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Synchronisations: **Size Categorisations under Nigerian Companies and Tax Legislation**

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Introduction

Before the two ***Finance Acts 2020***[1] (***FA1 2020*** and ***FA2 2020***)'s amendments to the ***Companies Income Tax Act***[2] **(*CITA*)** and the ***Value Added Tax Act***[3] **(*VATA*)** in January and December 2020 respectively, size-based company categorisation was not totally a low key affair in the now repealed ***Companies and Allied Matters Act,***[4] (***CAMA 2004***), or even in the ***CITA***. However, it was totally off the radar in the ***VATA***.[5] In between the two ***Finance Acts***, ***CAMA 2020*** was enacted in August 2020, with further detailed size-based provisions on company classifications.

Fa1 2020's newly introduced (threshold) distinctions between *"small"*, *"medium-sized"* and *"large"* companies has significant preferential tax treatment and compliance obligations.[6]

Subsequently, ***CAMA 2020 (CAMA)*** made copious new provisions for *"small"* (private) companies. ***FA2 2020*** followed suit with its own amendments to the original ***FA1*** amendments.[7]

This article discusses the policy rationale for size-based companies' categorisation, compares the relative treatment (historic and current) under Nigerian legislation and provides perspective on issues arising as a result of recent legislative changes, against policy considerations such as improving Nigeria's ease of doing business, especially for start-ups.

A. CAMA Categorisations

As is to be expected, categorisations is not new under the ***CAMA***, and happens under different guises. For example, by ***nature or character*** - depending on objectives, a company can be

1. The first in the series, erroneously self-styled ***Finance Act 2019*** (see ***section 57***), was signed into law on 13th January 2020. Its successor ***Finance Act 2020*** received presidential assent on 31st December 2020. This writer refers to both legislation as ***Finance Acts 2020 (FAs 2020)***, because the first did not become an Act until it was signed into law in January 2020. According to ***section 1 Interpretation Act, Cap. I23, Laws of the Federation of Nigeria (LFN) 2004***, *"An Act is passed when the President assents to the Bill for the Act…"* ***(section 1(1))***, and *"where an Act is expressed to come into force on a particular day, it shall be construed as coming into force immediately on the expiration of the previous day"* ***(section 1(3))***. The commencement dates of the ***FAs 2020*** as expressed respectively therein, are 13th January and 31st December 2020. See also this author's other ***FA1 and FA2 2020*** *LeLaw Thought Leadership* articles: ***'Connections, Collections': Issues Arising from the Imposition of Excise Duties on Telecommunications Services in Nigeria'***, *April 2021*: https://lelawlegal.com/add111pdfs/Connections_Collections_.pdf; ***'Addendum – 'Withholding Tax: The A-Z of Grossing-Up'***, *April 2021*: https://lelawlegal.com/add111pdfs/ Afolabi_-_Addendum_updated.pdf; ***'Rendezvous': Implications of Tax Provisions of Nigeria's Finance Act (No.2) for Non-Residents'***, *January 2021*: https://lelawlegal.com/add111pdfs/TLR_AE_-_FA2_2020.pdf; ***'Nigeria's Finance Act 2020 Tax Amendments - Should the Oil and Gas Sector Be Nervous?'***, *March 2020*: https://lelawlegal.com/ add111pdfs/Nigeria-Finance-Act-2020-Oil-Industry-Impact.pdf (all accessed 14.08.2021).
2. ***Cap. C21, LFN 2004***.
3. ***Cap. V1, LFN 2004***. Other tax legislation like For an earlier commentary on the interaction between Nigerian corporate and tax law by this author, see ***'Relationships and Scrutinisations: The Companies and Allied Matters Act 2020 and Transfer Pricing in Nigeria'***, *LeLaw Thought Leadership, April 2021,* available at: (accessed 14.08.2021).
4. ***Cap. C20, LFN 2004,*** which has now been repealed by ***Companies and Allied Matters Act No. 3 of 2020 (CAMA 2020)***. ***CAMA 2020*** received presidential assent on 7th August 2021. See for example, company categorisation provisions of ***sections 350, 351, 352, 353, 372, 376, 377, 567;*** and ***Seventh, Eighth and Ninth Schedules, CAMA 2004***. Notably, these provisions were also *in pari materia* replications of equivalent sections, etc in ***CAMA Cap. 59, LFN 1990***.
5. Rather, the ***VATA*** had VAT exempt list in its ***First Schedule***, and these included for example, medical and pharmaceutical products, basic food items, and books/educational materials.
6. ***Section 22 FA1 2020*** introduces definitions of *"small company"* (SC), *"medium-sized company"* (MSC) and *"large company"* (LC) into ***section 105(1) CITA***. By the combined effect of ***sections 9 and 16 FA1 2020*** (amending ***sections 23(1) and 40 CITA***), profits of SCs are tax exempt, MSCs pay at concessionary 20%, whilst taxable profits of LCs remain subject to the erstwhile (general) 30% rate. On its own part, ***section 38 FA1 2020's*** amended ***section 15 VATA*** relieves businesses (including companies) that have less than ₦25 million taxable supplies in any calendar year, from VAT registration and reporting requirements (in ***sections 8(2), 13, 29, 34 and 35 VATA***). In determining whether a person meets the ₦25 million threshold, *taxable supply of a capital asset or made as a consequence of sale of whole or part of the business or of permanently ceasing to carry on business, are excluded* (***section 15(2) VATA***). This in effect approximates to ***CITA's*** SC turnover threshold. Whereas MSCs enjoyed 20% CIT rate; under ***VATA***, MSCs and LCs' VAT obligations are unaffected.
7. For example, ***section 24 FA2 2020*** amends ***section 25 CITA*** as amended by ***FA1 2020*** vide addition of clarifying phraseology of *"per annum, or as otherwise defined by [CITA]"* to the turnover based definitions of MSCs and Scs.

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private[8] or *public*,[9] *limited by shares*[10] or *by guarantee* (i.e. not for profit),[11] or even *unlimited*.[12] Each form has start-up and ongoing (maintenance) compliance requirements;[13] and registration of a company confirms the incidences of its status.[14] There are consequences for non-compliance with the statutory requirements of the relevant corporate form, exemplified for private companies by ***section 23 CAMA***.[15]

However, our primary focus here is on ***size***: ***CAMA*** provides for small and other companies. *What are the policy reasons for small companies (SCs) size categorisation* and the presumably lighter compliance burden? Is there a presumed policy for more scrutiny on large companies (LCs) because they will impact the public more: given higher number investors and employees, wider ecosystem (suppliers/vendors, alliance partners), potentially more significant tax contributions, greater social impact in terms of corporate social responsibility (CSR), etc?[16]

8. By ***section 22 CAMA 2020***, a private company ***must be so described*** in its memorandum and articles of association (Memart). Also, its membership ***may not exceed 50 shareholders*** (excluding employee shareholders); it may *restrict the transfer of its shares, including providing for rights of first refusal to other members, where a shareholder intends to transfer shares. Divestment/acquisition transactions involving more than 50% of the company's shares to a third party can only be consummated if the latter has offered to buy all the existing members' interests, on the same terms. Proposed sale of assets exceeding 50% (by value) of the company's assets, require unanimous shareholder consent in order to proceed.* Finally, a private company is generally precluded from inviting the public to subscribe for its share or debentures or to deposit money for fixed periods or payable at call, whether or not bearing interest. ***The 50 shareholder limit is a size indicator in terms of ownership, but may well be irrelevant for turnover/financial strength/profitability purposes, as can be seen in the case of some notable private Nigerian companies.***
9. See ***section 24 CAMA***: *"Any company other than a private company shall be a public company and its memorandum of association shall state that it is a public company."* See also, ***section 27(1)(e)***: *"The memorandum of association of every company shall state* ***the company is a private or public company****, as the case may be".*
10. See ***section 27(2) and (3) CAMA***: *"(2)* ***If the company has a share capital*** *- (a) the [Memart] shall also state the amount of the minimum issued share capital which shall not be less than ₦100,000.00 in the case of a private company and ₦2,000,000.00, in the case of a public company, with which the company proposes to be registered, and the division thereof into shares of a fixed amount; and (b) each subscriber shall write opposite his name the number of shares he takes. (3) A subscriber of the memorandum who holds the whole or any part of the shares subscribed by him in trust for any other person shall disclose that fact and the name of the beneficiary in the memorandum of association."* It is trite that shares represent the measurement of unit of interest in the company: ***138 CAMA. Section 868 CAMA*** further defines *"shares"* as *"the interests in company's share capital of a member who is entitled to share in the capital or income of such company…"* The liability of members to contribute to the assets of the company in the event of winding up, is limited to the amount unpaid on their shares: ***sections 42, 117***. Per *Farwell, J* in ***Borland's Trustee v. Steel Bros. & Co. Ltd [1901] 1 Ch 279, at 288***: *"a share is the interest of a shareholder in the Company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the Shareholders inter se …. the contract contained in the Articles of Association is one of the original incidents of the Share. A Share is not a sum of money …. but is measured by a sum of money and made up of various rights contained in the contract including the right to a sum of money of a more or less amount."*
11. Companies limited by guarantee (coy ltd/gtes) are *sui generis*, given that their focus is on charitable and related objects, and their *raison d'etre* is not to generate profits for distribution to their members, but same must be applied in furtherance of their objects. Members/subscribers of coy ltd/gtes (equivalent of shareholders in other companies) do not take shares, but undertake to contribute to the assets and liabilities of the company in the event of its being wound up. By ***section 26(12) CAMA***, *"The total liability of a member of a company limited by guarantee to contribute to the assets of the company in the event of its being wound up shall not at any time be less than ₦100,000."* According to ***section 26(15)***, if there is any surplus after winding-up of a company limited by guarantee, same shall be transferred to some other coy ltd/gte, having similar objects or applied to some charitable object; and such beneficiary must be determined by the members, prior to dissolution of the company. See generally, detailed provisions of ***section 26 CAMA*** for the other attributes and start-up requirements for coy ltd/gtes. By ***section 27(4)***, the Memart of coy ltd/gte *"shall also state that - (a) the income and property of the company shall be applied solely towards the promotion of its objects, and that no portion thereof shall be paid or transferred directly or indirectly to the members of the company except as permitted by, or under this Act; and (b) each member undertakes to contribute to the assets of the company in the event of its being wound up* ***while he is a member or within one year after he ceases to be a member*** *for payment of debts and liabilities of the company, and of the costs of winding-up, such amount as may be required not exceeding a specified amount and the total of which shall not be less than ₦100,000."*
12. ***Section 25*** provides for unlimited companies thus: *"An unlimited company shall be registered with a share capital not below the minimum issued share capital permitted under section 27(2)(a) of this Act."*
13. Even for partnerships, ***CAMA 2020*** recognises regular business name (which could be utilised by sole proprietor or partnership); limited partnerships and limited liability partnership; see ***Parts E, D*** and ***C CAMA***.
14. See ***section 41(5):*** *"Upon registration of the memorandum and articles, the Commission shall certify under its seal - (a) that the company is incorporated ; (b) in the case of - (i) a limited company, that the liability of the members is limited by shares or by guarantee, or (ii) an unlimited company, that the liability of the members is unlimited ; and (c) that the company is a private or public company, as the case may be".* See also ***41(6)***: *"The certificate of incorporation shall be prima facie evidence that all the requirements of this Act in respect of registration and matters precedent and incidental to it have been complied with and that the association is a company authorised to be registered and duly registered under this Act."*
15. By ***section 23(1)***, default disentitles the company from *"the privileges and exemptions conferred on private companies by or under [****CAMA****] and"* which *"shall apply to the company as if it were not a private company."* However, the Federal High Court may upon application and subject to being accordingly satisfied, may grant relief from *"the consequences mentioned in subsection (1)".* See also ***section 26(11)***: *"If a company limited by guarantee carries on business for the purpose of distributing profits to its members, all officers and members who are cognisant of the fact that it is so carrying on business shall jointly and severally be liable for the payment and discharge of all the debts and liabilities of the company incurred in carrying on such business, and the company and every such officer and member shall be liable to penalty as prescribed by the Commission for every day during which it carries on such business."* Per ***section 26(14)***: *"If in breach of subsection (12), the total liability of the members of any company limited by guarantee is at any time less than ₦100,000, every director and member of the company who is cognisant of the breach is liable to a penalty as prescribed by the Commission for every day during which the default continues."*
16. *Cf.* with turnover based M&A regulatory requirements under the ***Federal Competition and Consumer Protection Act No. 1 of 2019 (FCCPA); section 92(4)*** defines both *"small merger"* and *"large merger"* in terms of *"merger with a value at or below the threshold stipulated by the Commission by regulations".* See also ***section 93(1)*** *"****Subject to the notification threshold*** *to be determined from time to time as set out in this Part,* ***a proposed merger shall not be implemented unless it has first been notified to and approved by the Commission.****"* Emphasis supplied. Per ***Regulation (Reg) 12 FCCPC Merger Review Regulations 2020***, ***small mergers are not notifiable to the FCCPC unless*** the parties voluntarily do so, or where the Commission determines (within six months of its implementation), that the small merger may have anti-trust implications, pursuant ***section 95(1) FCCPA***. In such instance, the Commission may *suo motu* demand notification or upon prompting or information from relevant stakeholders. However, under ***Reg 13, large mergers mandatorily require notification and approval of the FCCPC***. By ***Para 1, Notice of Threshold for Merger Notification 2019***, proposed mergers must be notified to the FCCPC, if the annual turnover of the combined undertakings is ₦1 billion and above, or if that of the target is ₦500 million and above.

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B. CAMA 2004** and **2020**: **Much Ado About Size?

Section 394 CAMA 2020 defines SCs in terms of *"qualifying conditions"* for the relevant year(s).[17] These are that: it is a private company with *not more than ₦120 million turnover or such amount as the CAC may fix from time to time; its net assets value is not more than ₦60 million or such amount that the CAC may determine from time to time*; all its members are Nigerians and none of them represents the public sector; and the directors between themselves hold at least 51% of its *equity share capital*.[18] Going by ***section 394(3)***, these requirements conjunctive, and not disjunctive.[19] *Turnover threshold correlates more to actual operations of the company's business rather than share capital; and has apparently been the preferred measure of size*[20] *– because a company with minimal share capital can record significant turnover.*[21]

Section 395, especially ***395(1) and (2)*** also provides in terms of small parent companies (SPCs): *"if the group headed by it qualifies as a small group"* and *"A group qualifies as small in relation to the parent company's first financial year if the qualifying conditions are met in that year."*[22]

By ***section 237(1)***, SCs (and companies having a single shareholder (CH1S)), are exempted from having an annual general meeting (AGM) every year, and thereby relieved from consequences of not holding AGM. According to ***section 240,*** SCs (and CH1S) are not obliged to hold their statutory meetings and AGMs in Nigeria. SCs are also exempted ***from section 271(1)'s*** prescription of at least two directors for every company, having a company secretary (***section 330(1)***), ***section 393(1)*** entitles SCs to deliver their financial statements in modified (less detailed) form in terms of ***CAMA's Sixth Schedule***, and related provisions like ***section 396***. Similarly, ***section 402(1)(b)*** enshrines exemption from audit requirement for SCs;[23] ***section 405*** relieves SCs' CEOs and CFOs from CSR certifications requirements for financial reports.

17. See ***section 394(1) and (2)***: *"(1) A company qualifies as small in relation to its first financial year if the qualifying conditions are met in that year. (2) A company qualifies as small in relation to a subsequent financial year if the qualifying conditions - (a) are met in that year and the preceding financial year; (b) are met in that year and the company qualified as small in relation to the preceding financial year; or (c) were met in the preceding financial year and the company qualified as small in relation to that year."* The predecessor of ***section 394 CAMA 2020*** was ***section 351 CAMA 2004***. Actually, ***sections 394(3) and 351(1) CAMAs 2020 and 2004*** are *in pari materia*, except for the turnover and net asset thresholds (₦120 million against ₦2 million; and ₦60 million against ₦1 million).

18. These conditions are set out in ***section 394(3)***. See also ***section 868*** (**CAMA's** definition section), to the effect that: *" 'small company' has the meaning assigned to it under section 394 of this Act".*

19. *Questions about the corporate governance implications of SCs' lighter reporting requirements are also relevant, especially for purposes of minority protection, since SCs directors must have majority stake in such SC*. The prospect of emasculating minorities, especially if they are unrepresented on the board (given that some SCs may have only 1 director), and are therefore unable to have close visibility of the SC's management, cannot be over-emphasised. However, provisions such ability to requisition extra-ordinary general meetings (EGMs) if they hold at least 10% of the paid up shares or voting rights (for companies without share capital, ***section 239***); sue for and on behalf of the company (institute derivative actions), where those in control are misusing their powers to the detriment of the company (*cf.* the rule in ***Foss v. Harbottle (1843) 2 Hare 461, 67 ER 189***); and claim for relief against minority oppression (***Chapter 13 CAMA (Protection of Minority Against Illegal and Oppressive Action by or Against the Company*** generally); restriction on acquisition of majority shares, unless other shareholders receive offer on similar terms (***section 22(2)(c)***), etc will help assuage such perception of emasculation. It is also worth noting that the requirement for 51% minimum shareholding by SC directors aligns with the reality that many SCs are corporate entrepreneurial vehicles of their owners/managers. See also ***Principle 23, Nigerian Code of Corporate Governance 2018 (NCCG)***: *"Equitable treatment of shareholders and the protection of their statutory and general rights, particularly the interest of minority shareholders, promote good governance."* And ***Para 23.1.3 NCCG*** (recommended practice that): *"minority shareholders are adequately protected from abusive actions by controlling shareholders"*. However, the **NCCG** is not applicable to all Nigerian companies, with *"private companies"* being generally out of its coverage.

20. *Cf.* that the turnover threshold (of ₦1 million) in ***section 315(1)(b) CAMA 2004*** had been in place - as exactly the same provision - in ***CAMA, Cap. 59, LFN 1990***.

21. *Cf.* the "MSC" used in methodology of World Bank's **Doing Business** rankings. It states in part: *"Doing Business records the taxes and mandatory contributions that **a medium-size company** must pay in a given year as well as measures of the administrative burden of paying taxes and contributions and complying with postfiling procedures."* See further, detailed information under ***'Assumptions About the Business'***: (last accessed 14.08.2021).

22. See the remaining ***subsections (3)-(6)*** for detailed listing of the qualifying conditions in respect of small groups (SGs) or SPCs. See also, ***section 397 CAMA*** on modified financial statements of (small) holding company/small groups.

23. *Quaere*: Is there a conflict with ***sections 388*** and ***389 CAMA 2020*** which amongst others, respectively require that within 18 months after incorporation and subsequently once at least in every year, directors lay before the GM copies of financial statements made up to a date not exceeding nine months previous to the date of the meeting; and penalty for default?

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Section 418(1) reflects carve-out for SCs, in respect of contents of Annual Returns (ARs) by companies limited by shares, whilst ***section 419*** and ***Eight Schedule*** specifies contents of SCs' ARs. However ***section 423(2)*** specifies in addition to the certificates accompanying ARs by all private companies in ***423(1)***, another signed certificate by SCs confirming its compliance status with the SC *"qualifying conditions"*.[24] Similarly, ***section 424(2)*** provides that *"A [SC] is exempted from the requirements imposed by section 422 [on documents to be annexed to AR] provided that it complies with the provision of section 394 of this Act.*
By ***section 425(1)***, *"If a company required to comply with any of the provisions of sections 417-423 fails to do so, the company and every director or officer of the company are liable to a penalty as may be prescribed by the Commission."* Incidentally, following the ***CAMA's*** 'lighter' regulatory touch on SCs, the CAC in exercising its delegated powers to prescribe penalties for non-compliance with ***CAMA*** provisions,[25] stipulates, *vide* ***The Companies Regulations 2021***, lighter penalties for SCs, *vis a vis* other companies.[26]

C. CITA and VATA Categorisations
It has been shown above that size classifications under Nigerian corporate law predated ***CAMA 2004***, raising the question: was there SC categorisation in tax laws pre-***FAs 2020***? An answer to this question will entail review of only the ***CITA*** and ***VATA***, firstly because these are the only two legislation that ***FAs 2020*** effected size classifications in, and secondly, because such classification are largely irrelevant in other substantive tax legislation.[27] An exception though may be the ***Venture Capital (Incentives) Act***,[28] (***VCA***). ***Section 2(e) VCA*** provides that *"For the purposes of the incentives specified in this Act, the [FIRS] shall certify that a venture capital project fulfils or is capable of fulfilling one or more of the objectives set out in this Act, that is - (e)* ***the promotion of the growth of small and medium scale enterprises*** *with emphasis on local raw materials development and utilisation".*[29]

CITA*: Pre-* ***FAs 2020***
Section 23(1)(o) CITA, an amendment introduced in 1996, listed amongst profits exempted from tax under ***CITA***, *"dividend received from [****SCs****] in the manufacturing sector in the first five years of their operation"*.[30] Equally, ***section 19 Industrial Development (Income Tax) Relief Act***[31] excludes pioneer companies from *"small companies' relief"* thus: *"A pioneer company shall not be entitled to any relief under section 28 of the principal Act [CITA]."* Incidentally, but not by an insignificant omission, the phrase *"small companies"* was not defined in the ***pre-FAs 2020 CITA!***

24. Note however that ***section 862(2)*** does not exculpate SCs, where they include false statements in their ARs: *"A company which makes a statement in its [ARs] which is false in any material particular shall in respect of each year of any such returns be liable to a penalty prescribed in the Commission's regulations* ***if it is a small company*** *or in any other case."* Emphasis supplied. *Per* the ***Eight Schedule (AR of a SC)***, the concluding part of the further certificate exhibited therein (also to be signed by a director and secretary) is: *"we also certify that the company still retains its smallness."*
25. See for example, ***sections 30(2), 47(2), 48(2), 51(10), 65(4),74(4), 136, 156(2), 157(2), 171(6) and 177(2)*** amongst several other instances of delegated authority for CAC to prescribe penalties for default, *vide* regulations.
26. See the *Penalties Table* at ***p. 261*** of the ***Companies Regulations 2021*** (CRs) reflecting amongst others, daily default and one-off penalties as follows: SC ₦250/₦5,000; Private other than SC ₦500/₦10,000; Company ltd/gte ₦500/₦10,000; and Public company ₦1,000/₦25,000 respectively. The CR is available at: https://www.cac.gov.ng/ wp-content/uploads/2021/01/COMPANIES-REGULATIONS-2021-published.pdf (last accessed 13.08.2021). *Cf.* also, ***section 346(1) CAMA 2004***: *"If in a year any of the requirements of section 345(1) or (3) of this Act [on directors duty to lay and deliver financial statements] is not complied with by any company, every person who immediately before the end of that period was a director of the company shall in respect of each of those subsections which is not so complied with, be guilty of an offence and liable to* ***a daily default fine of ₦50 in the case of a [SC]****, a company limited by guarantee or an unlimited company, and* ***₦500 in the case of any other company.****"* Emphasis supplied. Notably, its successor provision, (***section 389(1) CAMA 2020***) delegate sanction for breach to the CAC, *vide* regulations.
27. Such as ***Petroleum Profits Tax Act, Cap. P.8, LFN 2004 (PPTA); Personal Income Tax Act, Cap. P13, LFN 2004 (PITA); Capital Gains Tax Act, Cap. C1, LFN 2004 (CGTA); SDA, EDT***.
28. ***Cap. V2, LFN 2004***, originally enacted as ***Venture Capital (Incentives) Decree No. 89 of 1993***.
29. Emphasis supplied. The ***VCA*** provides for qualifying venture incentives in its ***section 4***. However some of these incentives are now irrelevant or superseded by subsequent legislative amendments conferring more encompassing or even sectoral incentives. For example, ***section 4(b)*** exempts CGT from disposal of its equity interest in a venture project company in a graduated manner depending on length/duration of the investment from 100% exemption within 5 years to 0% after 15 years. However, ***section 30 CGTA*** as amended by ***section 2 Finance Miscellaneous Taxation Provisions Act (Decree) No. 1998*** has conferred CGT exemption on disposal of all stocks and shares. ***Section 32 CGTA*** as further amended by ***section 49 FA1 2020*** also provide CGT exemption in M&A transactions, albeit the new ***section 32 CGTA FA1 2020*** amendment is more restrictive. For a pre-***FA1 2020*** CGT exempt status discourse, see, ***'Are Stocks and Shares Really Exempt from Capital Gains Tax?'***, *'Taxspectives by Afolabi Elebiju', ThisDay Lawyer, 21.02.2012, p.7*; also available at *LeLaw Thought Leadership* page: (accessed 16.08.2021). Provisions such as ***section 4(d) VCA*** which makes the ***Industrial Development (Income Tax Relief) Act, Cap. Cap. I7, LFN 2004 (IDITRA)*** applicable to a venture project company may help to answer the question whether the ***VCA*** has not become totally irrelevant.
30. Emphasis supplied.
31. ***Cap. I7, LFN 2004***.

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Some of the scenarios where size (by turnover), impacted tax treatment under the **CITA** was exemplified by the erstwhile ***section 33*** provisions on minimum tax (MT). ***Section 33(2)(a)*** and ***(b)*** specified that the applicable MT shall be a function of *whether the turnover of the company is below or above ₦500,000* (and the company has been in business for at least four calendar years). *If the turnover is ₦500,000 and below*, the MT was to be the higher of: 0.5% of gross profit; 0.5% of net assets; 0.25% per cent of paid-up capital; or 0.25% of turnover of the company for the year. However, *if the turnover was higher than ₦500,000, there would an additional 50% of the rate used for the lower threshold, on the amount by which the turnover is in excess of ₦500,000*. The foregoing meant that the amount of MT paid by companies subject to MT provisions was dependent on their turnover: *the 'smaller' (lower turnover companies), got preferential treatment*, with 'big' companies paying more.[32]

Section 52(2) CITA, an amendment provision introduced in 1996[33] provided that: *"Every company whose turnover is [₦1 million] and above shall file self-assessment return within six months of its accounting period provided that a company whose turnover is below [₦1 million] shall file a self-assessment return as from 1998 year of assessment."* This showed that previously, the entitlement of *"smaller companies"* by turnover to file returns based on self-assessment came later in time than their *"big"* counterparts.[34]

By ***section 7(2) National Information Technology Development Agency Act***[35] ***(NITDA Act)***, the NITDA Levy of 1% of profit before tax (PBT) was *only payable by designated companies/ enterprises with minimum annual turnover of ₦100 million*. Thus, companies below the turnover threshold were not subject to NITDA Levy.[36]

32. See also, ***section 40(6) and (7) CITA*** which provided for 20% tax rate for Nigerian companies engaged in manufacturing or agricultural production, mining of solid minerals or wholly export trade, with less than ₦1 million gross turnover; and a Nigerian company engaged in the trade and business specified in ***section 40(7)*** commenced business before 1 January, 1988 and makes a gross turnover less than ₦500,000 was to pay tax at 20% for each of the assessment years 1988, 1989 and 1990.
33. *Vide* ***Finance (Miscellaneous Taxation Provisions) Decree No. 32 of 1996***.
34. Note also ***section 55 CITA*** which required ***"every company, including a company granted exemption from incorporation whether or not liable to pay tax under [CITA]"*** to file self-assessment return with the FIRS for every year of assessment (***section 55(1)***); whilst ***section 55(3) and (5)*** prescribe sanctions for default without reference to size of the defaulting company.
35. ***Cap. N156, LFN 2004***.
36. *Cf.* with the Annual Operating Levy (AOL) payable by telecoms players to the Nigerian Communications Commission (NCC), assessed as percentages of licensees' *"net revenues"* for the relevant period as follows: Network Operators - 2.5%; Non-Network Operators -1%. See ***Reg 3, Annual Operating Levy Regulations, 2014*** issued by the NCC pursuant to ***section 70 NCC Act, Cap. N9, LFN 2004***: https://www.ncc.gov.ng/docman-main/legal-regulatory/regulations/559-regulations-on-annual-operators-levy/file (last accessed 13.08.2021). Further analogy may be drawn with the insurance and banking sectors. In insurance, the AOL payable to the National Insurance Commission (NAICOM) are as follows: (a) insurance brokers – the higher of 1% of gross commission or ₦25,000; (b) loss adjuster 1% of gross fees or ₦10,000. See ***sections 36(10), 45(5) Insurance Act, Cap. I17, LFN 2004; 16(1)(b) and (2)(b) and (c) NAICOM Act, Cap. N42, LFN 2004***; (c) insurer or reinsurer 1% of gross premium income: ***section 16(1)(b) and (2)(a) NAICOM Act***. According to a commentator, *"Funding for AMCON was initially provided by the Central of Bank of Nigeria (CBN) through a sinking fund known as the Banking Sector Resolution Cost Sinking Fund (the Fund) set up by CBN and the deposit money banks (DMBs) in 2011. CBN was to contribute ₦50 billion annually for ten (10) years starting from 2011, whilst the DMBs were to contribute as annual levy, 50 basis points (or such higher basis points as may be determined by the CBN) of their total assets at the end of the preceding financial year, commencing on 30th April 2014.[5] The Fund is now vested in the Banking Sector Resolution Cost Fund."* See Ejiro Eferakeya, ***'Impressions: Personal Liability of Directors Under the Asset Management Corporation of Nigeria Act (AMCON Act) As Amended'***, *LeLaw Thought Leadership Reflections, March 2021, p.1*: https://lelawlegal.com/add111pdfs/TLR-AMCON_corrected.pdf (accessed 14.08.2021). By ***section 77 Banks and Other Financial Institutions Act No. 5 of 2020***, each bank, specialised bank and every financial institution is now obliged to pay an annual levy of 10 basis points (bps) or such bps as may be determined by the CBN of total assets as at the date of audited financial statements for the immediately preceding year.

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VATA: *pre-* ***FAs 2020***

Like most other tax legislation, the ***pre-FAs VATA*** was size agnostic, whether in terms of compliance obligations and enforcement provisions, including penalties for breach.

D. FA1 and FA2 2020: Size Matters

FA1 and **FA2** have introduced key amendments for CIT and VAT purposes; some have been highlighted earlier on in this article.[37] It is worth noting though that the CIT exempt status of SCs is subject to *inter alia*, a key proviso in ***section 23(1)(o)(i)***: *"**such company shall, without prejudice to this exemption, comply with the tax registration and tax return filing stipulations of this Act** and be subject to the provisions as regards the time of filing, penalties for breach of statutory duties and all other provisions of this Act in all respects during this period which its profits are below the tax paying threshold".*[38]

There is also the *"**section 23(1A)** [CITA] [amendment] clarification that tax exempt status does not relieve WHT compliance (deduction and remittance) on rent, interest and dividend payment by such exempt companies to third parties. This provision was previously **23(1)(n) CITA** but was deleted and reinserted as **23(1A)** by **section 9 FA1 2020**."*[39]

Also, *"by the **new section 23(1)(o)(ii) CITA** (vide **section 9 FA1 2020**) dividends received from **small manufacturing companies** in the first five years of their operations are also tax exempt."*[40] Further, *"Small companies are also exempt from the 2% of assessable profit as Tertiary Education Trust Tax: **section 34 FA2 2020** (amending **section 1(2) TETFund Act**)."*[41]

By ***section 18 FA1 2020's*** new ***section 77(5A) CITA***, MSCs and LCs are respectively entitled to 2% and 1% early filing bonus of their tax amount paid, which shall be available as a credit against future taxes. To qualify for such bonus, the relevant company must have paid its CIT *"90 days before the due date as provided under section 55 [CITA]"*.[42]

37. See for example, the discussions at footnotes 5 and 6 ***(supra)***. *Cf.* however, provisions such as amended ***section 26(1) - (3) FIRS (Establishment) Act, Cap. F36, LFN 2004 FIRSEA)*** (courtesy ***section 52 FA2 2020***); new ***section 53 CITA*** (*vide* ***section 15 FA2 2020***); new ***section 63 CITA*** *(vide* ***section 17 FA2 2020****)* which impose requirements that must be complied with by all companies to which they are applicable and sanctions default, irrespective of size. See also ***sections 58 and 59 FA2 2020*** in respect of export free zone enterprises, and which caveats their *"exemption from taxes, levies, duties and foreign exchange regulations… provided that all companies registered and operating in the Zone shall comply with the provisions of section 55(1) [CITA] and render returns in the manner prescribed thereby to the [FIRS]"*, and stipulates that prescribed sanctions will apply for default. ***Sections 58 and 59 FA2 2020*** *in pari materia* amends ***sections 18(1) Nigeria Export Processing Zones Act, Cap. N107, LFN 2004*** and ***Oil and Gas Export Free Zone Act, Cap. O5, LFN 2004*** respectively.
38. Emphasis supplied. This sends a signal that the SC's CIT tax exempt status is not *carte blanche*. Since SCs are exempt from VAT reporting obligations, it is only by their filing CIT returns that the FIRS will have visibility of their turnover, which could then impact FIRS' VAT compliance enforcement. It is noteworthy that whilst ***CAMA*** prescribes lighter penalties for SCs, ***CITA*** and other tax laws diverge from such approach where they variously prescribe flat penalties. Some examples can be found in ***section 63(4) CITA*** (*vide* ***section 17 FA2 2020***, failure to provide any record or book requested by FIRS); ***sections 8, 28 and 35 VATA*** (as amended by ***sections 35, 42 and 44 FA1 2020*** - initial and subsequent months' penalties for failure to register for VAT, give notice of permanent cessation of business and submit VAT returns, respectively). The VAT flat penalties does not distinguish between medium and large companies. Albeit in non-flat penalty scenarios (*where percentages of the tax amount are the benchmarks*) , the tax penalty may still end up being smaller for SCs, given that their quantum of tax liability in issue, is likely to be smaller than for their MSCs and LC counterparts.
39. See Afolabi Elebiju and Chuks Okoriekwe, ***'Counting the Cost': An Impact Analysis of Nigeria's Tax Incentive Regime'***, *LeLaw Tax Monograph Series No. 1 (March 2021)*, (excerpts from *footnote 49 at p. 9*): https://lelawlegal.com/add111pdfs/AEChuks_-Tax_Inequality_Final_new.pdf (accessed 16.08.2021). Article originally published in ***(2021) 3 TLJN, pp. 1-30***, having been developed from the authors' talking points as panelists at Copenhagen Business School's ***Virtual Workshop on Corporate Tax Practice and Inequality*** in June 2020.
40. Elebiju and Okoriekwe, (***supra***), *p.10.* This provision was a rehash (with minor tweaks), of the erstwhile ***section 23(1)(o) CITA***. For further reading see, ***Section D*** of the article ***(Finance Acts 2020's Tax Incentives and Other Amendments: Inequality and Other Impacts)****, at pp. 9-10*.
41. Elebiju and Okoriekwe, (***supra***), *footnote 51, at p. 10.*
42. Notably, the ***CAMA*** does not provide for any early filing bonus. However, the CAC has on occasion granted filing fee waivers and reductions for SCs and business names, especially during start-up (registration) process, as part of the efforts to attract the informal sector. Other waivers has been pursuant to sector regulator mandated re-capitalisations (exemplified by the capital market, banking and insurance). See Sola, ***'CAC Reduces Cost of Business Registration'***, *Punch, 26.09.2017*: https://punchng.com/cac-reduces-cost-of-business-registration/. According to the report: *The Registrar-General, [CAC], … said on Tuesday in Abuja that the cost of business registration in Nigeria was now cheaper and its process simplified to enable small scale entrepreneurs to register their business. … Mahmud disclosed this while addressing the Micro, Small and Medium Enterprise Clinic. He said that with the Company Registration Portal, any member of the public could now register businesses on-line at the comfort of their homes and offices. 'This has drastically reduced the registration cost hitherto charged by professional middlemen (lawyers, accountants and chartered secretaries), in the registration process. Entrepreneurs who had already registered their businesses have the obligation to file annual returns with the Commission as and when due. The MSME Clinic is an initiative of the Office of the Vice President, which is aimed at holistically addressing all the operational challenges and bottlenecks of MSME in Nigeria,' …. According to him, the [CAC] is one of the critical government agencies that has been participating in the on-going nationwide MSME Clinic that commenced in Aba in January. He added that the MSME Clinic was expected to be held in all States of the Federation. 'So far, the Clinic has been held in 13 states of the Federation,' he said. According to him, other relevant agencies like FIRS, SON, Bank of Industry, NAFDAC, SMEDAN participated in the Clinic."* See also, Damilare Famuyiwa, ***'CAC May Reduce Business Registration Fee'***, *Nairametrics, 27.07.2018*: https://nairametrics.com/2018/07/27/business-registration-fee-to-drop-cac/; Kunle Sanni, ***'Corporate Affairs Commission Reduces Business Registration Fee to ₦5,000'***, *Premium Times, 05.01.2019*: https://www.premiumtimesng.com/business/business-news/304223-corporate-affairs-commission-reduces-business-registration-fee-to-n5000.html; and Victoria Ojeme, ***'CAC Extends 50% Reduction in Cost of Registration Fee for Business Names'***, *Vanguard, 12.08.2019*: https://www.vanguardngr.com/2019/08/cac-extends-50-reduction-in-cost-of-registration-fee-for-business-names/ (all accessed 14.08.2021).

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The tax exempt status of SCs is further reflected in the new MT provisions (of ***section 33 CITA*** *vide* ***section 14 FA1 2020***), being *"0.5% of the gross turnover of the company, less franked investment income"*, further reduced by ***section 13 FA2 2020*** (amending ***section 33(2) CITA***), to 0.25% for tax returns for any year of assessment falling due between 1 January 2020 and 31 December 2021, both dates inclusive. By ***FA1 2020's*** new ***section 33(3)(b) CITA,*** SCs joined the exempt list from the application of MT provisions. Thus, unless otherwise qualified for exemption under section 33, MSCs and LCs are liable to pay MT.

Given the criticality of the informal and SMEs sector to Nigeria's economic development and well-being, the policy arguments for having such size based preferential tax treatment are very convincing; and it is to the present administration's credit that recent tax amendments have focused on further intervention in this area.[43] These will positively impact Nigeria's ease of doing business ratings.[44] Size based tax breaks /incentives *cum* lighter regulatory burden means that resources can be focused on growing or sustaining the business, helping to accelerate growth towards potential future significant tax contributions by start-ups, SCs – the tax breaks could help them become MSCs and LCs.[45] Sometimes the opportunity costs of lower compliance costs can mean the difference between life and death of start-ups or Scs.

The ***FA1 and FA2 2020*** tax amendments provides good mechanism for drawing the informal economy into the tax net, a key objective of the ***National Tax Policy 2017 (NTP)***. This is moreso that the formal sector have often expressed concerns about 'unfair' treatment - that they are overtaxed because of excessive scrutiny from the Revenue when a greater chunk of the informal sector could be contributing their quota to the public *fisc*.[46]

E. Questions: Charting Forward Paths

Are there inconsistencies between ***CAMA*** and tax legislation? Of course, the answer is in the affirmative. Could they have been avoided, especially as ***CAMA*** was subsequent to the ***FA1 2020*** amendments, for example by relying on ***FA1 2020's*** definition of SCs? How do we resolve stark inconsistencies?

43. See Oluwaremi Feyitimi, *et al*, ***'Tax Incentives and the Growth of Small and Medium Scale Enterprises in Developing Economy – The Nigerian Experience'***, European Journal of Research and Reflection in Management Sciences, Vol. 4 No. 6, 2016: file:///C:/Users/ASUS/Downloads/TaxIncentivesandtheGrowthofSmall andMedium ScaleEnterprisesinDevelopingEconomyTheNigerianExperience.pdf (accessed 14.08.2021). It found that *"there was a significant correlation between taxation and SMEs' growth. The study recommends that there should be a friendly tax policy for all startup businesses preferably a tax holiday, or an introduction of a growth limit which can be said to be a level stable enough to sustain tax payment."* According to the authors (at p.3), *"In a bid to maintain rapid growth among new established [SMEs], fiscal incentives becomes a vital tool of government investment promotion strategy, fiscal incentives can play an important role in attracting and encouraging firms to expand supply by stimulating their investing power. Fiscal incentives available at the disposal of Nigeria government with which it can encourage the [SMEs] include: reduced corporation tax through reduced tax, flat rate, tax exemption and tax stability agreement and subsidy or grant and tax holiday and investment allowance. … "* The Study concluded (at p.18) that *"On the basis of the discussed findings of this research work, … tax incentives are germane to the growth, development and continued sustenance of [SMEs]. Tax incentive plays a vital role in ensuring that [SMEs] thrive because the federal government has made available tax holidays for pioneer companies, the government also grants a number of general and industry specific incentives. Finally, for many SMEs,* ***the decision to remain informal is deliberate because of the cost and procedural burden of joining the formal sector out weight the benefit of staying in the informal sector****. Informal sectors make large contributions to nation economies, in both human and financial terms. … being visible to government agencies and formal sector companies, they can be easily reached with capacity building improvement schemes but they cannot compete for business with larger companies thus a need for the government to accelerate their growth by creating an enabling environment for them vide appropriate tax incentives when necessary to enhance their sustenance and growth."* Its recommendations (at *p.* 19), included *inter alia* that *"1. Government can address the dire need for start-up fund for SMES by providing incentives for SMEs funding. 2. … 3. There is a need for the government to employ tax holiday as a major tax incentive for newly established [SME] because it stimulate their investing power thereby exempting them from other tax liabilities. 4. Government should promote the growth of [SMEs] by creating the necessary enabling frameworks and relax the burden of regulating measures and ensure that their efforts are geared towards granting tax incentives to micro, [SMEs]. 5. Building SMEs capacity through the localization of supply chains … all these … goes a long way in ensuring that tax incentives granted to SMES have a significant impact on their growth."*

44. There does not appear to have been a targeted study of the impact of the recent SC and MSC tax incentives on Nigeria's ***Doing Business*** or ***Paying Taxes*** global rankings yet, but presumably they would be boosters to improved ranking. As previously stated, an "MSC" meeting the set benchmarks is used in the ***Doing Business*** methodology.

45. The downstream effects on the economy can be significant, and produce virtuous cycle type impact through direct and indirect employment, turnover contribution to stakeholders in commercial ecosystem, etc, etc.

46. ***NTP***, *Federal Ministry of Finance, 01.02.2017.* See ***Para 1.4 (Challenges of Nigeria Tax System), at p.2.*** The first bullet on the list is the *"lack of robust framework for the taxation of informal sector and high network individuals, thus limiting the revenue base and creating inequity".* ***Para 2.1 (Guiding Principles of Nigeria Tax System), p.3*** states in part that *"All existing and future taxes are expected to align with the following fundamental features: Equity and Fairness: Nigeria tax system should be fair and equitable devoid of discrimination. Taxpayers should be required to pay according to their ability."* Under the same subheading, the ***NTP*** also envisages *"Low Compliance Cost: The financial and economic cost of compliance to the taxpayer should be kept to the barest minimum."*

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Understandably, ***CAMA's*** benchmarks for categorising SCs must extend beyond turnover; whilst for ***CITA*** and ***VATA***, turnover and supply transactions amount thresholds respectively suffice. Clearly, the basic underpinning is that one cannot use ***CAMA*** provisions (focused on companies' administration and corporate compliance), to answer tax compliance issues and *vice versa*, but can always be a guide where there are gaps, etc? The focus of the two regulators CAC and FIRS are different, albeit they have recently cooperated more intensively, as part of the initiatives to improve the ease of doing business in Nigeria.[47].[48] In other words, the inconsistencies in size prescriptions are not fatal.[49]

Conclusion

Some of these issues may become of great practical significance as CAC begins implementation of the ***CAMA***, and FIRS also undertakes its oversight functions pursuant to the new provisions. If there are no issues with grant of sectoral tax incentives, then by the same token, there is no reason to argue with size based tax incentives. Ultimately, issues as to different company size categorisations under ***CAMA*** and tax legislation may actually be *"much ado about nothing"*. This is reinforced by the fact that further to this author's review of Nigerian Caselaw, there does not appear to have been any tax or corporate litigation till date, predicated on companies' size. Hopefully, it will thus be a case of *"all's well that ends well."*

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Thank you for reading this article. Although we hope you find it informative, please note that same is not legal advice and must not be construed as such. However, if you have any enquiries, please contact the author, Afolabi Elebiju at: a.elebiju@lelawlegal.com or: info@lelawlegal.com.

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47. Championed by the Presidential Enabling Business Environment Council (PEBEC). It is also noteworthy that by ***section 3(2)(i) FIRSEA***, the CAC is represented in the FIRS' Board.
48. Issues of employing rules of statutory interpretation to resolve conflicts between ***CAMA*** and ***CITA***, etc will not arise because of the different focus of the respective legislation.
49. In this regard, analogy may be drawn with other historic ***CAMA*** and ***CITA*** divergences. For example, ***section 54 CAMA 2004*** (now ***section 78 CAMA 2020***), prohibited foreign companies from carrying on business in Nigeria without incorporating a Nigerian subsidiary. However, ***section 13 CITA*** recognised the possibility of doing so, (without a local subsidiary, but) through amongst others, agents; and furthermore, since the ***FAs 2020*** amendments, ***CITA*** recognised and tries to tax non-residents doing business in Nigeria extra territorially through digital means.

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