

PAYMENT OF STAMP DUTIES ON LOAN AGREEMENTS – IMPLICATION OF THE FINANCE ACT 2019

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Introduction

The Finance Act 2019 (“the Finance Act”) made significant changes to the tax regime in Nigeria, with broad implications for doing business, investment strategies and tax planning in Nigeria. Changes introduced by the Finance Act include those made to the Stamp Duties Act, Cap. S8, L.F.N. 2004 (“SDA”), amongst others. This article examines some of the changes introduced to the SDA and their impact on cross-border loan agreements.

Relevant Amendments by the Finance Act

The SDA provides that stamp duties are to be charged on various ‘instruments’ at the rates prescribed by the Schedule to the SDA [1] unless exempted. Section 4(1) of the SDA provides that the competent authority to impose, charge and collect stamp duties on instruments between a corporate body and another party is the Federal Inland Revenue Service (“the FIRS”). Stamp duties on instruments between individuals are payable to the relevant tax authority in a state.

The definitions for the words ‘stamp’, ‘stamped’ and ‘instruments’ were amended by the Finance Act to include the following:

Stamp - an electronic stamp or an electronic acknowledgement for denoting any duty or fee;

Stamped - instruments and materials digitally tagged with an electronic stamp or notional stamp on an electronic receipt; and

Instruments - electronic documents.

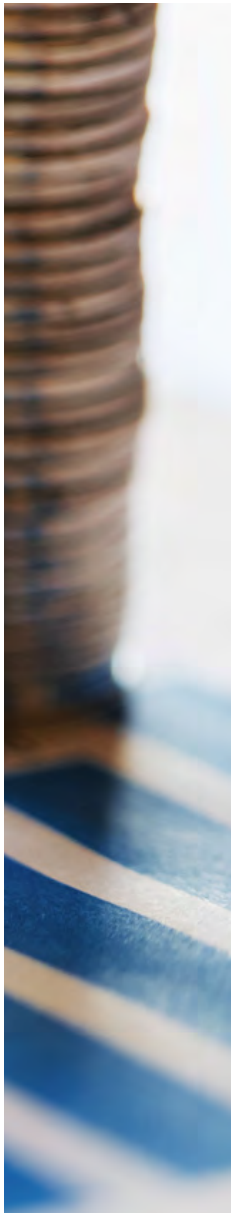
The Position of the FIRS

On 29 April 2020, the FIRS published an Information Circular titled ‘Clarifications on the Provisions of the Stamp Duties Act’ (“the Information Circular”) to guide the public, taxpayers and tax practitioners on the implementation of the extant tax laws.

The Information Circular clarified some of the amendments made to the SDA by the Finance Act and how the FIRS will interpret these amendments, such as the inclusion of ‘*electronic documents*’ as instruments and provision for electronic stamping on electronic document and electronic denoting on instruments.

The Information Circular is particularly important because, for example, though the Finance Act had amended the definition of ‘*instruments*’ to include ‘*electronic documents*’, there was no definition of electronic documents in the Act to guide what type of documents will be classified as such.

[1] Central Bank of Nigeria Operational Instruction on Global Standing Instruction (GSI) Individual < <https://www.cbn.gov.ng/ohr/2020/CCD/CBN%20-%20Operational%20Guidelines%20on%20Global%20Standing%20Instructions%20-%20Individuals.pdf> accessed on 15 April 2021. The GSI Guidelines provide a framework from which financial institutions can recover bad debts from all accounts of the borrower connected to their BVN without recourse to the courts. It was introduced to reduce the incidences of Non-Performing Loans (NPLs). This applies only to individual debtors and the protocol for a GSI for corporate debtors is currently being contemplated. See the African Business No reprieve for Nigeria's chronic loan defaulter <https://african.business/2020/10/finance-services/no-reprieve-for-nigerias-chronic-loan-defaulter/> accessed 12 April 2021.



The Information Circular iterated that all dutiable written, printed or electronic instruments must be stamped (such as electronic media content, electronic documents or files, emails, instant messages, short message service 'sms', any internet-based messaging service, documents on websites or cloud-based platforms, etc.), including any form of electronic acknowledgement of money for dutiable transactions. The examples provided by the FIRS illustrate that stamp duties are payable on dutiable transactions conducted and executed electronically even with no physical documents evincing the same [2]

About electronic documents received in Nigeria, the Information Circular states that an electronic document executed offshore is 'received' in Nigeria if it is retrieved or accessed in or from Nigeria, it or an electronic copy is stored on a device and brought into Nigeria, or it or an electronic copy is stored on a device or computer in Nigeria. Such instruments must be stamped within the period allowed in the SDA once they are deemed to be received in Nigeria.

An important question to consider here is whether this duty to stamp documents accessed in Nigeria depends on the person accessing the document. For example, consider where an electronic facility agreement is obtained through nefarious means from a company's servers stored offshore by a hacker in Nigeria. Would the obligation to stamp the document arise just because the document has been accessed in Nigeria? Unfortunately, the Information Circular does not address this expressly; however, we opine that the obligation to pay stamp duty should arise when the document is accessed by a person to which the benefit of the document enures (including their representatives and their advisors) for the purpose the document was created.

The Information Circular also clarified that stamp duty may be denoted by direct electronic printing or impression on an instrument, electronic tagging, stamp duty certificates or any other form of acknowledgement of payment for stamp duties adopted by the FIRS.

[1] Section 3 of the SDA

[2] Paragraph 3.0 of the Information Circular.

Payment of Stamp Duties and Penalty for Failing to Stamp an Instrument.

Save for the duty payable on bank transfers and receipts as amended by the Finance Act, the rate of stamp duty payable on instruments remains the same, as contained in the Schedule to the SDA. Generally, any instrument signed in Nigeria or relating to any property situated or to any matter or thing done or to be done in Nigeria must be duly stamped at the time when it was first executed, otherwise, it will not be available for any purpose or be given in evidence except in criminal proceedings [3] (subject to any subsequent stamping and exception in the SDA [4]).

This has been iterated in case law, for example, in **Princewill Asuquo & Ors vs. Grace Eyo & Ors** [5] where it was held by Uzo I. Ndukwe-Anyanwu, J.C.A that an unstamped instrument or document required to be stamped *“will not suffice to be used as that instrument before it is stamped and penalties paid”*.

The Court of Appeal in the same case reiterated that, Generally, evidence, including documents, that is relevant to a case or proceeding is admissible in court, however, there are exceptions which render certain documents inadmissible because they fail to meet certain conditions set by law, such as:

- (a) *“unregistered instrument required by law to be registered*
- (b) *unsigned deed of grant or copy thereof*
- (c) *unstamped instrument or document requiring to be stamped unless it may legally be stamped after execution and the duties and penalties are paid.”* (emphasis ours)

Instruments are to be stamped within 40 days from the date of execution on payment of the applicable stamp duty. Otherwise, a penalty of twenty Naira must be paid before it will be stamped. Where the duty payable exceeds N20, as a further penalty, interest at the rate of 10% per annum of the unpaid duty shall accrue on the stamp duty until when the interest becomes equal to the unpaid duty [6] Meanwhile, an instrument liable to ad valorem duty must be stamped before the expiration of 30 days after it was first executed in Nigeria while instruments executed outside Nigeria must be stamped within 30 days after it is first received in Nigeria [7]

[3] S22(4) of the SDA.

[4] For example, s 91 of the SDA provides for instances where an unstamped receipt may be admitted as evidence in any legal proceedings, depending on the illiteracy and ignorance of the person admitting the evidence.

[5] (2013) LPELR – 20199 (CA)

[6] S23 of the SDA.

[7] S23(3)(a) of the SDA.

Also, section 23(4) of the SDA provides that, except where the SDA makes other express provision about any particular instrument, any unstamped or insufficiently stamped instrument which was first executed outside Nigeria may be stamped or up stamped, at any time within 30 days after it is first received in Nigeria, on payment of the unpaid duty.

Save for some instruments specified in the SDA, all the parties to an instrument liable to stamp duty would be liable to the penalty for failing to stamp the instrument.

In other words, facility agreements with Nigerian counterparties, though executed outside Nigeria, will be deemed to be received in Nigeria once the documents are accessed from within Nigeria, either electronically or otherwise. Thus, the obligation to stamp the facility agreement will arise as soon as the dutiable instrument - the executed document - is retrieved or assessed in Nigeria (for example, downloaded to a device in Nigeria or assessed in Nigeria from cloud storage) and the stamp duties must be paid within the period stipulated by the SDA to avoid any liability to pay penalties.

This amendment decidedly curbs previous market practice on cross-border transactions where physical copies of executed documents are kept outside Nigeria to avoid stamp duties.

Conclusion

Stamp duties are payable on applicable instruments. It is important to note that as the definition of instruments now includes electronic documents, the provisions of section 23(4) of the SDA, which provides that an instrument first executed outside Nigeria must be stamped at any time within 30 days after the instrument is first received in Nigeria, will also apply to documents received by electronic means in Nigeria.

We note that the administration of the changes to the SDA in this regard is unclear in terms of how the tax authority will audit and determine when an electronic document is received in Nigeria. Thus, we advise that where the loan is with a Nigerian borrower, all required stamp duties are paid on the finance documents and all perfection requirements by Nigerian law fulfilled as this impacts enforcement of the loan and justiciability of the facility agreement in a Nigerian court.

It is also essential to get the opinion of a Nigerian legal practitioner on the tax obligations arising from a financial transaction as the facts and peculiarities of each transaction may differ.

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