Unravellings:

Tax Implications of Divorce Settlements and Optimality Structuring Possibilities in Nigeria


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"Official statistics vastly understate Nigeria's divorce rates"- The Economist[2]

"Divorce, 'can have a pretty meaningful effect on the outcome for individuals' incomes,' says Katie Prentke English, co-founder of Harness Wealth, a New York-based digital platform that helps individuals find financial, tax, and legal advisers."[3]

INTRODUCTION

The cliché that only death and taxes are certain in life has been proved right all too often; even in events as discomfiting as divorce, it is prescient to pay attention to the tax implications of property settlement before, and after, the dissolution of marriage. The recent high profile divorces of (Jeff and Mackenzie Bezos and Bill and Melinda Gates, has without doubt, made this a topic of interest. According to a recent *Forbes* article, of the fifty (50) wealthiest people in America, nine (9) are divorced, whilst another eleven (11) have divorced and remarried.[4] These 're-alignments' will obviously have financial, and therefore, tax implications.

In Nigeria too, high-profile divorces (especially of celebrities, and high networth individuals (HNIs)), are also in the news from time to time. This article examines Nigeria's tax provisions and seeks to point out potential tax implications of a dissolution.

The Nigerian Framework on Property Ownership in Divorce Cases

We will discuss the applicable framework under respective subheadings below.

No Fixed Formula for Property Division

The ***Matrimonial Causes Act***[5] (***MCA***) does not provide for a fixed formula for dividing property at the point of dissolution of marriage; neither does it confer automatic 'marital property' or 'community property' status on property acquired during marriage, and by extension, joint ownership. Instead, ***section 72(1) MCA*** provides that: *"The court may, in proceedings under this Act, by order require the parties to the marriage, or either of them, to make, for the benefit of all or any of the parties to, and the children of, the marriage, such a settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the case."*

1. The Lead Author is grateful to ***Niran Obele, Esq.*** (*Partner, Tayo Oyetibo & Co*), for the inspiration to write this article pursuant to recent conversation on ***Ilaje Lawyers Forum***. The authors are wholly responsible for the views expressed herein.
2. ***'Divorce in Nigeria: Rings Fall Apart'***, *The Economist*, 09.07.2016: https://www.economist.com/middle-east-and-africa/2016/07/07/rings-fall-apart (last accessed 19.05.2021).
3. Jessica Menton, ***'Divorce, Alimony and Taxes: What You Need to Know'***, *USA Today*, 10.02.2020: https://www.usatoday.com/story/money/2020/02/10/taxes-2020-divorce-alimony-child-support-tax-rules-have-changed/4680569002/ (accessed 21.05.2021).
4. Chase Peterson-Withorn, ***'For Richer And Richest: Inside The Billion-Dollar Marriages, Open Relationships And Bitter Divorces Of The Forbes 400'***, *Forbes*, 09.05.2021: https://www.forbes.com/sites/chasewithorn/2021 /05/09/bill-gates-divorce-inside-the-billion-dollar-marriages-most-expensive-divorces-bezos-divorce-harold-hamm-check/?sh=3eddc457da1f (accessed 18.05.2021). Also according to a commentator: *"Over the past 50 years, exactly one third of marriages have ended in divorce."* See Erin Yurday, ***'Divorce Statistics UK 2021'***, *NimbleFins*, 15.02.2021: https://www.nimblefins.co.uk/divorce-statistics-uk (accessed 15. 02.2021).
5. ***Cap. M7, Laws of the Federation of Nigeria (LFN) 2004.***

Interestingly, ***section 72(2) MCA*** goes further to extend the scope of the authority of the court to properties covered in ante-nuptial and post-nuptial agreements. According to the provision:

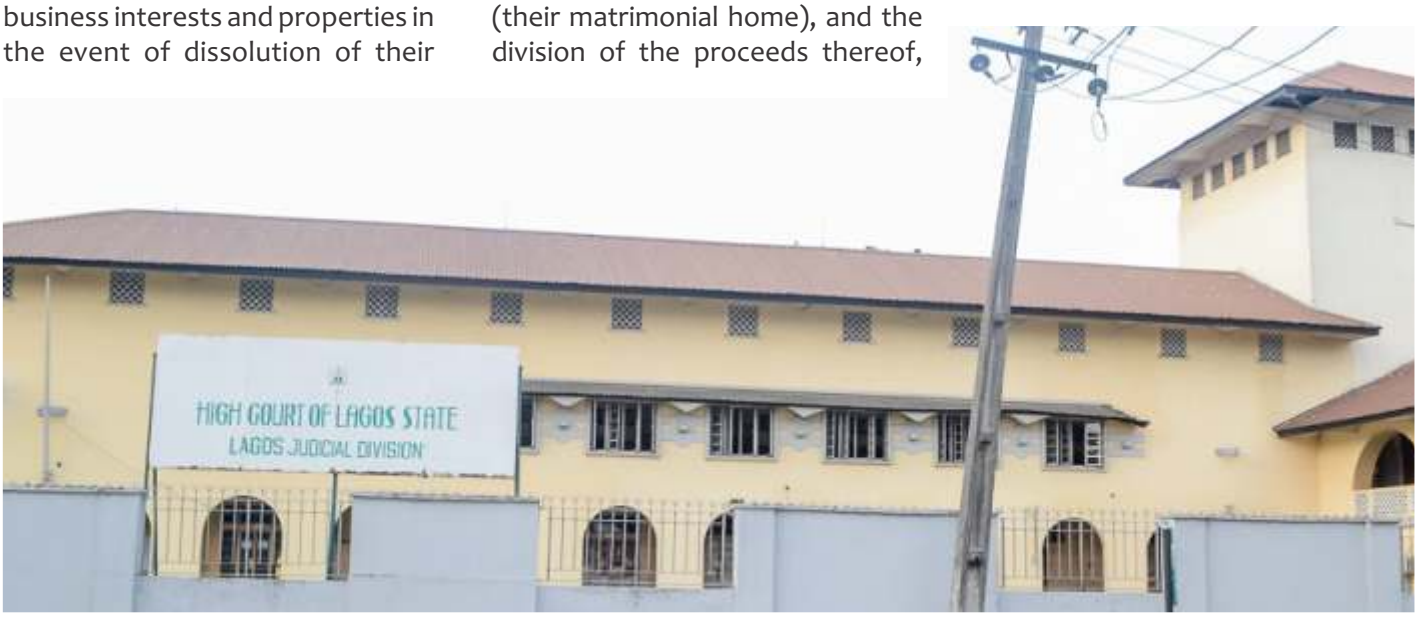
> *"The court may, in proceedings under this Act, make such orders as the court considers just and equitable with respect to the application for the benefit of all or any of the parties to, and the children of, the marriage of the whole or part of property death with by ante-nuptial or post-nuptial settlements on the parties to the marriage, or either of them."*

In ***Oghoyone v. Oghoyone***,[6] the Appellant/Cross-Respondent was married to a Dutch woman; whilst that marriage was still subsisting, he also got married to the Respondent/Cross-Appellant. The parties had before getting married, signed a document detailing the sharing pattern for their joint business interests and properties in the event of dissolution of their 'marriage'. Subsequently, the Respondent/Cross-Appellant commenced matrimonial proceedings against the Appellant/Cross-Respondent at the High Court (HC) of Lagos State, seeking a declaration that the marriage between herself and the Appellant/Cross-Respondent, was null and void.

The Respondent/Cross-Appellant also sought a declaration that she wholly or partially owned the two properties at Plot L, Block 26 Amuwo Odofin Layout; and Plot 316, Block 18 Amuwo-Odofin Residential Estate, Lagos. In the alternative, she sought an order of sale of the properties and an award of two-third of the sale proceeds; and in further alternative, an order of settlement of the property on her for life; and upon her death, that two-thirds of the proceeds of the sale, should devolve to her estate.

The trial court in its judgement, declared the marriage void. It also ordered the sale of Plot L, Block 26 (their matrimonial home), and the division of the proceeds thereof, into two equal halves. Further, it declared Plot 316, Block 18 the exclusive property of the Appellant/Cross-Respondent. According to the Court:

"Plot 316 Block 18, Amuwo Odofin Residential Estate. The Petitioner is claiming an interest on the above premises to which the Respondent claims is his, exclusively. DW1 gave evidence that he sold the property to the Respondent who paid him for which he issued a receipt. The Petitioner also testified that she also bought a Plot of Land Plot 5 Block 28, Amuwo Odofin in her own name. I am not going to go into the details of who paid for what in respect of this Plot because I am of the view that if the Petitioner can have a Plot in her name, the Respondent is entitled to one in his own name too. It is the justice of the matter that should always prevail. For this reason I will not grant the Petitioner's prayer in respect of this Plot of Land and will declare that it remains the exclusive preserve of the Respondent herein. I accordingly hold that she has no interest herein."[7]



6. *[2010] 3 NWLR (Pt. 1182), 564.*
7. *Ibid., 589D-G.*

Dissatisfied with the judgment, the Appellant/Cross-Respondent challenged same in respect of Plot L, Block 26 and the Respondent/Cross-Appellant was also aggrieved about the unfavourable ruling on Plot 316, Block 18. The Court of Appeal (COA) per *Rhodes-Vivour, JCA* (as he then was), dismissed both the appeal and the cross-appeal. On the cross-appeal, *Rhodes-Vivour, JCA* held that:

> *"... I must observe that in matters of this nature a Judge must be guided by what is just and fair in the circumstances. Plot 316 Block 18, was ordered to be given the Appellant/Respondent to cross-appeal exclusively, while Plot 5 Block 28 is owned by the Respondent/Cross-Appellant exclusively. Both are to share Plot L Block 26 equally. To my mind, this sharing formula is justice and fairness... I am satisfied with the learned trial Judge's order."*[8]

Proof of Joint Ownership

However, before joint interest will be inferred by the Courts in Nigeria, *the party claiming joint ownership must provide direct, irresistible and compelling evidence of such contribution*. In ***Essien v. Essien***,[9] the COA affirmed that a *direct financial contribution to the purchase price of the matrimonial home or to the repayment of the mortgage instalments* in respect thereof, was sacrosanct before joint interest could be inferred. However, in ***Kafi v. Kafi***,[10] the COA held that *contribution is not restricted to contribution towards the development or purchase of the property, but also contribution to the success of the business of the spouse.*

In ***Amadi v. Nwosu***,[11] (a Supreme Court (SC) decision cited by the COA in ***Essien***), the spouses were married under customary law, and were therefore not subject to the ***MCA***. In ruling on the issue of joint ownership of property, the SC ruled that *it was important for the spouse to show direct financial contribution in the purchase of the property*. According to *Kutigi JSC,* who read the lead judgement:

"... by using the words 'joint-owner' and 'co-jointly' in paras. 14 & 20 of her Statement of Defence above, the Appellant meant that she contributed to the building of the house. If it were so, then certainly when she came to testify in court she ought to have explained the quality and quality of her contribution. She also ought of [sic] have given details and particulars of the contributions which would have enabled the court of [sic] decide whether or not she owned the property with P.W.1. She did not. In addition the Appellant called no witness to prove that she contributed either labour or sand to the building."[12]

The takeaway from the foregoing is *that the mere fact that a property was acquired during the subsistence of a marriage, does not automatically make such property, "marital property" and thus, a jointly owned property by the parties to the marriage*. Instead, the court will examine the contributory roles of the spouses to the acquisition or procurement of such property.[13]

We now proceed to discuss the tax impact under two scenarios: *voluntary* and *court settlements*.

Nigerian Tax Implications of Voluntary Settlements

In countries such as the United States of America (USA) and the United Kingdom (UK), it seems that the tax provisions favour amicable and non-contentious divorce settlements. However, the reality is that any optimal tax impact is achieved by the parties' ability (or choice) - given their amicable scenario or context - to take advantage of tax planning to underpin their marital property settlements. In the USA for example, it was once estimated that 95% of divorce cases do not proceed to trial.[14]

8. ***Ibid., 590B-D.***
9. ***[2009] 9 NWLR (Pt.1146), 306.***
10. ***[1986] 3 NWLR (Pt.27), 175.***
11. ***[1992] 5 NWLR (Pt.241), 273.***
12. ***Ibid., 280A-B.***
13. In Ghana, property distribution upon dissolution of a marriage is hinged on the equitable doctrine that *"equality is equity"*. Hence, in a petition for dissolution of marriage, the Court will treat every property acquired during the marriage as jointly held and share same equally between the spouses, except where the application of the principle will lead to unfair results. See David Yaw Danquah, ***'Property Distribution at Divorce in Ghana: The Wife Factor and the Principle of Equality is Equity'***, *Mondaq, 19.05.2021*: https://www.mondaq.com/Article/1070016 (accessed 21.05.2021).
14. Lisa Taylor, ***'Why You Should Mediate Your Divorce Instead of Litigating It'***, *Mediate.com, December 2019*: https://www.mediate.com/articles/Taylor-mediate-divorce.cfm (accessed 19.05.2021).

How does the Nigerian tax regulatory framework contextualise these issues? Are parties better served if they elect for a voluntary settlement? In our endeavour to answer these questions, a prefatory remark is that it appears that the relevant tax provisions to such a disposal will be the ***Personal Income Tax Act (PITA), Capital Gains Tax Act (CGTA)*** and the ***Stamp Duties Act (SDA)***.[15]

***PITA** Implications*

Tax is imposed by ***section 3(1) PITA*** *on the total income of every individual resident in Nigeria, earned inside or outside Nigeria, subject to provisions on tax exempt income as may be applicable*.[16] The taxable income sources listed under ***section 3(1)(a)-(e) PITA*** include *gain or profit from any trade, business, profession or vocation; salary, wage, fee, allowance or gain from employment; gains or profit arising from a right granted to any person for the use or occupation of any property; dividend, interest or discount; any pension, charge or annuity.*

Whilst these provisions clearly do not cover monies received from a settlement under ***section 72 MCA***; however, by ***section 3(1)(f) PITA***, tax is imposed on "*any profit or gain or other payment not falling within **paragraphs (a)** to **(e)** inclusive of this subsection.*"[17] Of note is also ***section 23 PITA*** states that PIT is calculated on the income accruing to an individual from each source of his/her income, regardless of whether that source will provide taxable income in the next tax year. Thus, income accruing to spouses from a voluntary settlement will also be taken into cognisance, in determining the aggregate taxable income of a taxable person.[18]

This will include proceeds from the disposal of real and other properties, such as shares and vehicles, and lump or periodic payments for maintenance of the spouse. Interestingly, ***section 3(2)(b) PITA*** defines income broadly to *include any amount deemed to be income under this Act*. It is noteworthy however, that where the settlement includes the inflow of foreign currency to a Nigerian resident spouse, such income would be exempt from PIT if received through official channels.[19]

Relief is also granted by ***section 33 PITA*** for *amounts paid as alimony to a former spouse and maintenance for unmarried children*. More specifically, ***section 33(3)(a)*** provides that the deduction allowed under ***section 33(2) PITA*** shall include "*a deduction of the amount of any alimony not exceeding N300 paid to a former spouse under an order of a court of competent jurisdiction in the case of an individual whose marriage has been dissolved*." This means that where parties agree voluntarily on the payment of a certain amount as alimony, *the amount cannot be claimed as an allowable deduction in calculating PIT of the payor spouse for the year, until an order is made by a court dissolving the marriage*. To say the least, the ₦300 deduction threshold is very unrealistic, in today's world.[20]

15. ***Caps. C8, S8, and C1, LFN 2004.***
16. *Cf.* the view that "*Generally, non-resident Nigerians are not liable to Nigerian PIT to the extent that they are not 'individuals deemed to be resident for that year in the relevant State under the provisions of this Act' (section 2(1)(a)); and they do not 'derive income or profit from Nigeria' (section 2(1)(b)(iv)). Nigerian tax system does not tax non-resident citizens (individuals) on their worldwide income. From the foregoing, diasporans would be liable to Nigerian tax only in respect of their Nigerian sourced income – which has not been also specifically exempted - for example, investment returns on government securities.*" See Afolabi Elebiju and Gabriel Fatokunbo, '*Remittances: Legal Regulatory and Commercial Issues in Diaspora Transactions*', *LeLaw Thought Leadership Insights, February 2020, p.4*: https://lelawlegal.com/add111pdfs/REMITTANCES.pdf (accessed 27.05.2021).
17. Even monies earned illegally will also be liable to tax under this provision which serves as the omnibus charging provision of ***PITA***.
18. Contrast with the position in the UK where transfer of assets under a divorce settlement will not give rise to income tax payment. However, where the asset is an income generating asset, income tax will be imposed on subsequent income generated from it. See Shipleys, ***'Taxation and Divorce'***, *15.12.2020:* (accessed 15.05.2021). Also, maintenance payments will not be taken into account in calculating the income of the spouse being maintained. See Saffrey Champnes, ***'Tax Fact Sheet: Tax Implications of Separation and Divorce'***, *October 2020, p.2*: https://www.saffery.com/~/media/Files/S/Saffery-Champness-V2/documents/publications/2020/tax-implications-of-separation-and-divorce-2020.pdf (accessed 15.05.2021).
19. According to Elebiju and Fatokunbo (***supra***, at *p.4*), "*Remittances received in Nigeria through the formal channels are tax exempt, for example when non-resident Nigerians transfer foreign currency (forex) into their forex domiciliary accounts with Nigerian banks. The tax exempt status is achieved by the combined operation of sections 19, 75 and Third Schedule, Personal Income Tax Act (PITA).*"
20. Could it be that the reason for the incredibly low reliefs provided by ***PITA*** is attributable to an oversight by the draftsman - who presumably should have deleted these marital related heads of relief after they were merged into a single relief, the Consolidated Relief Allowance (CRA) vide PITA amendment legislation in 2011? See ***section 5 PITA (Amendment) Act No. 20 of 2011***. The amendment, taking into cognisance inflationary realities provided for a total relief of the higher of ₦200,000 and 1% of gross income, plus 20% of gross income as against the erstwhile relief of ₦5,000 plus 20% of earned income. It is interesting to note that ***section 27 Finance Act No. 1 2020 (FA) 1 2020*** deleted ***section 33(4)-(6) PITA*** which provides for scenarios where a spouse can claim the deductions of the other spouse falling outside ***section 33(3)(a)*** and could have used the same opportunity to address ***section 33(2) and 33(3)(b) PITA.***

Under ***section 33(3)(b)***, a deduction of ₦2,500 is allowed in respect of four (4) unmarried children who were maintained in the previous year, provided they were below sixteen at the beginning of that year, or were attending an educational institution full time or learning a trade or profession, full time. For the purposes of limiting the scope of the relief, ***33(3)(b)(i)*** provides that the two spouses will be treated as one and the same individual. Furthermore, in a voluntary settlement pending a potential suit for dissolution, the law will still restrict the maximum relief for maintenance to children of the marriage to four (4) children at ₦2,500 per child.[21]

Whilst the ₦300 alimony deduction and ₦2,500 per-child deduction could be claimed by the burdened spouse (who is an employee), under the Pay-As-You-Earn (PAYE) scheme,[22] the other property settlements will entail filing of PIT forms in order to declare them as *"Other Income"* as the case may be, for the employee-spouse benefitting from such settlement. Thus, remittance of PAYE by an employer on behalf of an employee in no way amounts to full compliance with the PIT obligations of the employee (taxpayer) in this regard – because the tax impact of any marital settlement cannot conceptually be captured under the PAYE scheme, not being employment related.[23]

A tax planning option open to spouses seeking to reduce PIT exposure on the transfer of cash during a settlement is to channel the cash into the subscription for shares in a company owned wholly by the receiving spouse. The latter can set up an effectively (but not so described), special purpose vehicle (SPV) in this regard. The consideration will not be subject to Companies Income Tax (CIT) as it accrues to the company as capital and not income; it is also not direct income (even if it is effectively so), to the spouse. Afterwards, the subsequent subscriber spouse t can transfer his/her shares by way of gift to the other spouse.[24]

Another alternative is if one spouse or the spouses have real estate in a property holding company, settlement could result in transfer of shares such that the other spouse become a co-owner of such company (in agreed ratio), or if already co-owned to reflect new shareholding structure consistent with the divorce settlement terms. Since there is no mark to market rules in Nigeria, the acquisition of new or additional shares by one spouse would be PIT neutral. The other advantage is that the indirect transfer of real property in this manner, optimises transactions costs (by obviating for example, consent and professional fees that would have resulted from an assignment of the transferring spouse's interest).

21. Meanwhile, ***PITA*** appears to be impervious to the fact that the spouses could re-marry and then have blended families; for example, where they marry ex divorcees or spouses that were previously single parents.
22. According to an author, "*The term PAYE (Pay-As-You-Earn) is used to describe the system whereby the employee pays tax on whatever income he earns from his employment in any particular month at the end of that month. The employer deducts the tax from the employee's monthly earnings including any allowances or benefits paid in cash or given in kind to or on behalf of the employee. The total amount deducted by the employer from his employees' earnings at the end of every month is then remitted to the relevant tax authority.*" See A.K. Agyei, ***'Principles of Personal Income Taxation in Nigeria'***, *(WABPL, 1983), p.145.*
23. The relief for alimony and maintenance seems to have been introduced by 1999 ***PITA*** amendment legislation.
24. Such share transfer by way of gift will also not liable to CGT and the instrument exempt from SD.

Notably, the foregoing approach also entails regulatory optimality: time and efforts on perfecting title pursuant to any direct transfer of real property is also avoided. Indirect transfer of the real estate through shares can be consummated quickly and seamlessly.[25]

***CGTA** Implications*

The ***CGTA*** has no specific provisions on capital gains (CG) implication of property settlement for spouses in Nigeria.[26] However, its general provisions are clear enough to allow parties organise their affairs in a tax efficient manner. Where a person disposes an asset at an amount greater than the acquisition cost of the asset plus historic maintenance costs, including expenses incurred in trying to defend or establish title to the asset, enhance the value of the asset or dispose the asset, Capital Gains Tax (CGT) is levied on the difference (gains) at a flat rate of 10%.[27] By ***section 2(4) CGTA*** (as amended by the second ***Finance Act 2020 (FA 2 2020,***[28] ***section 2***), upon disposal of a chargeable asset, the transferor "*shall not later than 30 June and 31 December of that year, compute the tax, file self-assessment return and pay the tax computed in respect of the chargeable assets disposed in the periods.*"

Where a spouse disposes by way of a gift, an asset not acquired on a devolution of death, the spouse gifting that asset shall not be chargeable to CGT, on such disposal.[29] However, if the property was acquired by the disposing spouse by devolution under ***section 8 CGTA***, *such gift shall be chargeable to CGT, if it takes place more than two years after the death of the original owner*; a gain is deemed to have accrued in such circumstance.[30] Hence, the two year rule should be a very important factor when gifting properties so as to lighten the tax burden of the person (spouse) disposing the property.

25. We concede that the approach does not mean there would not be other issues to attend to; for example, there could be transfer pricing (TP) implications of subsequent management arrangements of the SPV or asset holding company; and or of its transactions with the spouse(s), for example if a spouse is a tenant of the company, etc. A spouse may later want liquidity, the company may not be paying dividends sufficient to sustain a spouse's living costs, there would be ongoing maintenance (corporate compliance) costs, etc. In fact, so many other subsequent circumstances may arise, but tax planning based on full awareness of couple's present and reasonable projections about future circumstances can help to at least put them in a more prepared position than otherwise. It affords the opportunity to do detailed comparative analysis of potential options (including financial modelling as appropriate), before choosing the most optimal one.

26. *Cf.* with the Ghanaian position in ***section 43 Income Tax Act 2015 (Act 896)*** as amended, which exempts the transfer of an asset to a spouse or former spouse from CGT**.** See Emmanuel Mate-Kole, ***'How to Lower Tax Liability Arising from Property Sale'***, *11.06.2018*: https://www.mondaq.com/property-taxes/709506/how-to-lower-tax-liability-arising-from-property-sale (accessed 20.05.2021).

27. ***Sections 11 and 13 CGTA.***

28. Two (2) ***Finance Acts*** received presidential assent in 2020. ***FA1 2020*** was signed on 13th January, whilst ***FA2*** was signed on 31st December 2020. Although the former erroneously self-styled itself (in ***section 57***) as ***Finance Act 2019***.

29. ***Section 40 CGTA.*** Under South African (SA) law, a transfer between spouses will also not trigger any CGT liability per ***section 9HB Income Tax Act (58 of 1962***). See, SA Revenue Service, *'Comprehensive Guide to Capital Gains Tax' (Issue 9), 05.11.2020, p.568:* https://www.sars.gov.za/wp-content/uploads/Ops/Guides/LAPD-CGT-G01-Comprehensive-Guide-to-Capital-Gains-Tax.pdf (accessed 26.05.2021). In the UK, transfer of assets between spouses or civil partners who are living together in any part of the year is regarded as being made on a no gain/no loss basis, and thus no CGT is paid per ***section 58 Taxation of Chargeable Gains Act (TCGA) 1992.*** According to ***section 282 Income and Corporations Tax Act (ICTA) 1988 UK,*** a woman is treated as *"living together"* with her husband, unless she is separated under a court order or separated by a formal deed of separation or separated in such circumstances that the separation is likely to be permanent. This *'no gain/no loss rule'* will cease to apply at the end of the tax year of separation, whether or not they were living together at the time of transfer. See Shipleys (***supra***). However, they will be treated as connected persons for purposes of income tax and any disposal between them valued at market value until an order of dissolution is made by the court: Robert Wilson, ***'Divorcing Couples- Beware of Capital Gains'***, *30.07.2020*: https://www.etctax.co.uk/blog-news/ divorcing-couples-beware-of-capital-gains-tax/ (accessed 19.05.2021).
The position in the USA is similar; ***section 1041 Internal Revenue Code (IRC)*** provides that no gain or loss is recognised on the transfer of a property between spouses or to a former spouse, provided it is incidental to the divorce. Such transfers are treated as a gifts; and a transfer is incidental to divorce if it occurs within one (1) year of the cessation or is related to the cessation of the marriage. See also: https://www.govinfo.gov/ content/pkg/USCODE-2010-title26/pdf/USCODE-2010-title26-subtitleA-chap1-subchapO-partIII-sec1041.pdf (accessed 20.05.2021).

30. ***Section 8(6) CGTA.***

Again, *where there is a disposal of real property by the spouses for the purposes of sharing the proceeds, such transaction will normally be chargeable to CGT. The exception is where such property has been the individual's only or main residence throughout that period, or throughout the period of ownership except for all or any part months of that period, and this will include adjoining land.*[31] However, the acquisition of the dwelling house must have been made for the purpose of residing in it, and not wholly or partly for the purpose of realising a gain from its disposal. Also, any gain attributable to any expenditure made after the period of ownership with the intention of realising a gain from disposal, will be liable to CGT.[32]

If a vehicle is gifted to a spouse in pursuance of the settlement, such transaction being a gift, will clearly not be subject to CGT, and this is regardless of whether it devolved to the spouse disposing of it by reason of death, under ***section 8 CGTA***. This is because ***section 39 CGTA*** exempts from CGT, proceeds from the disposal of "*mechanically propelled road vehicles constructed or adapted for the carriage of passengers.*"

Also, where there is a transfer of shares/stocks as a gift to a spouse, such disposition will not be liable to CGT, because the transferor is not realising any gains from such disposal; but more importantly, the reality is that transfer or disposal of shares or stock (whether by sale or gift), is be exempt from CGT under ***section 30 CGTA***. ***Section 30*** therefore offers a complement to the PIT-neutral indirect transfer of interests in real property *via* shares of asset holding company as discussed under '*PIT Implications*' above. On current law, this is an all-round tax optimal approach for effecting divorce settlement.

Finally, ***section 23 CGTA*** treats husband and wife as "*connected persons*", so that any acquisition and disposal made between them (which is not a gift), is presumed not to have occurred at arm's length.[33] Hence, the value of the consideration will be the market value and not the actual consideration (if below market), and CGT will be chargeable unless the asset is exempt.[34]

SDA *Implications*

It is apt to restate that Stamp Duty (SD) is not a tax on transactions,[35] but on the documents evincing such transactions. The ***SDA*** imposes duty on any transfer operating as a voluntary disposition *inter vivos* as if it were a conveyance or transfer on sale. The value of the property is regarded as the consideration and an effective rate of 0.3% (i.e. 15 kobo for every N50) is applied to ascertain the SD chargeable.[36]

In addition, if spouses decide to exchange real property between themselves, or upon the division of real property, agree to pay a certain sum exceeding N200 for equality, the instrument upon which the exchange or partition is effected will be stamped at the same *ad valorem* rate as a conveyance on sale for the consideration paid.[37]

31. ***Section 37 CGTA.*** The position is similar in the UK as no CGT will arise on the disposal of the main place of residence of the spouses courtesy of ***section 222 TCGA.*** However, where the transferor spouse moves out of the matrimonial home thereby altering his/her main place of residence, relief will still be available if the disposal takes places within nine (9) months of the property ceasing to be the transferor's main place of residence according to ***Section 223 TCGA.*** *Cf.* with the SA position where spouses married in community of property will be entitled to the R2 million primary residency relief. The relief will be divided equally between them to allow them claim up to R1 million Rand each in untaxable gain for such disposal. See SA Revenue Service, ***'Disposal Between Spouses'***, *03.05.2021:* https://www.sars.gov.za/types-of-tax/capital-gains-tax/ exclusions-and-roll-overs/disposals-between-spouses/ (accessed 20.05.2021). In the USA also, there is no total exemption of gain from the disposal of the principal place of residence; instead, spouses are allowed to individually exclude the first US$250,000 (total of US$500,000) gain on the disposal of their place of primary residence according to ***Section 121 IRC***. However, where one spouse elects to buy out the interest of the other spouse and remain in the house, the seller will not be liable to pay CGT, as the sale is part of the divorce settlement. On the other hand, the buyer will be liable to pay CGT on a subsequent disposal to a third party, subject to the US$250,000 relief. However, for a home to qualify as a principal place of residence, the transferor(s) must have lived in it for two (2) of the five (5) years preceding the sale. On this point, see Emily Doskow, ***'Capital Gains When You Sell Your House at Divorce'***, *DivorceNet:* https://www.divorcenet.com/resources/divorce/capital-gains-tax-sell-house-divorce.htm (accessed 20.05. 2021).

32. ***Section 37(4) CGTA.***

33. ***Section 23 CGTA***, captioned "*Meaning of 'connected persons'* " prescribes in ***23(1)*** that "*any question whether a person is connected with another shall for purposes of the [CGTA] be determined in accordance with this section…* " By ***section 23(2)***, "*A person is connected with an individual if that person is the individual's husband or wife, or is a relative, or the husband or wife of a relative, of the individual or of the individual's husband or wife.*" See also ***section 20*** (***Artificial or fictitious transactions***), especially ***section 20(3)(b)*** on transactions otherwise than at arm's length; ***section 22*** (***Transactions between connected persons***) and ***section 46*** (***Interpretation and supplementary provisions***).

34. ***Section 22 CGTA.***

35. See ***section 3(1) SDA.***

36. ***Section 63 SDA.***

37. ***Section 67 SDA***. It appears that the sum paid in this instance equates to the excess of the value of one property over another.

The ***SDA Schedule paragraph*** (***Para***) headed "***Agreement or Any Memorandum of an Agreement***" also imposes 15 kobo fixed duty on any agreement or memorandum of any agreement under hand only, and not otherwise charged with duty, whether the same be only evidence of a contract or obligatory upon the parties from its being a written instrument.

The ***Para*** headed "***Bond Covenant, or Instrument of any kind***" is in *pari materia* with similar ***Para*** in ***Schedule 1*** of the ***English Stamp Act 1891*** before its repeal by ***section 64(1)(a) UK Finance Act 1971.*** Historically, instruments providing for the payment of maintenance in matrimonial causes were subjected to SD, pursuant to that provision. The ***SDA*** prescribes SD at 75 kobo for every N10 (0.075%), where the instrument evincing payment of any sum or sums of money at stated periods shows that payment is for the time of life or any other indefinite period. Where the payment is for a definite period so that the total amount to be paid can be ascertained, the rate will be the same *ad valorem* duty for a mortgage or bond which is 75 kobo for every N200 (0.00375%).[38]

An instrument evincing transfer of shares and stocks will also be exempt from SD, pursuant to ***Item 13,*** under "***General Exemptions from all Stamp Duties***" in the ***SDA Schedule.***

Nigerian Tax Implications of Court Ordered Settlement

Often, because of the surrounding (adversarial) circumstances in many divorce situations, the parties are unable to agree on the settlement of real and personal property leaving the court to exercise its discretionary powers under ***section 72 MCA.*** Consequently, we now analyse the related tax implications of a court ordered settlement of property under the three taxes discussed above.

PITA *Implications*

Where the court orders for the payment of a lump sum to a spouse or for periodic payments or the disposal of any property and the payment of all or part of the proceeds to the spouse or settles any real property on her behalf from which she earns rent, the tax treatment will be similar with that of a voluntary settlement.

An individual will also be entitled to deduct the amount of any alimony paid to a former spouse under an order of a court of competent jurisdiction. However, the relief to be claimed is limited to N300 annually.[39]

The order of dissolution also entitles the spouses to 'separate personalities' for the purposes of claiming relief for maintenance. Hence, where the parties have more than four children it will be possible where no party is maintaining more than four children to deduct up to N20,000 between them as relief for maintenance under ***section 33(3)(b) PITA.***[40]

In a scenario where the maintenance cost is shared between two or more persons, the total deduction allowed is N500 and the deduction to be allowed an individual is the fraction of N500 apportioned to him/her, by the relevant tax authority.[41] Although the sum to be deducted is quite infinitesimal, from a tax planning perspective, the ex-couples will be better served if they do not share the maintenance burden for any child.

38. *Cf.* with the Ghanaian provision that exempts instruments evincing transfers made as part of divorce settlements and transfers made as gifts *inter vivos* from SD per Item ***(2)*** and ***(3), Schedule 1, Para*** headed "*Transfers: General Exemptions from all Stamp Duties*" ***Stamp Duty Act, 2005 (Act 689).*** See Emmanuel Mate-Kole (***supra***).
39. ***Section 33(3) (a) PITA.*** The relief granted the spouse paying alimony is incredibly low given current realities. Considering the very recent amendments to ***PITA*** *vide* the ***Finance Acts 2020***, could the legislative neglect be intentional? Or maybe the legislature sees the low relief as a tool to discourage spouses from dissolving their marriages? *Cf.* SA where the spouse making the payment is not entitled to claim a tax deduction on the amount paid as alimony/maintenance. See Taxsaves, ***'Tax(ing) Consequences of Marriage Contracts'***, *08.11.2019*: http://taxsavesa.co.za/taxing-consequences-of-marriage-contracts/ (last accessed 20.05.2021). In the same vein, a former spouse in the UK paying alimony is also not entitled to claim any relief for it. See Saffrey Champnes (***supra***). In the USA, for divorces finalised before 1 January 2019, a payer of alimony is allowed to deduct such payment for tax purposes, but the receiver must report and pay income tax on it if the payer so deducts. See Internal Revenue Service, ***'Topic. No. 452 Alimony and Separate Maintenance'***, *12.03.2021*: https://www.irs.gov/taxtopics/tc452 (accessed 20.05.2021).
However, for marriages dissolved after 31 December 2018, alimony payments are no longer tax deductible for the payer, and they are not recognised as taxable income in the hands of the receiver for Federal tax purposes: Jessica Menton, ***(supra)***. It is instructive to state that such payments are still tax deductible for the purposes of State and City income taxes in New York and California for instance, which elected not to follow the Federal position. See Heather L. Locus, ***'Minimising Taxes in Divorce Without the Alimony Deduction'***, *Forbes, 12.07.2019*: https://www.forbes.com/sites/heatherlocus/2019/07/12/minimizing-taxes-in-divorce-without-the-alimony-deduction/?sh=79aecd38344b (accessed 20.05.2021). See also, **Matthew A. Feigin** *et al*, '***The Alimony Deduction Lives on in New York … With a Few New Loopholes***', *Law.com (Yahoo Finance), 31.12.2018*: https://finance.yahoo.com/news/alimony-deduction-lives-york-few-073025822.html (accessed 21. 05.2021).
40. *Cf.* USA where payments made as Child Support are tax neutral, as the payer cannot deduct it or the receiver report it.
41. ***Section 33(1)(b)(iii).***

***CGTA** Implications*

It is trite that a court in an action for the dissolution of marriage can order a party to settle property on behalf of the other spouse. Where such an order is made, it is submitted that such a disposal to a spouse will not be liable to CGT as no consideration would have been paid, and by extension, no gain will accrue on the disposal. However, if the spouse is instead ordered by the Court to sell the land and distribute the proceeds, it seems the gains accruing will be subject to CGT, as the law fails to expressly exempt such gain from CGT.[42]

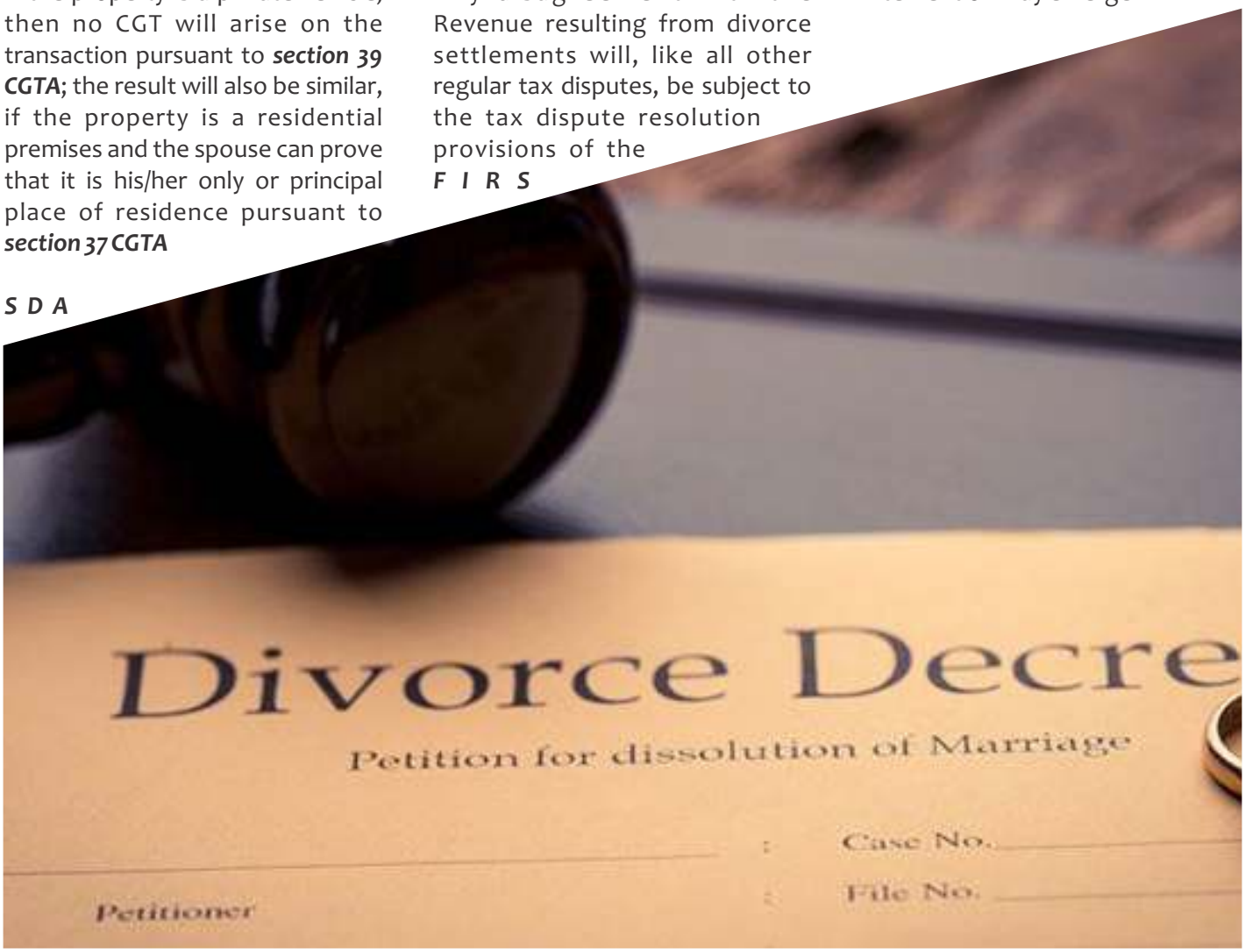
If the property is a private vehicle, then no CGT will arise on the transaction pursuant to ***section 39 CGTA***; the result will also be similar, if the property is a residential premises and the spouse can prove that it is his/her only or principal place of residence pursuant to ***section 37 CGTA***

***S D A** Implications*

In addition to paying SD under ***"Bond Covenant, or Instrument"*** in the ***SDA Schedule***, SD will also be paid on the transfer of property to a spouse by order of court. This is according to ***section 65 SDA*** which *imposes duty on every instrument, any every decree or order of any court, whereby any property on any occasion, except a sale, or mortgage, is transferred to or vested in any person*. The applicable rate is 0.015% or 75k for every N50, charged on conveyance or transfer of property.

Divorce Settlements: Tax Dispute Resolution

Any disagreement with the Revenue resulting from divorce settlements will, like all other regular tax disputes, be subject to the tax dispute resolution provisions of the ***F I R S (Establishment) Act***[43] ***(FIRSEA)*** and ***PITA***, ***CGTA*** or ***CITA*** as the case maybe. The apparent dearth of tax litigation in this space is a testament to the fact that there has not been much activity (in terms of robust Revenue *vs* taxpayer engagement) on tax related marital matters. For socio-cultural, religious reasons, divorce settlements may be low key, not requiring much formality, or have some other elements that make the Revenue not to think of stepping into the arena, influenced by thinking that it needs to pick its fights. As things evolve, fitting cases for Revenue's enforcement intervention may emerge.



42. See for instance, ***section 6 CGTA*** on the wide scope of disposals that are subject to CGT and ***section 9 CGTA*** which exempts from CGT, gains from a compulsory acquisition. Also see the
43. CGT exemption on related party corporate restructurings in ***section 32 CGTA*** (as introduced by ***section 49 FA1 2020***).
Cap. F36, LFN 2004.

Conclusion

As indicated in Footnote 1, a discussion on the tax liability of HNIs upon separation, inspired this article. Although a very popular topic in developed countries, the Nigerian religio-cultural bias on divorce, seems to have crept into our tax laws. There are very few provisions that cater for the peculiarities of spouses who have decided to separate. In the few instances like the ***section 33 PITA*** provision on "*relief for payment of alimony*", the sum is so paltry in the light of current inflationary realities, that the provision is better deleted. Arguably, its retention is due to draftsman oversight, especially when some other amendments were being effected to the ***PITA*** vide the ***FA1 and FA2 2020***.

It appears that voluntary settlements might be more tax efficient, considering that the heaviest tax burden will most likely arise from CGT on disposal of assets; and parties may be able to take advantage of tax planning to optimally structure such disposals.[44] Although the Courts enjoy a wide discretion under ***section 72 MCA***, and may be convinced to make tax efficient orders, there are no guarantees in this regard, as sometimes it may boil down to the attitude of the particular Courts regarding perceived tax planning.[45] It is therefore risk averse for parties to do voluntary settlements that would be amenable to bespoke tax planning.

The fact that this area has largely gone under the radar in Nigeria could be a reflection of the historic situation whereby divorce statistics was not worrisome and/or traditional methods were applied to deal with such. Statistics attributed to the National Bureau of Statistics states that in 2016 "*just 0.2% of men and 0.3% of women have legally untied the knot.*"[46] However, according to a commentator, between March 2020 and March 2021, the High Court of the Federal Capital Territory, Abuja dissolved over 200 marriages.[47]

Given the impact of the 'modern' nature of the Nigerian society and further potential forward looking scenarios, it may be prescient for individuals, especially HNIs to pay more attention to the tax impact of their pre-nuptial and post marital arrangements.[48] Given the increasing focus on the Revenue on improving tax collections, this could also be an area that will not be so invisible, going forward.

It is not unlikely that in future, especially if the Federal Government (FG) finds some policy reasons to attempt to "*tobaccolize*" divorce, for it to amend the tax laws, such that the incidence of divorce will deliver higher tax yields to public coffers. This is particularly as the FG intends to pass amendment tax legislation annually, *vide* ***Finance Acts***.[49]

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44. The option of using a trust vehicle is one that might seem attractive. However, apart from the professional fees for setting up and running the trust, income accruing and paid to the beneficiaries (spouse(s) will be taxable in their hands.
45. See for example, ***Phoenix Motors Ltd v. National Provident Fund Management Board [1993] 1 NWLR (Pt. 272), 718 at 731F (Phoenix Case)***, where *Niki Tobi, JCA* (as he then was) held that "*No court of law should lend its hand to a person or body bent on beating the efforts of Government at collecting revenue by relying on technicalities of the law with a frugal aim to cheat Government of its legitimate income.*" Also, in ***Mobil Oil (Nig.) Ltd v. FBIR 2 All NTC 203, at 218*** *Bello JSC* maintained that "*In construing a statute, regard shall be given to the cause and necessity of the Act, then such construction shall be put upon it as would promote its purpose and arrest the mischief which it is intended to deter. As the Appeal Commissioners pointed out in the judgement, some companies have been manipulating their accounts with intent to hide their true assessable profits and in that manner have been avoiding tax which they ought to have paid.*" Also, see the more recent position of the TAT in ***CGM CMA Del Masa v FIRS (2021) 55 TLRN 28 at 74*** aligning itself with the position of the Court in the ***Phoenix Case***.
46. *The Economist* (***supra***).
47. Ochogwu Sunday, ***'Alarming Rate of Divorce in Abuja, Other States Traced to the Use of Kayan Mata'***, *05. 03.2021*: https://dailypost.ng/2021/03/05/alarming-rate-of-divorce-in-abuja-other-states-traced-to-use-of-kayan-mata/ (accessed 19.05.2021).
48. For instance, in the petition for divorce filed by Melinda Gates at the Superior Court of Washington, she urged the court to divide all their properties, debts and liabilities as *per* their separation agreement. Without doubt, the Gates' would have consulted financial and tax planners to methodically organise their affairs in the agreement, before officially filing for divorce. See Alexis Keenan, ***'Bill and Melinda Already Decided How to Share Wealth: 'Divorce is Not Something to Waste Money On'***, *Yahoo Finance, 04.05.2021:* (last accessed 20.05. 2021).
49. Although same could be criticised as callous and immoral– in effect worsening the trauma of a couple whose marriage just crashed, and potentially attracting the same opprobrium as 'Tampon Tax' (VAT or sales tax on female hygiene products, not applicable in Nigeria, and the UK (following Brexit) but still applicable in the EU and some States in the USA. As a commentator noted, "*Some may say that divorce is the psychological equivalent of a triple coronary bypass. … Zsa Zsa Gabor and Liz Taylor certainly made process seem easy, but jokes aside, getting divorced can present a torrid time for many. The physical and emotional effort and administration required can be a drawn out, lengthy and costly process and should not be taken for granted.*" See Robert Wilson (***supra***). We believe that the taxman should not make burden of such life transforming experience heavier for divorcees.