../TAX\\_INCENTIVES\\_AND\\_REF...](http://www.academia.edu/.../TAX_INCENTIVES_AND_REF...)

<sup>19</sup> Section 15(8)

<sup>20</sup> [www.sec.gov.ng/files/capital-market-as-a-long-term-option-for-financing-infrastructure-...](http://www.sec.gov.ng/files/capital-market-as-a-long-term-option-for-financing-infrastructure-...)

<sup>21</sup> [www.investopedia.com/terms/holding-company-definition](http://www.investopedia.com/terms/holding-company-definition)

<sup>22</sup> Joshua Kennon. How a holding company works. Available at [www.joshuakennon.com/.../how-a-holding-company-work...](http://www.joshuakennon.com/.../how-a-holding-company-work...)

<sup>23</sup> <https://en.m.wikipedia.org/wiki/holding-company...>

Under the holding company structure, the holding company's role is effectively taken away from the bank to a holding company, which must be resident in Nigeria. This permits foreign intermediate holding companies to be interposed in the structure subject to CBN's approval. The bank holding structure or what some people call the financial holding structure where the holding company has both bank and non bank subsidiaries, is expected to;<sup>24</sup>

- (a) facilitate better risk management and supervision;
- (b) ring-fence the risks associated with other riskier non-banking activities in the relevant entities rather than under the bank;
- (c) ensure better specialization in the different financial services; and
- (d) support clearer responsibility and reporting lines.

In line with CBN Regulations of 2010, banking groups in Nigeria had to restructure their business operations by incorporating one or more holding companies to aggregate shareholder capital and hold ownership interest in operating companies conducting banking and other permitted businesses separately.

### 1.3 Three Options available to the Banks

In order to continue with the operation of banking, the following options were considered by Quadri;<sup>25</sup>

#### Option A

A bank may choose not to adopt the holding company structure by simply disposing its existing subsidiaries and operating solely as a bank.

#### Option B

A new subsidiary company may be formed to take over the operations of the existing bank while the old bank continues to operate as a financial holding company.

#### Option C

A new holding company may be formed to buy the shares of the old bank by offering its shares to the bank's shareholders and then transfer the existing non bank subsidiaries to the new holding company.

Whatever option is adopted would have the effect of restructuring the operation of the bank and would unite tax consequences which though sometimes unintended could be favourable or adverse. The new holding structure for banks is therefore no exception. The impact of taxation on the process of restructuring the bank and operations of the new holding company, if not envisaged and proactively managed, could lead to significant tax cost and value destruction for shareholders.<sup>26</sup> As holdings in banks rise, people and supply of credits available to the public declines.<sup>27</sup>

Under the existing tax legislation and practice, the Companies Income Tax Act (CITA)<sup>28</sup> is the legislative instrument for taxing companies in the banking industry.

### 1.4 Advantages and Disadvantages of the Holding Company Model

**1.4.1 Advantages:** There are certain advantages for acquiring a controlling interest in a subsidiary as a holding company.<sup>29</sup>

1. The use of a holding company is legally simpler and less expensive than other means of gaining control of another company, such as merger or consolidation. A holding company is able to reap the benefits of a subsidiary's goodwill and reputation, yet its liability is limited to the proportion of the subsidiary's stock that it owns.
2. The holding company has the ability to control a small percentage of ownership and thus, smaller up-front investments.
3. Expansion may happen through simple stock purchases in the public market, which avoids the difficult step of gaining approval from the subsidiary's board of directors.

<sup>24</sup> Dipo Okuribido. CITN Tax Series on Approbating and Reprobating Punitive Taxation of Holding Companies in Nigeria.

<sup>25</sup> Razaq Kunle Quadri. "The Holding Company Model: Tax Implications for Nigerian Banks" Paper presented at the 4<sup>th</sup> annual banking and finance conference organized by the Chartered Institute of Bankers of Nigeria (CIBN) held on Thursday, September 23, 2010.

<sup>26</sup> Akanji O.O. Banking Sector Crisis and Resolution Options in Nigeria, Bullion Vol. 34 No. 1 available at [cbn.gov.ng/OUT/BULLION](http://cbn.gov.ng/OUT/BULLION)

<sup>27</sup> Ibid.

<sup>28</sup> Published as part of the Laws of the Federation of Nigeria, 2004, as amended.

<sup>29</sup> Rahmat Liaz. Advantages and disadvantages of Holding Companies and Subsidiary Companies; [www.academia.edu/.../Advantages\\_and\\_disadvantages\\_of\\_holding\\_...](http://www.academia.edu/.../Advantages_and_disadvantages_of_holding_...)

4. A company may be a holding company because it has different subsidiaries for different purposes. They can take risks through subsidiaries, and limit this risk to the subsidiary alone rather than placing the holding company on the line. This is how large corporations protect themselves from risks of this manner.

These factors among others make holding companies an effective form of organization at both national and international levels.

#### 1.4.2 Disadvantages of Holding Companies Model

There are also disadvantages associated with the holding company model.<sup>30</sup>

1. The group of companies cannot enjoy tax consolidation in Nigeria. The holding company may therefore be exposed to multiple taxes.
2. A holding company can be forced to dissolve more easily than a single merged operation.
3. The requirement to consolidate the financial statements of the holding company and its subsidiaries can be difficult, costly and time consuming especially for multinational operations.

#### 1.5 Taxes payable by Banks:

The urge to generate revenue by government is high, hence it should be noted that the types of taxes being discussed are not exhaustive of all the taxes payable by corporate bodies, however they are the major types. There is a need for further clarification as to treatment of the various types of taxes peculiar to each company.<sup>31</sup>

The following are some of the taxes payable by corporate bodies and by implication, banks in Nigeria.

##### 1.6.0 Companies Income Tax:

By virtue of Companies Income Tax Act<sup>32</sup> the profits of any company accruing in, derived from, brought into or received in Nigeria is subject to tax under Section 9 (1) of the Act. Section 13 of the Act says 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. Hence the income of a company that are subject to tax include any trade or business for whatever period of time, such trade/business may have been carried on; rent or any premium arising from a right granted to any other person/company for the use or occupation of any property; dividends, interest, royalties, discounts, charges or annuities; fees, dues and allowance for service rendered; any amount of profits or gains arising from acquisition and disposal of any short-term monetary instrument; and any source of annual profits or gains not falling within the above categories. In summary the total tax rate for the profits made in a company is 30 kobo per Naira which is 30%.<sup>33</sup>

##### 1.6.1 Excess Dividend Tax;

The most crucial tax implication in bank restructuring is "excess dividend tax." The FIRS clarifies that<sup>34</sup> any dividend paid by subsidiary companies within each Group to their parent Holding Company (HoldCo) is Franked Investment Income which would not form part of the said Holding Company's total profits for tax purposes including consideration of total profits chargeable to tax in the contemplation of the anti-tax avoidance provisions in Section 19 of the Companies Income Tax Act.<sup>35</sup>

Section 80 (3) of CITA provides:

**...dividend received after the deduction of tax prescribed in this section shall not be charged to further tax as part of the profits of the recipient company. However, where such income is redistributed and tax is to be accounted for on the gross amount of distribution in accordance with subsection (1) of this section, the company may off-set the withholding tax which it has itself suffered on the same income.**

Section 80(3) regards dividend received by a company after deduction of withholding tax as Franked Investment Income (FII), which should not be subjected to further tax (income tax) and by extension WHT.

<sup>30</sup> Ibid.

<sup>31</sup> FIRS Information Circular titled Explanatory Notes on the Critical Issues for the Operation of Bank Holding Company Structure in Nigeria, published in April, 2012.

<sup>32</sup> (CITA) Cap C21 LFN, 2004 as amended

<sup>33</sup> While section 9 CITA imposes taxation of Companies, S. 40(1) stipulates the rate of 30% of the companies' profits.

<sup>34</sup> Ibid.

<sup>35</sup> CITA Cap C21, LFN, 2004 (as amended)

Therefore, FII received by a Holding Company from its operating subsidiaries should not be subjected to further companies' income tax. It follows therefore from practice that a dividend income which has suffered withholding tax is regarded as franked investment income and exempt from further tax under the companies' income tax and should not subject the dividend declared to its own shareholders to further withholding taxes, having suffered withholding tax before receiving the dividend from its shareholders.

Accordingly, the provisions of Section 19 of CITA will not apply to such FII upon redistribution of dividends to such Holding company's ultimate shareholders.

However, Section 19 introduced anti-avoidance provisions in the tax law as follows:

**"Where a dividend is paid out as profit on which no tax is payable due to -**

**(a) no total profits or**

**(b) total profits which are less than the amount of dividend which is paid, whether or not the recipient of the dividend is a Nigerian company, where it is paid by a Nigerian company, the company paying the dividend shall be charged to tax at the rate prescribed in subsection (1) of section 40 of this Act as if the dividend is the total profits of the company for the year of assessment to which the accounts, out of which the dividend is declared, relates."**

Based on the latter provision of the tax law quoted above, the tax authorities usually apply the conflicting provision of excess dividend tax to further impose tax on dividend income. It is now clear that, to the extent that any Holding company's income profile may consist of dividend received from its subsidiaries, such dividend will not be subjected to any further tax. Note however that this exemption does not extend to any other income or profit earned by the holding company from other sources aside from dividends from its subsidiaries.

Section 19 of CITA is further extended in the case of *Oando Plc v. Federal Board of Inland Revenue*.<sup>36</sup> The appellant had alleged that no tax was due from the company in 2004 since no taxable profit arose notwithstanding the fact that the company paid out dividend to its shareholders, supposedly from its retained earnings rather than profits. The Chief Judge of the High Court, in a considered ruling held,

**Having declared dividends and paid same to its shareholders, the Appellant has in my view represented to its shareholders and indeed the whole world that it has made profit. It must therefore pay tax.**

In other words, if a company declares dividend from reserves, it must subject it to the 30% excess dividend tax. Banks had to a lesser extent faced this problem in the past even under the universal banking model, on their exempt income. Where tax exempt income has been excluded from the determination of taxable profit but forms part of distributable profit available for dividend, this will result in the dividend paid being higher than the taxable profits at some point. The excess dividend tax provisions therefore results in tax exemptions not really being exemptions as the tax is merely deferred and imposed once the exempt income is distributed as dividend. The problem is even more pronounced under the holding company structure since there will now be at least one company between the bank and the ultimate shareholders.

### **1.6.2 Treatment of Withholding Tax on Dividend**

The tax is payable on any interest other than interest on inter-bank deposits. Examples include royalty, rent, dividend or other distribution, due from one company to another company. The rate of the tax deducted at source is 10%.<sup>37</sup> It is important to note that withholding tax is also to be deducted from source in respect of payments by any company who provides petroleum operation services and related services to a company carrying on petroleum operations in Nigeria. For the purpose of S. 79, a person authorised to deduct tax includes government departments, parastatals, statutory bodies, institutions and other establishments approved for the operation of pay as you earn.<sup>38</sup> Where payment is due to a company in respect of goods or services supplied by another company, the company making the payment shall deduct a portion of such tax by way of withholding the tax, and remit the withheld tax to FIRS.

<sup>36</sup> 1 Tax Law Report of Nigeria (TLRN) p. 61 at 81

<sup>37</sup> Section 79(2) CITA as amended.

<sup>38</sup> Section 79(3) CITA as amended.

Under the HoldCo arrangement, the FIRS understands that, existing shareholders of the Bank would receive shares in HoldCo in exchange for all or most of shares they currently hold in the Bank, so that HoldCo emerges as owner (or majority shareholder) of the operating Banks and other subsidiaries, including Intermediate HoldCo.<sup>39</sup> The principal source of income for a HoldCo would be dividends received, net of WHT deduction, from its operational subsidiaries. Where a re-distribution of the dividend income to HoldCo's shareholders occurs, Section 80 of CITA allows for the shareholders to take credit for the WHT suffered by HoldCo on that income and, thus, avoid any further tax on the income.

Under existing WHT administrative framework, WHT deducted by the operating Banks and other subsidiaries, including Intermediate HoldCo, would be remitted to the FIRS since the recipient is a Company, taxable under CITA. However, WHT on eventual distribution to individual shareholders in HoldCo would be due to the particular revenue authority administering the taxes of that shareholder. In the case of individual shareholders, the relevant State Internal Revenue Service (SIRS) will be the appropriate authority, while for corporate entities the FIRS would be appropriate.

In view of the above and in order to avoid administrative challenges that may occur for the companies, FIRS permits the obligation to deduct and remit WHT to be exercised at the HoldCo level, as against the operational subsidiary or Intermediate HoldCo level. Consequently, the gross amount of dividends should be paid by operational subsidiaries to a HoldCo, who will then distribute to its shareholders less WHT. The HoldCo shall ensure that within 30 days of receipt of dividends, the appropriate withholding tax is deducted and remitted to the relevant tax authority of their respective shareholders,<sup>40</sup> and also comply with other existing WHT compliance procedures and regulations.

For shareholders of subsidiary companies other than HoldCo, the subsidiary company shall deduct withholding tax on its dividends and remit same to the relevant tax authority of such shareholders.

### 1.6.3 Exemption from Commencement and Cessation Rules

The reorganization of existing banking entities and subsidiaries into a HoldCo structure can bring about the occurrence of the following transactions:<sup>41</sup>

- (1) Incorporation of new entities e.g. a HoldCo, which may include an Intermediate HoldCo;
- (2) Cessation of some existing businesses e.g. capital market operations which the CBN no longer permits a bank to undertake;<sup>42</sup>
- (3) Movement of assets and other business attributes of existing banks into the various new companies being established pursuant to the CBN Policy; or
- (4) Mergers between existing subsidiaries to improve group efficiency.

In this regard, the provisions of Section 29(9) of CITA<sup>43</sup> states that

**where a trade or business carried on by a company is sold or transferred to a Nigerian company for the purpose of better organization of that trade or business or the transfer of its management to Nigeria and any asset employed in such trade or business is sold or transferred, if the board is satisfied that one company has control over the other or that both are controlled by some other person or are members of a recognized group of companies, the Board may in its discretion direct that:**

- a) **the provisions of Section 29 (3) and (4) (that is Commencement and Cessation rules) of this section shall not apply to such trade or business; and**
- b) **for the purposes of the second schedule to this Act, each such asset shall be deemed to have been sold for an amount equal to the residue of the qualifying expenditure thereon on the day following such sale or transfer.**

In view of the CBN Regulation,<sup>44</sup> the Board of FIRS has pursuant to S. 61 FIRS Act, 2007 directed that commencement and cessation rules shall not apply provided that:

<sup>39</sup> FIRS Information Circular Explanatory Notes op.cit.

<sup>40</sup> Section 29(3) & (4) CITA.

<sup>41</sup> Section 29(4) CITA.

<sup>42</sup> CBN Regulation No. 3, 2010.

<sup>43</sup> CAP C21 of CITA, LFN, 2004 (as amended).

<sup>44</sup> No. 3 of 2010

- (i) the formation of the HoldCo in compliance with the CBN Regulation does not result in any change in ownership structure of the existing Banking Group;
- (ii) the business of the HoldCo and the subsidiaries are not discontinued; and
- (iii) the assets are sold or transferred at an amount equal to the residue of the qualifying expenditure, that is, at their tax written down values (TWDV).

#### 1.6.4 Petroleum Profits Tax:

This tax is payable by oil producing companies. The rate is at 85% on the profit accrued to the company.<sup>45</sup> However when the company is within its first five years of operation, the rate is 65.75%.<sup>46</sup> There is also a concession where the company is involved in a production sharing contract, the company is taxed 50% on the chargeable profits for the period of the contract. Where dividends or royalties are to be paid by such companies, they are enjoined to deduct a WHT of 10%.

#### 1.6.5 Capital Gains Tax<sup>47</sup>

This type of tax is payable on profit accrued when a company disposes its capital assets. The rate is at 10%.<sup>48</sup>

The CBN Regulations<sup>49</sup> has mandated banks to divest from non-banking activities, as a result of which the banks have to re-organize and move assets around the successor entities, including HoldCos. The transfer/disposal of such assets may result in an exposure to capital gains tax.

In this regard, Section 32 of Capital Gains Tax Act<sup>50</sup> provides that

**a person shall not be chargeable to tax under this Act, in respect of any gains arising from the acquisition of the shares of a company either taken over, or absorbed or merged by another company as a result of which the acquired company loses its identity as a limited company, provided that no cash payment is made in respect of shares acquired.**

In line with the provisions of Section 32, any assets transferred at TWDV, shall not be subject to Capital Gains Tax as no capital gains would be derived from the transaction. Also, even where the assets are transferred at a value higher than the TWDV, consequent upon the acquisition of the ordinary shares of a subsidiary, Capital Gains Tax shall not be applicable provided that no cash payment is made with respect to the shares acquired.

#### 1.6.6 Value Added Tax

A company is required to register for VAT with the Federal Inland Revenue Service within six months of the commencement of business and obtain a Tax Identification Number to facilitate the payment of the Tax.<sup>51</sup> The Value Added Tax Act covers all business transactions except goods and services specifically exempted.<sup>52</sup> It provides that all taxable goods and services shall have as part of the price a 5% margin.<sup>53</sup> This tax is usually paid by the final consumer. A penalty of 5% is charged where there is non-remittance of VAT and interests are charged at the prevailing commercial rate, on the amount of tax in default.

The operation of the bank holding company structure will require the bank to re-organize and move assets around the successor entities (including HoldCo), which will continue different lines of business within their group. Businesses previously conducted through a single company will now be undertaken by multiple entities under control and supervision by HoldCo.

The transfer of assets within the group, will attract value added tax in line with Section 2 of the Value Added Tax,<sup>54</sup> which provides that

**The tax 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.**

<sup>45</sup> Section 21(1) Petroleum Profit Tax Act

<sup>46</sup> Section 21(2) PPTA

<sup>47</sup> The applicable law is the Capital Gains Tax Act (Cap C1 LFN. 2004 as amended)

<sup>48</sup> Section 2(1) Capital Gains Tax Act

<sup>49</sup> CBN Regulation No. 3 2010 op cit

<sup>50</sup> Cap C1 LFN, 2004

<sup>51</sup> Section 8(1) Value Added Tax Act Cap VI LFN, 2004 (as amended).

<sup>52</sup> Section 2 VATA and First Schedule to the Act.

<sup>53</sup> Section 4 VATA.

<sup>54</sup> (VAT) Act Cap V1, LFN 2004 1993 (as amended)

In addition, Section 46 of the VAT Act states inter alia:

**“supplies” mean any transaction, whether it is the sale of goods or the performances of a service for a consideration, that is, for money or money’s worth.”**

**“supply of goods” means any transaction where the whole property in the goods is transferred or where the agreement expressly contemplates that this will happen and in particular includes the sale and delivery of taxable goods or services used outside the business, the letting out of taxable goods on hire or leasing, and any disposal of taxable goods.**

Based on the above provisions of the VAT Act, it is clear that intra group transfer of assets at the residue of the qualifying expenditure is not an exempted transaction and is therefore liable to value added tax.

#### **1.6.7 Minimum Tax**

In Nigeria, companies are liable to pay minimum tax under the Companies Income Tax Act.<sup>55</sup> This arises, where in any year of assessment, the assessable profits of a company results in a loss or where the total profits result in no tax payable or tax payable, which is less than the minimum tax payable under the CITA. The rationale for the minimum tax is to ensure that the Government receives a fair share of return from every economic entity.

The bank holding company structure will result in HoldCo becoming a non-operating, investment vehicle carrying on minimal economic activity as all substantive economic activities would be undertaken by the operational subsidiaries, in line with the CBN’s Regulations. HoldCo therefore as an entity risks being subjected to minimum tax provisions as though it were a fully active economic entity based on the provisions of CITA.

For purposes of clarity, Section 33 subsections (1), (2) and (3) of CITA, provides as follows:

- 1. Notwithstanding any other provisions in this Act, where in any year of assessment, the ascertainment of total assessable profits from all sources of a company results in a loss, or where a company’s ascertained total profits results in no tax payable or tax payable which is less than minimum tax, there shall be levied and paid by the company the minimum tax as prescribed by subsection (2) of this section.**
- 2. For the purposes of subsection (1) of this section, the minimum tax to be levied and paid shall-**
  - (a) If the turnover of the company is ₦500,000 or below and the company has been in business for at least four calendar years be –**
    - 0.5 per cent of gross profit; or**
    - 0.5 per cent of net assets; or**
    - 0.25 per cent of paid-up capital; or**
    - 0.25 per cent of turnover of the company for the year, whichever is higher; or**
  - (b) If the turnover is higher than ₦500,000, be whatever is payable in paragraph (a) of this subsection plus such additional tax on the amount by which the turnover is in excess of ₦500,000 at a rate which shall be 50 per cent of the rate used in paragraph (a)(iv) of this subsection.**
- (3) The provisions of this section shall not apply to-**
  - a) A company carrying on agricultural trade or business as defined in subsection (9) of section 11 of this Act.**
  - b) A company with at least 25 per cent imported equity capital; and**
  - c) Any company for the first four calendar years of its commencement of business.**

In applying the above provision of CITA to the bank Holdcos and in order to avoid counting twice the capital deployed within the group, the following definitions shall apply:<sup>56</sup>

- (i) the turnover of Holdco shall not include the dividends it received from its subsidiary companies and intermediate Holdco for investments from abroad;
- (ii) net assets of Holdco shall not include the amount of investments it held in its subsidiaries prior to the restructuring;

<sup>55</sup> Section 33(1) – (3) CITA Cap C21, LFN 2004.

<sup>56</sup> Section 33(4) CITA.

- (iii) the share capital of Holdco shall not include the share capital of the subsidiaries recognized in the holding company's capital.

### 1.6.8 Payment of Stamp Duties

The re-organization of the existing banking entities and subsidiaries into a Holdco structure would trigger the occurrence of a number of transactions, which will likely attract payment of stamp duties. These transactions include:<sup>57</sup>

- i. incorporation of new entities e.g. a Holdco, which may include an intermediate Holdco;
- ii. mergers between existing subsidiaries;
- iii. increase in share capital of existing companies;
- iv. transfer of vested security interest between re-organizing banking entities; and
- v. perfection of amendments to contractual arrangements necessary to fully comply with CBN Regulations.

In this regard, the relevant provisions of Section 104 of Stamp Duties Act,<sup>58</sup> will apply to exempt Holdco from payment of stamp duty. Section 104 will be read into the transaction and applies as follows:

**If in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any companies, it is shown to the satisfaction of the Commissioner of Stamp Duties that certain conditions are met, relief from capital and transfer duty may be enjoyed by the reconstruction group subject to the following conditions:**

- I. The Holding company is to be incorporated or is required to increase its share capital with a view to consummating the acquisition of the bank shareholding; and
- II. The consideration for the acquisition consists of not less than 90% of the shares of the bank and vice-versa.

Where the above conditions exist, the HoldCo shall not be subjected to stamp duties charge on its incorporation. The CBN has now introduced a new fifty naira (50) stamp duty on bank customers for transactions of ₦1000 and above transferred into accounts.<sup>59</sup> Although this payment is per transaction and not per volume there is an outcry from the Nigerian populace for being exposed to one charge too many in addition to all the other numerous charges such as commission on turnover, card maintenance fee, card withdrawal fee, sms fee among others.<sup>60</sup> The CBN boss, Emefiele, reveals that as part of the efforts to boost revenue base through taxes and rates, the federal government targets to make ₦66 billion from stamp duties in 2016.<sup>61</sup> According to Premium Times Nigeria,<sup>62</sup> salaries are not affected by the new stamp duty policy. Because of the misconceptions of Nigerians including banks over this levy, banks have made charges which have been termed illegal and were ordered to refund 6.2 billion illegal charges to customers in February, 2016.<sup>63</sup> Consequently, bank customers will henceforth pay ₦50 stamp duty for money recovered into their accounts via electronic transfer, cash and cheques. This order was contained in a circular to all deposit Money Banks and other Financial Institutions titled, collection and remittance of statutory charges on receipts of Nigerian Postal Services under Stamp Duties Act.

### 1.6.9 Dividends and Income Earned from Abroad

Section 23(k) of CITA provides that "dividends, interest, rent, or royalty derived by a company from a country outside Nigeria and brought into Nigeria through "Government approved channels", are exempted from tax in Nigeria.

The CBN Regulations have approved an Intermediate HoldCo as an alternative structure to warehouse foreign subsidiary companies owned by the Banks.<sup>64</sup> In this case, the dividend incomes from foreign subsidiaries would be received by the Intermediate HoldCo, which will then subsequently distribute the income to the HoldCo, as dividends.

<sup>57</sup> Section 104 Stamp Duties Act, Cap 58 LFN 2004

<sup>58</sup> Cap 58, LFN 2004

<sup>59</sup> The News. Nigerian banks activate ₦50 stamp duty charge. Available at [thenewsnigeria.com.ng/.../Nigerian-banks-activate-...](http://thenewsnigeria.com.ng/.../Nigerian-banks-activate-...)

<sup>60</sup> Punch News Papers. CBN clarifies ₦50 stamp duty on bank transactions. Available at [www.punchng.com/cbn-clerifies-n50-...](http://www.punchng.com/cbn-clerifies-n50-...)

<sup>61</sup> Daily Post Nigeria. FG targets ₦66 bn revenue from stamp duty in 2016.

<sup>62</sup> Salaries not affected by new stamp duty policy CBN, [www.premiumtimesng.com/.../19...](http://www.premiumtimesng.com/.../19...)

<sup>63</sup> Ibid.

<sup>64</sup> FIRS Explanatory Notes op.cit.

The government approved channels as defined in Section 23(k) are the Central Bank of Nigeria, any bank or other corporate body appointed by Minister as authorized dealer under the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act or any enactment replacing that Act.

Based on the above, dividend incomes received from abroad by an intermediate Holdco or Holdco when re-distributed shall not be liable to further tax provided such dividend is brought into Nigeria through the government approved channels stated in Section 23(k).

The best options to mitigate against the many problems are to:

- i. Initiate the necessary legal procedures to amend the tax law in order to abolish the draconian excess dividend tax provision; and
- ii. Make presentations to the Federal Inland Revenue Service on the interpretation of Section 19 of CITA.

### 1.7 Conclusion

There is need for serious tax planning in view of the challenges ahead and the Tax Practitioners and stakeholders should be ready to assist in managing tax costs in an effective and efficient manner. This will in no small way, assist tax payers to understand the legislation rather than learn schemes to tax plan or avoid tax as soon as legislation is made to close one loophole. According to Lord Morton in the case of *Chapman v. Chapman*,<sup>65</sup> the struggle between the legislature and the Taxpayer's Advisers as undignifying game of chess and said;

**Parliament imposes a charge: the (tax) adviser finds a way to avoid it. Parliament enacts anti-avoidance legislation, adviser's device a more elaborate avoidance**

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<sup>65</sup> (1942) AC 429 at 468