An Appraisal of Finance (Miscellaneous Taxation Provisions) Bill 2004

Abiola Sanni

Senior Lecturer
Department of Commercial & Industrial Law
University of Lagos

INTRODUCTION

To parody the Psalmist¹, I was very glad to hear that Finance (Miscellaneous Taxation Provisions) Bill 2004² had been introduced in the National Assembly to amend the various Nigerian Tax laws. The excitement was based on the fact that a Tax Study Group headed by Professor Dotun Phillips to reform the entire tax system in Nigeria had submitted its Report since 2003. My expectation, therefore, was that the Bill would embrace some of the recommendations of the Study Group accepted by the Federal Government.³

But, alas, the Bill has a limited and less ambitious scope - to "give effect to the fiscal measures contained in the 2001 Budget and other matters connected therewith"! The thrust of this article is to appraise the provisions of the Bill.

1.0. FISCAL MEASURES OF 2001 BUDGET

Since the aim of the Bill is to give effect to the fiscal measures contained in the 2001 Budget, it will be necessary to go through those fiscal measures, if only cursorily, in order to see whether anything has been added or left out.

The fiscal policy measures of the 2001 Budget were geared towards improving the industrial climate and stimulating higher capacity utilisation; providing adequate protection for domestic industries against unfair competition from imports and dumping of manufactured goods; providing a level-playing field for investors in the various sectors of the economy; encouraging diversification of foreign exchange

---

¹ Psalm 122 verse 1 (King James Version) reads "I was glad when they said unto me, Let us go into the house of the Lord".
² Published as HB 70 and SB 53 in the House of Representatives and the Senate respectively. The bill is hereinafter referred to as "the Bill".
³ Some of the recommendations of the Tax Study Group include the following: (i) introduction of Taxpayer Identification Card for individual and corporate bodies, vesting the State Governments with power to collect the income tax of small companies whose turnover is below N50 million, companies whose turnover is below N50 million should be given power to elect paying a turnover tax of 2% or the normal companies income tax whichever is lower, limitation of special tax incentives such as tax holiday and import duty exemption for the Oil and Gas Sector and industries located in the rural areas, solid mineral development and wholly export-oriented industries, abolition of the Capital Gains Tax Act, and the replacement of the Nigerian tax system with a new one, in the long term, comprising only two taxes: Income Tax and Expenditure Tax. See generally, the Main Report of the Tax Study Group on the Nigerian Tax System, July, 2003.
earnings through increased export activities especially in the non-oil sector; reducing operating costs and inflationary pressures; creating new jobs and reducing the upper band of the country’s tariff regime to accord with trade movement worldwide particularly within the West African sub-region. The measures proposed to achieve these goals include alleviating the tax burden on individuals and enhancing their disposable income, ensuring equitable distribution of Value Added Tax (VAT). Adjustment of tariffs on certain goods, shift from import prohibition to import restriction, export promotion, port reforms, strengthening of tax authorities and establishment of a non-oil revenue committee.

The 2001 Budget Speech categorically stated that the Federal Government had submitted a Bill to the National Assembly to give effect to the various proposals. Meanwhile, circulars were issued to the various Federal Government Ministries, Parastatals and Agencies to start implementing the measures with effect from the 4th of January 2001.

2.0 SCOPE OF THE BILL

The Bill consists of 47 sections and divided into seven parts. Apart from Parts I and VII on “general” and “short title” respectively, each Part is devoted to the provisions of each of the following tax laws:

(a) Companies Income Tax Act;
(b) Personal Income Tax Act;
(c) Petroleum Profits Tax Act;
(d) Value Added Tax Act.
(e) Taxes and Levies (Approved List for Collection) Act.

Although Taxes and Levies (Approved List for Collection) Act was omitted in section 1 of the Bill as one of the tax enactments to be amended, Part VI (sections 44-46) is devoted to the statute. Hence, for completeness, it is suggested that Taxes and Levies (Approved List for Collection) Act should also be listed in section 1 as one of the tax laws affected by the Bill.

Space will not permit a full discussion of each section of the Bill. Hence, only the major issues will be considered in this paper. We will begin with Companies income Tax Act.

---

5 See the 2001 Budget Breakdown by the Minister of Finance in ThisDay of Friday January 5,2001, pp. 7-9.
6 Cap 60 LFN., 1990.
7 Decree No. 104,1993.
9 See Decree 102 of 1993.
10 Cap Decree No. 21 of 2001
3.0 COMPANIES INCOME TAX LAW ACT (CITA)

Out of a total of 47 sections, the Bill devotes 35 sections to the Companies Income Tax Act (CITA). The main thrusts of the provisions are:

3.1 Foreign Loan

A loan granted by a foreign company to a Nigerian company is increased from a minimum of N150,000.00 to N5 million as a precondition for the interest on the loan to be exempted from income tax.\(^\text{11}\) The amendment is basically to reflect the current economic realities in view of the devaluation of the naira. If a foreign loan must enjoy special tax advantage, it is logical to require that it should be fairly substantial. All things being equal, the amendment might attract higher foreign loans for the use of Nigerian companies especially from foreign holding companies to their Nigerian subsidiaries.

3.2 Restriction of Conditions for Export Relief Manufacturing Companies

Manufacturing companies generally enjoy tax concession rate of 20 per cent of their taxable profits\(^\text{12}\) for a period of four years of commencing business.\(^\text{13}\) The Nigerian Export Promotion Council in certain circumstances also makes cash grant to exporters in form of Export Expansion Grant (EEG) and Export Development Fund (EDF). Presently, a company will be certified as being engaged in manufacturing for export if (i) a minimum of half of its goods are sold outside Nigeria and (ii) are not re-exported to Nigeria.\(^\text{14}\) The Bill proposes to make the conditions more stringent by inserting a new subsection 10 in section 9 of CITA thus:

(10) A company shall be deemed to be engaged in manufacturing for export if (sic: if) -

(i) at least 50% of the manufactured goods are exported; and

(ii) the undertaking repatriates at least 75 per cent of the export earnings through government approved channels.\(^\text{15}\)

The proposed amendment is, perhaps, motivated by the need to restrict the available grants by the Nigerian Export Promotion Council to companies with greater potentials to contribute more to the economic growth of the country. The EEG was recently suspended by the Federal Government of Nigeria on account of corrupt practices and maladministration of the scheme. The President had promised in the 2005 Appropriation Bill to reintroduce the scheme after the ongoing reform.\(^\text{16}\)

\(^{11}\) See section 3, of the Bill.

\(^{12}\) Compared to 30 percent paid by companies generally. See section 29(1) CITA.

\(^{13}\) The same concession also applies to companies engaged “in agricultural production, mining of solid minerals or wholly export trade’s earns with a total turnover of below one million naira only. See section 29(6) CITA.

\(^{14}\) See section 9 CITA.

\(^{15}\) See section 3(c) (ii) of the Bill.

\(^{16}\) See the 2005 Appropriation Bill.
3.3 Taxation of Insurance Companies

Section 14 of CITA makes special provisions for the computation of the profits of companies engaged in insurance business. There is also a separate tax treatment for life insurance business and non-life insurance business. Section 14(5) of CITA expressly provides that:

For purposes of this Act, where an insurance company carries on life insurance business in conjunction with insurance business of any other class, the life insurance business shall be treated as a separate business from any other class of business carried on by the company.

In Federal Board of Inland Revenue v American International Insurance Company Plc\(^17\) the respondent was licensed to carry on business as an insurer under the Insurance Act and was engaged in both life and non-life insurance businesses. The Board rejected the respondent's assessments for 1986-1990 where the profits in life insurance were used to offset losses in non-life insurance. The respondent successfully challenged the decisions of the appellant on the basis that the statutory division of insurance business into life and non-life was only for the purpose of the Insurance Act and did not create two separate heads of income under CITA for tax purpose. The above decision, therefore, created avoidance opportunities for insurance companies which the Bill attempts to plug.

Section 4 of the Bill provides a more detailed framework for the taxation of the profits of insurance businesses: life, non-life and reinsurance. Section 4(7) - (8) specifically aims at addressing the mischief in Federal Board of Inland Revenue v American International Insurance Company Plc\(^18\) by providing that:

4(7) Where an insurance company takes on a life class and a non-life class insurance business, the funds and books of account of one class shall be kept separate from the other as though one does not relate to the other class, and the annual tax returns of the two classes of insurance business shall be made separately.

(8) Each class of insurance shall be assessed separately as to "Life Insurance Assessment and "Non-Life (other) Insurance Assessment and in respect of each class of insurance, where there are more than one type of insurance business in the same class, the loss from one type of business shall not be allowed against the income from another type of insurance business, but the loss shall be available to be carried forward against profits from the same class of insurance business and in all cases, the period of carrying forward of a loss shall be limited to four years of assessment.

It is now mandatory, for every insurance company that engages the services of an insurance broker, agent, loss adjuster to include in its annual tax returns, a schedule showing the name and addresses of each agent, broker, loss adjuster, the date their services were employed and terminated, as applicable, and the payment made to each of them for the period covered by the tax returns.\(^19\) The requirement

\(^{17\text{(1998-1999) 1 N.Rev.L.R.}}\)

\(^{18\text{Supra.}}\)

\(^{19\text{See section 14(12) as inserted by section 4 of the Bill.}}\)
will among other things provide an audit trail for the collection of withholding tax on the income or the agents, brokers, and loss adjusters in the insurance Industry.

3.4 Tax Assessment

Apparantly in its effort to ensure a more, efficient collection of the Companies income Tax and restrict opportunity for tax avoidance, the following changes have been proposed in the Bill with regards to assessment:

(a) the confusion created by sections 40AA and 41(1) on the obligation to file returns with or without notice from the Board has been removed, it is now made clear that the obligation to file returns is not contingent upon a notice given by the Board; 20

(b) cancellation of bonus for early filing of self-assessment; 21

(c) abolition of provisional tax; a company shall pay its tax within two months of service of assessment notice and not later than 21st December of every year; 22

(d) penalty for any offence under the Act is to be increased from a fine of “N200” to “N20,000”. The daily penalty is also to be increased from a fine of “N40” to “N2,000” respectively for each day that the offence persists. 23

4.0 PERSONAL INCOME TAX ACT

The provisions of the Bill in relation to Personal income Tax aim at (i) exemption of the pension of public servants from taxation, (ii) increase of certain allowances, (iii) strengthening the Joint Tax Board and (iv) reduction of tax rate and revision of the tax band. The provisions of the Bill on these aspects will now be examined.

4.1 Pension

Sections 24 and 25 attempt to exempt from taxation "pensions in respect of service in the public service of the Federation or of a State." 24 The exemption of the income of only the public servants from taxation in the 2001 Federal Government Budget Speech was severely criticised as discriminatory against those in the private sector According to the Chartered Institute of Taxation of Nigeria (CITN):

The proposal is a departure from the rule of equity and justice in taxation. Where the pensions of the public servants alone are exempted from tax and that of private companies employees

---

20 See section 13
21 See section 17
22 See section 13
23 See section 20(b)(i)
24 See section 25.
are not, is not fair. The law should be seen to be fair to all taxpayers irrespective of their status or station.\textsuperscript{25}

The Federal Government bowed to the criticism in 2002 fiscal year when it announced in the Budget Speech for that year the exemption of the pension Income of those in the private sector. As it were, the new Pension Reform Act 2004 expressly makes the pension Income generally tax-free.\textsuperscript{26} Nevertheless it is still necessary for the Personal Income Tax to be amended by exempting from tax the pension income of those in the private sector for completeness since the Act primarily regulates taxation of income.

\textbf{4.2 Increased Allowances}

In its effort to improve the disposable income of an average taxable person, it was proposed that the transport and housing allowances should be increased from N15,000.00 and N120,000.00 to N20,000.00 and N150,000.00 respectively. Towards this end, section 26 of the Bill provides that "any allowance approved by the government or an employer for workers shall be treated as non-taxable in both public and private sectors subject to the following limits –

\begin{enumerate}
\item transport allowance N20,000.
\item housing allowance N150,000.
\end{enumerate}

Although it is well settled that taxpayers are entitled to claim transport and housing allowances in Nigeria up to a prescribed limit, an attempt is made to make definite provisions for the two allowances under the Personal Income Tax Act, 1993. As it were, there are still some other allowances that are not expressly provided for in the Personal Income Tax Act.\textsuperscript{27} It is suggested that the provisions of section 26 of the Bill should be widened to include other allowances for which no clear legal basis have been made in the Personal Income Tax Act, such as in Table 1:

\begin{center}
\begin{tabular}{|l|l|}
\hline
Meal Subsidy & Maximum of N5,000.00 \\
Utility allowance & Maximum of N10,000.00 \\
Entertainment allowance & Maximum of N6,000.00 \\
Leave grant & 10\% of basic salary \\
\hline
\end{tabular}
\end{center}

\textbf{Table 1}

\textbf{4.3 Strengthening the Joint Tax Board}

The Joint Tax Board (JTB) was established principally to ensure a measure of uniformity in the Personal Income Tax Law and Administration in Nigeria and avoid the incidences of double taxation. The powers of the Board are spelt out in section 85(9)(a)-(e) PITA. The board comprises:

\begin{enumerate}
\item the Chairman of the Federal Board of Inland Revenue as the Chairman;
\end{enumerate}

\textsuperscript{25} See CITN Commends Tax Reforms, \textit{The Guardian}, Tuesday, January 9, 200, p 19.

\textsuperscript{26} Section 7(1) of the Pension Reform Act 2004 provides that "Any amount payable as a retirement benefit under this Act shall not be taxable."

\textsuperscript{27} See section 33 of the Personal Income Tax Act, which provides generally for most of the allowances.
(ii) one member from each state nominated by the Commissioner for Finance who shall be a person experienced in income tax matters;

(iii) a representative of the Federal Civil Service Commission;

(IV) the Secretary and

(v) the Legal Adviser of the Board.

Ostensibly intended to strengthen the JTB, section 27 of the Bill proposes that (i) that each state is represented by the Chairman of its Board of Internal Revenue and not just "anyone experienced in income tax matters" who is nominated by the Commissioner for Finance and (ii) the Chairman of the SBIR is appointed from within the service of the State.

The first objective is legitimate and will help to strengthen the JTB. If the states were represented on the JTB by the Chairmen of their SBIR, they might be in better position to take certain decisions on behalf of their Boards, which officers of a lesser cadre may not have the authority to make.

However, the second objective of the provisions is *ultra vires* the Federal Government. It is the prerogative of each State to determine who shall be eligible for appointment into the office of the Chairman of the SBIR. Little wonder that many States and Local Governments have simply been ignoring JTB directives/publications and carried on business as usual.

Although the motive of the Federal Government could be altruistic, it is trite that good or pious intention cannot legalise *ultra vires* action. If the Chairman of a State Board is excluded from a meeting of the JTB, on account that he is not appointed from within the service of the state, in what way will the" exclusion adversely affect the State? Rather, it will provide the States the opportunity to carry on its task of tax administration without the strictures and limitation sometimes imposed by the JTB on the States and Local Government Councils.

4.4 Reduction of Tax Rate and Review of Tax Band

As part of the effort to increase the disposable income of taxpayers, the Bill proposes to adjust the tax bands and rates. The current tax rates and the proposed rates are as in Table 2.

<table>
<thead>
<tr>
<th>Current Year</th>
<th>Rates</th>
<th>Bill</th>
<th>Rates</th>
</tr>
</thead>
<tbody>
<tr>
<td>Below N20,000</td>
<td>05%</td>
<td>Below N30,000</td>
<td>5%</td>
</tr>
<tr>
<td>First N20,000</td>
<td>5%</td>
<td>First N30,000</td>
<td>5%</td>
</tr>
<tr>
<td>Next N20,000</td>
<td>10%</td>
<td>Next N30,000</td>
<td>105%</td>
</tr>
<tr>
<td>Next N40,000</td>
<td>15%</td>
<td>Next N30,000</td>
<td>15%</td>
</tr>
<tr>
<td>Next N40,000</td>
<td>20%</td>
<td>Next N30,000</td>
<td>20%</td>
</tr>
<tr>
<td>Above N120,000</td>
<td>25%</td>
<td>Above N30,000</td>
<td>25%</td>
</tr>
</tbody>
</table>

Table 2

Notwithstanding the array of tax incentives and reliefs, experts have described them as modest. For instance, the implication of the expansion of the tax band is that the income tax liability of an individual
whose taxable income is say N160,000.00 per will now become N22,000.00 becomeN22,000.00 Instead of 27,000.00. According to ArthurAndersen:

The proposed changes in fiscal policy are, at best modest and might not meet the desired objectives of stimulating investment, disposable income and job creation... However, bolder reforms are still required to leapfrog the economy in 2001 and achieve the target of 5 percent growth rate in the Gross Domestic Product.28

As modest as the allowances might be, they have still not been implemented by the State Governments because of the delay in presenting the Bill before the National Assembly.29Since the new policy would have resulted in reduction of the revenue of the State Governments, the State Governments have been using the absence of the appropriate legislation as an excuse for not implementing the new allowances. This development has once again brought to the fore the problem of vesting the Federal Government with the power to make law on State taxes. The Federal Government is fond of introducing amendments to such laws without consulting the States. Ideally, the necessary amendments ought to have been initiated at best by the States or by the Federal Government after due consultations with the State Governments.

There are three main proposals with regard to the Petroleum Profits Tax Act in the Bill. These are:

(i) interest on loan granted by a related company to a company engaged in petroleum operations will become deductible.30

(ii) loss to become deductible in the year of assessment following the year in which it was involved. Currently, under section 14(3) PPTA, a company may, within five months after the end of an accounting period, elect in writing that a loss or any part thereof shall be deferred to and be made in any succeeding accounting period of its choice;31

(iii) the relief of Petroleum Investment Tax credit is limited to companies that signed a Production Sharing Contract on or before 1993.32

The above proposals will still leave unaddressed the major issue of codifying the Memorandum of Understanding (MOU), which provides the framework for the taxation of profits of companies engaged in petroleum operations in Nigeria.

6.0 VALUE ADDED TAX

The key amendments proposed to the Value Added Tax Act include the following:

---

28Arthur Andersen, 2001 Budget Newsletter Vol 2001-02, 28th February, 2001, p. 4
29It is instructive that it took the Executive over three years before the Bill implementing the Budget measures could be forwarded to the National Assembly.
30See section 31 of the Bill.
31See section 32 of the Bill.
32See section 34 of the Bill.
Presently, the VAT Act makes it obligatory for a taxable person to register for VAT before commencing business. It is now proposed that a taxable person should have up to six months of commencing business within which to register for VAT collections. In our view, it may be in the interest of a taxable person to register for VAT as early as possible in order to enable it deduct its input VAT from the output VAT collected by it. However, the value of the proposed amendment is that a taxable person will now have a choice as to whether to register for VAT or not within a period of six months of commencing business without penalty.

As a specific requirement for branch registration is provided;

Ministries and Parastatals are to ensure VAT collection and prompt remittance. A tax clearance certificate issued by the Board will become a condition precedent for ministries and parastatals to receive their allocation from the office of the Accountant-General of the Federation;

Express provisions are made for a taxable person to object to assessments by the Board. However, the provisions contained several gaping holes. For instance, the time limit within which an objection can be made is not stated, it does not state the grounds upon which an objection could be made in order to avoid frivolous objections, it fails to make provisions making the assessment to be final and conclusive if objection is not lodged within a given period of time or after the rejection of appeal;

Some of the exempted goods are now defined. For instance, "basic food items" has now been amended to read "basic locally produced food item", while "locally produced fertilizer" has been amended to read "fertilizer".

While the above proposals may to a certain extent improve the administration of VAT, the main issue raised in the 2001 budget on VAT has not been addressed. The President had promised to review the formula for distributing the Value Added Tax revenue among the states in accordance with the principle of derivation. In his words:

To ensure fair VAT distribution based on the principle of derivation of VAT proceeds, it is recommended that the VAT law should be amended.

Apparently because nothing has been done by the Federal Government to address the concerns of Lagos State on the alleged unfairness in the formula for distribution of the proceeds of VAT, the State reintroduced its own Sales Tax on selected goods and services which is now collected simultaneously with the VAT in Lagos State. Generally, the future of VAT as a federal tax under the 1999 Constitution may be uncertain. The view has been expressed elsewhere that it is ultra vires the Federal Government.

---

33See Section 8 of the Value Added Tax Act No 102, 1993.
34See section 39(1) of the Bill.
35See section 39(3) of the Bill.
36See section 40 of the Bill.
37See section 43 of the Bill.
38See 2001 Budget Speech.
to impose VAT, since taxation of sales or purchase is not one of the items contained in the exclusive legislative list. Apparently, in realisation of this point, the first recommendation on VAT by the Tax Study Group was that "the 1999 Constitution should be urgently amended to include VAT in the Exclusive Legislative List."

It is doubtful if the above recommendation of Tax Study Group will provide an enduring solution against the background of a new consciousness among the State Governments in Nigeria to limit the fiscal powers of the Federal Government. A better option may be for the Federal Government to brace up for the challenges of the fact that VAT unconstitutional under the 1999 Constitution and lead or encourage the State by providing an efficient frame work for a transition of VAT from a Federal tax to a State tax.

7.0 TAXES AND LEVIES (APPROVED LIST FOR COLLECTION) ACT

The main amendment under Taxes and Levies (Approved List for Collection) Act aims at ensuring that the States and Local Governments keep within the boundaries demarcated for them under the Act. Section 45 of the Bill provides that:

Subject to the provisions of Subsection (2) of this section the Federal Government, State Government and Local Government shall not collect any taxes or levies other than those listed in Part I, Part II and Part III respectively of the Schedule to this Act.

In our view this provision, like some of the past efforts of the Federal Government and the JTB to curb the menace of multiplicity of taxes at the State and Local Government levels may not achieve much. The constitutionality of the Act since the commencement of the 1999 Constitution has been called into question. The provisions of the Act cannot override the express provisions of the Constitution on divisions of taxing power. The futility of the Act can be easily revealed when one realises that certain federal taxes such as excise duties, import and export duties are not included in the Part I of the Act. Does this mean that the Federal Government is now bereft of power to collect these taxes? The answer, to our mind, is in the negative. Also, the provisions of the Act are null and void to the extent that it purports to override the provisions of the 1999 Constitution. While the idea of curbing arbitrary taxation is undoubtedly a good one, it is our view that the initiatives for an enduring solution to the problem of multiplicity of taxes prevalent at the lower levels of Government must be done at the State and not the Federal level.

8.0 CONCLUSION

It is remarkable that a Bill reported to have been forwarded to the National Assembly since December 2000 was gazetted in February 2004. The Bill is therefore three years in arrears! Certainly, the provisions

---

41 See Act No. 21 of 1998.
42 Section 1 (3) of the 1999 Constitution establishes the principle of Supremacy of the Constitution.
of the Bill would have been more meaningful if they had been enacted at the appropriate time. Ordinarily one is tempted to hold the National Assembly responsible for the delay. However, looking at the date on the Bill (4th February 2004), one could see that the Executive actually did not forward the Bill to the National Assembly until this year. If this pattern continues, one is afraid that the necessary legislative framework for the reform of the tax system recommended by the 2003 Tax Study Group will ever see the light of the day.

Against this background, it is suggested that a review of the tax laws should be regarded as a critical success factor in fiscal policy formulation. All the necessary tax law amendments should be prepared well in advance and passed, where necessary, with the Appropriation Bill. In this way, the amendments of the tax laws would receive the same priority attention that is usually accorded the Appropriation Bill. Much more, the executive should, take up the challenge of considering the recommendations of the Tax Study Group without delay and forward a more comprehensive Bill on the reform of the National Assembly.