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Questions and Pathways:
**Recent Issues in
Nigerian Stamp Duties'
Regulatory Framework**

(‘LeLaw on Stamp Duties’)



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It is no longer news that stamp duties became a hot burner issue in the Nigerian tax space in the course of Year 2020, following enactment of the **Finance Act 2020** that amended provisions of the **Stamp Duties Act, Cap. S8, LFN 2004**. Given declining oil revenues and increasing pressure for non-deficit funding of public budgets, it is no surprise that government is beginning to look at stamp duties as an avenue to generate substantial funds. Rather what may be surprising is why it took government so long to actually look in the direction of stamp duties before now.

Consequent on the new focus on stamp duties, and always being mindful of issues of concern to our clients and prospective clients at *LeLaw Barristers & Solicitors*, we decided to write a little primer memorialising some of the related thorny or topical issues based on

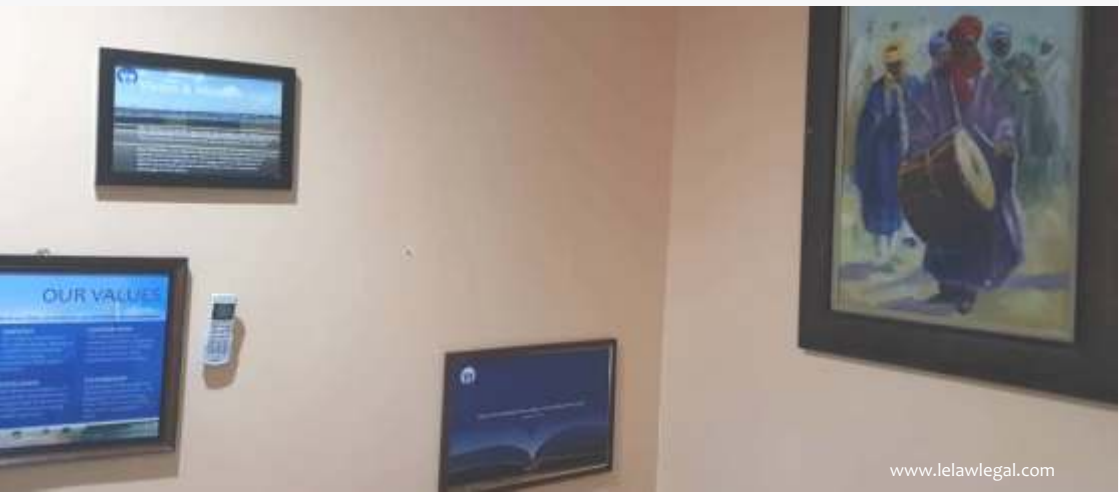
current state of the law and practice for the benefit of interested stakeholders.

We hope this treatise answers some of your own questions, and would be delighted to provide more specific stamp duties advice, should you so require. We would also appreciate any other feedback you may have on this publication.

We hope you find this publication an enjoyable read. With it, we are birthing a tradition of producing a special publication annually, each focusing on a major “*stay awake*” or trending issue in the Nigerian market. We would be pleased to share the next edition of the publication with you, D.V. in December 2021.

Whilst thanking our clients for their support and patronage in 2020, we wish all our readers a Merry Christmas and a wonderful 2021.

Afolabi Elebiju, Esq., Principal
Lagos, 24th December 2020.





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Next Steps



1.1 Whilst the Federal Government (FG)'s enactment of the **Finance Act No.1 of 2020 (FA 2020)**¹ in January 2020, was a headline news item, most people focused on its Companies Income Tax (CIT) and Value Added Tax (VAT) amendments. However, the **FA 2020's Part VII (sections 52-56)** amended the **Stamp Duties Act (SDA)** seeking to bring the **SDA** in line with current business realities, and the **SDA** amendments began to attract attention when government announced its intention to take stamp duties as a source of public funding, more seriously. In line with the amended **SDA's** envisaged enhanced collections to the public *fisc*, the FG, whilst launching an Inter-Ministerial Committee to drive the effort, announced a projected 2020 SD target of N1 trillion for the Federal Inland Revenue Service (FIRS)³. There were anecdotal references to FG's intent to look to SD as a major source of revenue; stamp duties was even said to be “*the new oil*” to government.⁴

1.2 Pursuant to the **FA 2020 SDA** amendments, the FIRS also issued an

Information Circular and **Public⁵ Notices** (collectively, “**FIRS Publications**”, one of which purported to increase stamp duty rates on some instruments), in addition to FIRS disseminating information through several other media including its twitter feed. The issues attracted more focus, when FIRS' intention to enforce retrospective SD liabilities, were widely reported in the news media.

1.3 This **Newsletter** discusses “stay awake”, and potential risk issues, given the enhanced visibility of stamp duties in the national tax landscape. Corporate players are re-thinking, or inventing their stamp duties compliance strategy and risk management, given the need to address historic compliance and also have go forward plans, since FIRS' enforcement actions, are now more likely imminent.

1.4 For appropriate background context, we preface the discussion of the above stay awake issues, with an overview of the SD regime in Nigeria.

1. Given that the President assented to the FA on 13th January 2020, it is erroneous for it to be titled or referred to (as reflected by its **section 57**) as **Finance Act 2019**. This is more so that **pages A4 to A21 of the Gazette** also contains reference to “**2020 No. 1**”; its title and **section 57** can be regarded as draftsman's errors. We have accordingly referred to it as **FA 2020** throughout this publication.

2. **Cap. S8, Laws of the Federation of Nigeria (LFN) 2004**. All our subsequent references is to the **SDA** as amended by **FA 2020**.

3. See for example, Ayodeji Adegboyega, ‘**Nigerian Govt, Sets N1 Trillion Stamp Duty Target**’, *Premium Times*, 01.07.2020: <https://www.premiumtimesng.com/news/top-news/400554-nigerian-govt-sets-n1-trillion-stamp-duty-target.html> (accessed 16.07.2020). According to news reports, the FIRS collected N66 SDs from January to May 2020 (compared to N6 billion for same period in 2019), and N18 billion for all of 2019.

4. See Muhammed Nami, ‘**FIRS: making Stamp Duty the New Black Gold**’, *The Guradian*, 13.07.2020: <https://guardian.ng/business-services/firs-making-stamp-duty-the-new-black-gold/> (last accessed 12.12.2020).

5. See **FIRS information Circular No. 2020/05, 29.04.2020 - Clarifications on the Provisions of the Stamp Duties Act, (FIRS SD Circular)**: <https://www.firs.gov.ng/sites/Authoring/SiteAssets/Lists/Content/GetContent/2019%20FA%20information%20Circular-Stamp%20Duties.pdf> (accessed 16.07.2020); the undated **SDPN1** is available at: <https://www.firs.gov.ng/SiteApplication/Home/Home.aspx> and also at <https://www.firs.gov.ng/sites/Authoring/contentLibrary/Public%20Notice%20on%20Stamp%20Duty.pdf> (both accessed 16.07.2020). **SDPN2** (undated) is captioned, ‘**Clarification on Administration of Stamp Duties in Nigeria**’, *BusinessDay*, 20.07.2020, pp. 6-7.



1.5 Nigeria's SD regime is primarily enshrined in the provisions of the **SDA**, a legislation that has apparently not received significant legislative attention until recently. Before the **FA 2020** amendments,



the last substantive amendment of the **SDA**

was in 1956.⁶

1.6 Consistent with **SDA's explanatory note** that "it is an Act to provide for the levying of stamp duties on certain matters", **section 3 SDA** imposes duties "upon the several instruments" in the **Schedule to the SDA (the Schedule)** and also subject to the exemptions contained in the **SDA** or any other subsisting legislation.⁷

1.7 Depending on the type of instrument (often underpinned by the nature of the transaction), the duty rates in **the Schedule** are either *ad valorem* (expressed as percentage of the value of the transaction) or flat (nominal) rate. Substantive provisions, such as **sections 100-102 SDA** also specify SD rates for particular transactions.⁸

1.8 **Section 2 SDA** defines "stamp" as an "impressed pattern or mark by means of an engraved or inked block die as an adhesive stamp or an electronic stamp acknowledgement for denoting any duty or fee." **Section 2 SDA** also provides that: " 'stamped' ...applies to instruments and material impressed with stamps by means of an engraved or inked block die, adhesive

6. The **SDA** was consolidated into **LFN 2004 as Cap. 58, LFN 2004**; it was previously **Cap. 411, LFN 1990**. See notations evidencing **SDA's** legislative history in the **SDA**. Some other evidence of 'historic in attention' include stipulations (by current standards) of negligible penalty amounts. For example, **sections 91 and 92** prescribe penalties of between ₦4 to ₦20 in respect of receipts, ₦100 in **sections 96 and 98** regarding share warrants and stock certificates to bearer respectively, and ₦40 in **section 99** relating to warrant for goods. **Section 15** provides for an application fee of ₦0.26k for denoting a second instrument, the chargeable duty on which, is subject to the duty paid on another instrument.

7. **The Schedule** contains the specific listing of instruments and respective SD rates. Pursuant to **section 116(1) SDA**, only the "National Assembly may by resolution increase, diminish or repeal" SD in **the Schedule** pertaining to documents or matters over which the FG has legislative competence and may pursuant to its powers, revise **the Schedule** by adding "new duties or otherwise add to, vary or revoke **the Schedule**." Accordingly, powers vested in the President to make regulations pursuant to **section 115 SDA** for purposes of amongst others, "further and better carrying into effect the objects and purposes of this Act" (**section 115(ff)**), cannot extend to varying **the Schedule**. Dutiable instruments for significant sector operator client will cover virtually all its contracts; the few exceptions would be as exempted in **the Schedule**, etc.

8. **Section 100(2) SDA** prescribes 0.5% duty on share capital of limited liability companies; **section 102(2)** charges ₦0.25k for every ₦200 of loan capital.



stamps affixed thereto as well as to instruments and materials digitally tagged with electronic stamp or notional stamp on an electronic receipt.” Its definition of “instrument” is that it “**includes every written document and electronic document.**”⁹



1.9 **Section 4(1) SDA** tasks the FIRS with responsibility for SD collections for the FG on transactions involving companies (irrespective of status of the counterparty)¹⁰. Apparently, whilst amending **section 4(1)**, the draftsman substituted the FG with the FIRS, thereby conferring on the FIRS, power to also “impose” SD.¹¹ In our view, the National Assembly (NA) has arguably exceeded its legislative powers under the **1999 Constitution** by purporting to vest the FIRS with power to “impose” SD.¹²

9. Traditionally, SD as taxes levied on executed transaction documents/instruments was denoted by revenue or postage stamp or an impressed die on the instrument: **section 5 SDA**. In determining the nature of the relevant transaction, the court will consider the substance of the instrument and its legal effect: *Oughtred v. IRC (1958) 1 Ch 678*. However, the **FA 2020** has widened the means of denoting stamp duties, as well as instruments to electronic versions. The argument that SD is charged on instruments and not on transactions is now moot. An oral or 'transaction by conduct' might have previously escaped duty because there was no available document to be stamped, any funds transferred pursuant to the transaction will be subject to N50 SD, pursuant to **section 89(3) SDA**.

10. Accordingly, our discussion is focused only on FIRS' administered SD, since is a corporate. The States' Internal Revenue Service (IRS) and FIRS (for residents in the Federal Capital Territory (FCT)) assess and collect duties on documents executed between individuals. We discuss in subsequent part of this Opinion the 'turf war' between FIRS and Nigerian Postal Service (NIPOST) in respect of which agency properly has oversight for duty, denoted by “stamps”. Assuming the new **section 4(1) SDA** was not enacted, provisions of the **FIRS Establishment Act (FIRSEA)** listing the SDA amongst the tax laws to be administered by the FIRS still showed without doubt that the FIRS was the collection agency for FG's SDs. Support for FIRS oversight for SD can also be found in *NLNG Limited v FBR (2011) 5 TLRN 97*, at 110-111, where the FHC held that pursuant to **section 2(1) and Item 7, Part 1, Schedule of the Taxes and Levies (Approved List for Collection) Act, Cap. T2, LFN 2004**, the FIRS is the “appropriate tax authority” for the administration of SDs involving corporates and residents of the FCT.

11. The extant **section 4(1) SDA** reads: “The [FIRS] shall be the only competent authority to impose, charge and collect duties upon instruments specified in the Schedule to this Act if such instrument relates to matters executed between a company and an individual, group or body of individuals.”

12. **Section 4 1999 Constitution** vests federal legislative powers in the NA to make laws for “the peace, order and good government of the Federation or any part thereof” on matters in the **Exclusive and Concurrent Legislative Lists (in Parts I and II, Second Schedule)**, and on any other matter over which the NA is constitutionally empowered to make laws. SDs is **Item 58 in Part I, Second Schedule (the Exclusive List)**, thereby strongly calling into question, the ability of the NA to clothe the FIRS with power to impose SD. Contrast however, **section 1(2) Taxes and Levies Act (TLA) Cap. T2 LFN 2004** vesting the Minister of Finance with power to vary the **Schedule to the Act** (listing taxes collectible by various tiers). Its military era origin is typified by **section 2(1)** that purports to make TLA superior to the **1999 Constitution**, a clear invalidity under present dispensation, given the *grundnorm* status of the **Constitution**. Unsurprising, **section 1(2) TLA** was recently held unconstitutional by *Fajji J (Lagos Division, FHC) in Registered Trustees of Hotel Owners and Managers Association of Nigeria v AGF and Minister of Finance (2020) 52 TLRN 01*.



1.10 Giving effect to the amended **section 4(1)** means that as a recipient of statutory power, the FIRS can “impose” SD inconsistent with the prescriptions in **the Schedule**.¹³ **Section 4(1)** also translates into an implied repeal of **sections 3** and **116(1)**¹⁴ **SDA**. The FIRS’ power to “assess”, “charge” and “collect” SD pursuant to **section 4(1)** involves exercising discretion on how to treat respective instruments *vis a vis* the different rates in **the Schedule**. It cannot mean that FIRS is at liberty to “impose”¹⁵ rates. Whilst **section 4(1)** could be a result of draftsman's error, the better view is that it is invalid to the extent of its use of the offending word, “impose”. **The end result of the foregoing is that any rates imposed by the FIRS (or indeed any other power exercised by it), inconsistently with the SDA, risks being declared null and void.**

1.11 *The categories for denoting SD has now been widened to include: direct electronic printing or impression on the instrument; electronic tagging; issuance of stamp duties certificate, or any other form of acknowledgement of payment for stamp duties adopted by the FIRS.*¹⁶ As noted earlier, stampable instruments now include electronic documents such as documents on website or cloud-based platforms, POS receipts, and Automated Teller Machine (ATM) printouts etc.¹⁷ The FIRS has also set up its integrated SD **s e r v i c e s w e b s i t e** (<https://stampduty.gov.ng/>) that amongst others enable taxpayers “assess and pay ... stamp duty on the go” seamlessly, from anywhere and at anytime.¹⁸

1.12 According to the **FIRS SDPN1**, the outline classification of flat rate (fixed duty) *vis a vis ad valorem* instruments are as follows:

13. In contrast, power to make regulations on specific topics can be conferred and such would be less open to challenge. See for example, **section 44 Value Added Tax Act, Cap. V1 LFN 2004 (VATA)** empowering the FIRS to “with the approval of the Minister, make regulations for giving effect to the provisions of this Act.” Although **section 38 VATA** states that “the Minister may by order published in the Gazette” amend the VAT rate or revise the VAT Exempt List in **First Schedule VATA**, that power (which many argued was *ultra vires*), was never exercised to the point of implementation. Any attempt to “impose” SD by FIRS pursuant to **section 4(1) SDA** may be successfully challenged by taxpayers.

14. By **section 116(1) SDA**, only the NA can by resolution vary the SD rates in **the Schedule**. **There is no provision for delegation of such power to any person or authority. We also believe that if the NA intended to repeal section 116(1), it would have done so expressly;** implied repeal here is arguably too drastic and cannot be sustained on constitutional grounds.

15. **Notably, the powers and functions of the FIR Board and the FIRS respectively in sections 7 and 8 FIRSEA does not include that it can “impose” taxes. Sections 60 and 61 FIRSEA** typify permissible delegated legislation: (a) By **section 60**, the Minister may give to the FIRS or its Executive Chairman, “such directives of a general nature or relating generally to matters of policy with regards to the exercise of its or his functions as he may consider necessary ...” (b) **Section 61:** “[the FIRS] may with the approval of the Minister, make rules and regulations ... for giving full effect to the provisions of [FIRSEA] and for the due administration of its provisions and may in particular, make regulations prescribing the - (a) forms for returns and other information required under [FIRSEA] or any other enactment or law; and (b) procedure for obtaining any information required under [FIRSEA] or any other enactment or law.”

16. See **Paras 3.0 and 3.1, FIRSD Circular**.

17. **Section 2 SDA, Para 3 FIRSD Circular**.

18. Whilst this is a welcome development from efficiency and ease of doing business considerations, there may be issues with objecting where a person does not agree with the online assessment; presumably the objection process will apply as with physical assessment.

Fixed Duty Instruments	Ad-Valorem Instruments ¹⁹
Power of Attorney (PoA)	Deed of Assignment
Certificate of Occupancy (C of O)	Sales Agreement
Proxy Forms	Legal Mortgage or Debentures
Appointment of Receiver	Tenancy or Lease Agreements
Memorandum of Understanding (MoU)	Insurance Policies
Joint Venture Agreements (JVA)	Contract Agreements
Guarantor's Form	Vending Agreements
Ordinary Agreements	Promissory Notes
Receipts	Charter-Party
	Contract Notes

1.13 The more recent **FIRS SDPN2** features a more exhaustive listing of instruments, specifying respective *ad valorem* or flat rates for (categories of) instrument(s). Whilst the **FIRS SDPN2** provides helpful guidance to taxpayers, some of the positions taken therein may be open to challenge: because, *it is trite that the FIRS cannot, whilst purporting to provide clarifications, surreptitiously 'amend' the SDA.*

1.14 For example, the **SDA** is silent as to who has the responsibility for paying SD on many instruments, and the FIRS' attempt to fill the gap - ostensibly based on the party "*deriving benefit*" or being paid under the instrument, because the statute

so provided in some other instances – is not unassailable. Meanwhile, the more common scenario is that both parties derive benefit from their contracts, and some contracts may not involve monetary/cash consideration, thus making it more difficult to externally appropriate compliance responsibility, other than by statute.

Commissioners of Stamp Duties (CSD)

1.15 **Section 6 SDA** provides for appointment of Commissioners of Stamp Duties (CSDs) whose duties include considering applications to denote duties (on a second instrument where its chargeable duty depends upon duty paid on another instrument, **section 15 SDA**);

19. For obvious reasons, it is to be expected that *the FIRS will likely focus more on ad valorem duties than on flat rate ones.*

20. Incidentally, the FIRS has also in **SDPN2** listed "**Contract Agreement**" (which we think is equivalent to "**Ordinary Agreements**", since both relate to instruments not specifically listed), as subject to 1% *ad valorem* duty. Since **SDPN2** is later in time, it should be assumed that FIRS will charge *ad valorem*, rather than nominal stamping on "**Ordinary Agreements**".

21. This may be why MoU and JVA are included amongst flat rate instruments in the above Table.



expressing opinions as to duties payable on any executed instrument presented by any person making such enquiry (**section 16**) resulting in a certificate endorsed on the instrument reflecting the CSD's opinion (assessment);²² such CSD may call for requisite evidence and refuse to proceed, if such is not provided (**section 17**).

1.16 By **section 19**, any instrument bearing a certificate from the CSD pursuant to **section 16** “*shall be admissible in evidence and available for all purposes, notwithstanding any objection relating to duty*”, provided that duty can only be paid in line with the assessment of the CSD. It is forbidden for taxpayers to represent an already assessed instrument to another CSD for re-assessment or second opinion, such being sanctionable with a fine of ₦20 upon conviction (**section 20**).

1.17 **Section 21** empowers persons

dissatisfied with assessments to, if so inclined, appeal to the Tax Appeal Tribunal (TAT) or the Federal High Court (FHC) within twenty-one (21) days of the date of assessment and upon paying the assessed duty.²³ The appeal shall proceed by way of case stated and the matter shall be resolved in line with the determination of the FHC: excess duty paid in line with erroneous assessment may be ordered refunded with or without costs; if the Court assesses a higher amount, the appellant shall pay the differential together with any unpaid fine and/or penalty with or without costs “*forthwith or within such time as the Court may direct...*”

Effect of Not Stamping a Document

1.18 Generally, dutiable but unstamped documents are not void, but may suffer from disabilities:²⁴ A major one is **section 22(4) SDA** prohibition that any “*instrument executed in Nigeria or relating wheresoever executed, to any property situate or to any matter or thing done or to be done in Nigeria, shall not, except in criminal proceedings, be given in evidence or be available for any purpose whatsoever, unless it is duly stamped in accordance with the law in force in Nigeria at the time when it was first executed.*”

23. Although **section 21 SDA** provides for “*appeal against the assessment to the High Court of the State in which the assessment was made*”, arguably such provision has now been overtaken by: (a) **section 59 FIRS (Establishment) Act, Cap. F36 LFN 2004 (FIRSEA)** vesting the TAT with jurisdiction over disputes arising from the SDA (and other tax legislation listed in **Schedule 1 FIRSEA**) and the supremacy clause status of **section 68 FIRSEA** vis a vis other inconsistent tax legislation provisions; and (b) provisions of **section 251(1)(a) and (b) 1999 Constitution**, vesting exclusive jurisdiction on disputes “*a. relating to the revenue of the Government of the Federation in which the said Government or any organ thereof or a person suing or being sued on behalf of the said Government is a party; b. connected with or pertaining to the taxation of companies and other bodies established or carrying on business in Nigeria and all other persons subject to Federal taxation*”. Whilst arguably, such appeal must be made to the appropriate Zone of the TAT or division of the FHC, **NLNG v FBIR (supra)** was decided by *Mustapha, J* of the Lagos Division of the FHC. It is noteworthy that *payment of the disputed assessment is a pre-requisite to competence of the appeal*.

24. In light of the evinced FIRS aggressive enforcement posture on SDs, it is now doubtful whether SD can still be correctly referred to as voluntary tax because historically, in many instances people (especially in the informal sector), omit to stamp their documents without any major efficacy issues to their transactions. Also because the penalties are relatively light, people can defer stamping until it is absolutely necessary (for example if required as evidence in litigation), in the hope that the situation necessitating stamping (litigation) will not arise.



1.19 However, **section 22(1)** stipulates terms upon which an unstamped document may be received in evidence. They include: payment of the unpaid duty plus applicable penalty “*and a further sum of two naira*”.²⁵ Provided that such document must of the type that can be legally stamped after execution.²⁶

1.20 Another dimension is that for instance, a purchaser that has not perfected his title to a property²⁷ by registering same would have an equitable, instead of legal interest. Meanwhile, stamping is a pre-condition to registration of interests in real property, whether assignments, long term leases or power of attorney; it is an offence to register property without paying SD.²⁸ In order for the purchaser/assignee/lessee/donee to be “safe rather than sorry”, stamping is imperative.²⁹ Another example is **section 45 SDA** stipulation that: “**a bill of sale shall not be registered under any law ...relating to the registration of bills of sale unless the**

original, duly stamped, is produced to the proper officer.”

1.21 **Para 11 FIRS SD Circular** provides that failure to comply with provisions of the **SDA** may result in consequences such as prosecution for offences, payment of penalties and enforcement actions.



Furthermore, **Para 10 SDPN2** states that: “*Failure to deduct or remit stamp duties into the Federal or State Stamp Duties Account attracts penalty and interest as stipulated in the [SDA]...*” Many of these also carry reputational risk implications and could send wrong signals to a company's stakeholders, especially investors.

25. Note also **section 91(3) SDA** (wrongly referred to in **section 22(4)** as “**section 90(3)**”) exception: an unstamped receipt ordinarily inadmissible may, having regard to the ignorance or illiteracy of the party seeking to tender it, be admitted upon payment of ₦4 penalty. By **section 91(5)** an innocent party that paid such penalty in order to tender the receipt may recover same “*from the person whose duty it was to stamp the receipt at the time when it was first issued.*” We doubt if such provision will apply to client's counterparties. See also *Nicholas Frank v. Van Kumasi Yukwe*, 3 All NTC 405, where the CA held that it is wrong to hold that an unstamped document is inadmissible; the proper order is to direct that the document be duly stamped upon fulfilment of stated conditions.

26. Some documents cannot be stamped after execution. For example, **section 44 SDA** expressly prohibits such bills of lading, criminalising with a fine of ₦100 upon conviction.

27. See for example, **section 77 Lands Registration Law of Lagos State of 2015**. Cf. with regulatory processes such as incorporation of a company or registration of charges at the Corporate Affairs Commission (CAC); without paying SD, the applicant cannot proceed not to talk of consummating the regulatory process. Part of the Inter-Ministerial effort is to ensure that SD is paid on contracts with ministries, departments and agencies (MDAs).

28. See **section 25 SDA**: “*any person whose office is to enroll, register or enter in or upon any rolls, books or records any instrument chargeable with duty, enrolls, registers or enters any such instrument not being duly stamped, he shall be guilty of an offence and liable on conviction to a fine of twenty naira.*”

29. See for example, *Romaine v. Romaine (1992) 5 SCNJ 25 at 36*, where *Nnaemeka-Agu JSC* held that, it does not mean that once a Claimant produces an instrument of grant, he is automatically entitled to a declaration that the property is his...“*rather, production and reliance upon such an instrument inevitably carries with it the need for the Court to inquire into some or all of a number of question, including... Whether it has been duly executed, stamped and registered...*”



Penalties for Failing to Pay Stamp Duties: Would the **SDA** or **FIRSEA** be Applicable?



1.22 Importantly, as noted earlier, it may be assumed that the **SDA's** penalties are light. **However, we believe that by virtue of sections 59 and 68 FIRSEA, the heftier penalties in FIRSEA have arguably been incorporated by reference into the SDA, thereby making SDA's (civil) penalties as stiff as contained in the FIRSEA.**³⁰

1.23 The additional basis for this view is found in the provisions of the **FIRSEA** as follows:

1.23.1 **Section 25(1) FIRSEA** empowers the **FIRS** to administer all the tax laws listed in **Schedule 1 FIRSEA** and the **SDA** is one of such listed legislation;

1.23.2 **FIRSEA's explanatory note** and **section 8**, particularly **section 8(1)(b)** provision that the **FIRS** shall “assess,

collect, account and enforce payment of taxes as may be due to the Government or any of its agencies”;

1.23.3 **Section 26** empowers **FIRS** to call for information, books, returns and secure attendance of any person as therein described, whereas each contravention thereof is tantamount to an offence and upon conviction renders the person liable to a fine equivalent to 100% of the tax liability. Furthermore, the foregoing does not preclude **FIRS** from conducting tax audit;

1.23.4 **Section 27** empowers **FIRS** to, by written notice, require any necessary person to provide fuller or further returns in respect of any matter relating to **FIRS** functions under the **FIRSEA**. By **section 27(2)**: “Where a tax is not paid, when it falls due under any enactment, by any person from whom it is due,... it shall be paid on demand made by the Service ... and if it is not paid on demand, the person in default shall, in addition to the 100 per cent of tax due and payable, also be liable to a penalty equal to the amount of tax due and payable.”

30. **Section 68 FIRSEA** provides: “(1) **Notwithstanding** the provisions of this Act, the relevant provisions of all existing enactments including, but not limited to, the laws in the First Schedule shall be read with such modifications as to bring them into conformity with the provisions of this Act. (2) If the provisions of any other law, including the enactments in the First Schedule are inconsistent with the provisions of this Act, the provisions of this Act shall prevail and the provisions of that other law shall to the extent of the inconsistency be void.” In **NDIC v. Okem** [2004] 10 **NWLR** (Pt. 880), 107 at 182, the Supreme Court held that “when the term 'notwithstanding' is used in a section of a statute, it is meant to exclude an impinging or impeding effect of any other provision of the statute or section so that the said section may fulfill itself.” Thus, apart from enhancing the efficacy of **FIRS' SD** enforcement actions, another advantage of supplementing **SDA** provisions with **FIRSEA's** is that it affords the **FIRS** exclusive ability to administer **SD** for the **FG**. For example, the **section 111 SDA** provision that “all duties, fines, penalties and debts due to the Government of the Federation imposed by this Act shall be recoverable in a summary manner in the name of the Attorney-General of the Federation...” has arguably been rendered otiose.

1.23.5 **Section 32(1)** is to the effect that **any tax that is not paid within the periods prescribed will attract an addition of 10% per cent of the tax payable** and the provisions of **FIRSEA** on the collection and recovery of tax shall apply to the collection and recovery of such sum. **The tax due, if in Naira, shall attract interest at the prevailing minimum rediscount rate of the Central Bank of Nigeria (CBN) plus spread to be determined by the Minister from the date when the tax becomes payable until it is paid**, and the provisions of **FIRSEA** relating to collection and recovery of tax shall apply to the collection and recovery of the interest. Whereas if it is in foreign currency, **the tax due shall incur interest at the prevailing London Inter-Bank Offered Rate or the prevailing minimum rediscount rate of the CBN whichever is higher**, plus spread to be determined by the Minister from the date when the tax becomes payable until it is paid, etc.³¹ **Section 32(2)** provides that “Any person who without lawful justification or excuse fails to pay a tax within the period of one month prescribed in subsection (1)(d) of this section, commits an offence under this Act.”

1.23.6 **Section 33** confers on the FIRS, power to distraint in appropriate circumstances for enforcing payment of the tax due under tax laws, which includes the **SDA**. It is worth noting that courts have held that FIRS' circulars, public notices or other such documents simply represent the opinions of the FIRS; they will not prevent the court from forming its own views on the positions taken by the FIRS in such publications, which if inconsistent with the law, will not even bind the FIRS: **Halliburton v. FBIR**.³²

1.23.7 By **section 40**, “Any person who being obliged to deduct any tax under this Act or the laws listed in the First Schedule ..., but **fails to deduct, or having deducted, fails to pay to the Service within 30 days from the date the amount was deducted or the time the duty to deduct arose, commits an offence and shall, upon conviction, be liable to pay the tax withheld or not remitted in addition to a penalty of 10 per cent of the tax withheld or not remitted per annum and interest at the prevailing Central Bank of Nigeria minimum re-discount rate and imprisonment for period of not more than three years.**”

31. The FIRS may, after serving a demand notice and if payment is not made within one month thereafter, proceed to enforce payment under **FIRSEA**. Furthermore, an addition imposed hereto shall not be deemed to be part of the tax paid for the purpose of claiming relief under any of the provisions of **FIRSEA**.

32. 6 All NTC 55.



body corporate or firm or other association of individuals: (a) every director, manager, secretary or other similar officer of the body corporate; (b) ...; (c) every person concerned in the management of the affairs of the association; or (d) every person who was purporting to act in any capacity, commits an offence and shall be liable to be proceeded against and punished for the offence in like manner as if he had himself committed the offence, unless he proves that the act or omission constituting the offence took place without his knowledge, consent or connivance.”

1.23.9 Section 59(2) vests the TAT established by the **FIRSEA** with jurisdiction “to settle disputes arising from the operations of **this Act and under the First Schedule.**”

1.24 It can be argued that where there are two categories of provisions, one lenient and the other stiff, the former should apply, in tandem with the rule of construction of tax statutes that³³ ambiguities must be resolved in favour of the taxpayer, rather than of the Revenue. Another constructionist argument is that the general provisions of the **FIRSEA** (on tax administration), cannot displace the specific provisions of **SDA** (on SD administration). Furthermore, penal sanctions or tax obligations cannot be

1.23.8 The omnibus criminal provision of section 49 states: “(1) Any person who contravenes any provisions of this Act for which no specific penalty was provided, commits an offence and shall be liable on conviction to a fine not exceeding N 50,000.00 or imprisonment for a term of imprisonment not exceeding six months or to both fine and imprisonment. (2) Where an offence under this Act is committed by a

33. See for example, the FHC decision in *Citibank Nigeria Limited v. FIRS* (2017) 30 TLRN 40, at 54-55 which followed settled case law in holding that: “A law which imposes pecuniary burden is ... subject to the strict construction. All charges upon the subject must be imposed by clear and unambiguous language because in some degree they operate as penalties. Thus, the subject is not to be taxed unless the language of the statute clearly impose the obligation. The language of statute must not be strained in order to tax a transaction which had the legislature thought of it would have been covered by appropriate words. In a taxing legislation, therefore one has to look merely on what it clearly said. There is no room for any intentment. There is no equity about tax, no presumption at all and nothing is to be implied...”



imposed by inference, but by express provision.³⁴ It has also been contended that the **FIRSEA** provisions will not apply because SD is a “surcharge” and not a “tax”.³⁵

1.25 However, our respectful view is that the express (supremacy) provisions of **section 68 FIRSEA** makes all the foregoing counter-arguments inapplicable. Consequently, **SDA's** penal provisions will only apply where there is no equivalent in the **FIRSEA**. Given the foregoing, our recommended risk averse approach is to assume that the heftier **FIRSEA** penal provisions may apply, to provide additional incentive for optimal SD compliance.³⁶ Depending on the circumstances, it is possible for the FIRS to seek financial penalties under the **SDA** where the potential recovery could be higher than under the **FIRSEA**, and also invoke **FIRSEA's** criminal provisions where that will provide more leverage to FIRS enforcement actions.

1.26 **Section 23(1) SDA** provides that generally, any unstamped or insufficiently stamped instrument may be stamped upon payment of appropriate duty **within forty (40) days** from its first execution. **However, instruments chargeable to ad valorem duty (including those executed outside Nigeria) have a time limit of 30 days: section 23(3)(a) SDA.**³⁷

1.27 Except for listed (*ad valorem*) instruments in the **Table** in **section 23(3)(c)**, for which failure to stamp timeously is also criminalised, generally **all late stamped instruments attracts, in addition to the unpaid duty, a penalty of ₦20 and, where the unpaid duty exceeds ₦20 a further penalty of 10% interest on such duty from the day the document was first executed up to the time when the amount of interest is equal to the unpaid duty.**³⁸ **Section 23(3)(b)**

34. According to a commentator, “**Section 36(12) 1999 Constitution** provides that crimes must be statutorily created; the old case of *Aoko v Fagbemi* [1961] All NLR 406 decided under **section 21(10) 1960 Constitution** was a forerunner in this regard.” See Yewande Obayomi, ‘Some Thoughts on Corporate Criminal Responsibility in Nigeria’, LeLaw Thought Leadership, September 2017: <https://www.lawalliance.com/insights/2017/09/08/some-thoughts-on-corporate-criminal-responsibility-in-nigeria/> (accessed 31.07.2020).

35. According to some commentators, “The FIRS also stated that it will invoke **Section 32 and 40 of the FIRSEA** which impose penalties and interest for non-deduction of tax. This provision may not be applicable to stamp duties as stamp duties are a surcharge and not a deduction.” See Taiwo Oyedele, et al, ‘**FIRS Begins Audit and Recovery of Back-Years Stamp Duties**’, 02.07.2020: <https://www.lawalliance.com/insights/2020/07/02/firs-begins-audit-and-recovery-of-back-years-stamp-duties/> (accessed 29.07.2020). We disagree with this view because **section 69 FIRSEA** defines “tax” to include “**any duty, levy or revenue accruable to the government in full or in part under this Act, the laws listed in the First Schedule to this Act or any other enactment or law.**”

36. Even if the FIRS represents as in **Para 10 SDPN2** that fines and penalties under **SDA** will apply, such would not be regarded as binding estoppel against the FIRS, if it later chooses to invoke **FIRSEA**. An analogy may be drawn from change of FIRS enforcement attitude regarding the excess dividend tax (EDT) provisions of **section 19 CITA**. After a period of long neglect, the FIRS began to enforce same, until it was recently whittled down by **FA 2020** amendments.

37. The 30 day timeline reflects that the **SDA** prioritises *ad valorem* stamping over flat rate instruments. For documents executed outside Nigeria, the 30 day timeline starts running from “**after it has been first received in Nigeria.**” **Section 23(4)** also confirms that stamping documents executed outside Nigeria after 30 days will not attract any penal consequences – only the unpaid duty will be payable on the late stamping.

38. Cf. **sections 23(1) and 23(3)(b) and (c) SDA**. Please see **Para 4.6 (p. 14)** of this Opinion for the **section 23(3)(c) Table**. The default makes the affected party guilty of an offence and liable on conviction to the above penalties, “**unless a reasonable excuse for the delay in stamping or the omission to stamp, or the insufficiency of stamp is afforded to the satisfaction of the ... before whom it is produced.**”



imposes in addition “a further penalty equivalent to the unpaid duty thereon”, unless there is reasonable excuse for the delay, omission to stamp or insufficiency of stamp satisfactory to the CSD or court, arbitrator or referee before whom the unstamped document is produced.³⁹

1.28 By **section 23(4)**, where a document is inchoate;⁴⁰ being subject to ministerial (regulatory) approval, time only begins to run from the date of such approval. Furthermore, where a document is submitted to CSD for his opinion on duty payable before the stamping deadline has expired, the instrument may be stamped accordingly within 21 days of receiving the notice of assessment: **section 23(6)**. For a

variety of reasons and having regard to circumstances of particular cases, the President may by order abridge or extend the 40 or 30 day period within which to stamp instruments.⁴¹

1.29 Also, **section 8(a) SDA** prescribes that unless otherwise provided, an instrument containing several distinct matters shall have each distinct matter separately charged with duty in respect of each of its considerations as if it were a separate instrument.⁴² For example, an instrument vesting property in separate persons would require stamp duty in respect of the transfer to each person or an instrument which appoints new trustees and vests property in them is liable both to appointment duty and to deed duty. Presumably, the rationale is that the law regards each transfer to the respective person as a separate transaction. Furthermore, it prevents people from ‘cramming’ distinct agreements into one instrument/document to minimise SD costs.

39. A community reading of the above provisions means that **the maximum SD exposure for late stamping of flat rate instruments is:** (a) the unpaid duty; (b) fine of ₦20; and (c) 10% interest per annum up to the amount of unpaid duty. Whereas ad valorem instruments comprise: (a) the maximum SD exposure for flat rate instruments; (b) criminal conviction and a fine of ₦20; and (c) further penalty equivalent to the unpaid duty. **Thus, the penalty for unpaid ad valorem duties are heftier, compared to flat rates, obviously because ad valorem stamping has greater revenue potential.**

40. Whilst the wording used is ‘void’, we believe that ‘inchoate’ is more apt contextually; such document is not void but ‘in suspense’, until the regulatory approval is obtained.

41. Such considerations include if it is perceived that the party is using the timeline in any manner for the purpose of evading SD or the time is too long or too short by reason of ease or difficulty of access to a CSD to assess the duty payable.

42. See also **section 8(b)**: “An instrument made for any consideration or consideration in respect whereof it is chargeable with ad valorem duty, and also for any further or other valuable consideration, or considerations, shall be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the considerations.” See also **section 57** along the same lines for real estate transactions.

2.1 The question of the responsible party for meeting SD obligations is pertinent because in many instances, the **SDA** either does not answer or at best answers the question indirectly (for example, by stipulating the party that would be subject to penalty for omission to stamp at all, within time or under-stamping). Except for the minority of instances where there is express or inferential indication of party responsible, SD responsibility may be a contractual/risk issue – either the party in the stronger negotiating position, with more robust risk management or the party most at risk if the instrument is ineffectual as a result of being unstamped.⁴³

2.2 From experience, the party presenting the document for stamping pays the duty, including interest and penalties for late payment of duty, except in cases where the law provides that a certain person should pay.⁴⁴ Meanwhile, the **SDA's** lack of overall clarity in designating the responsible party for SD payment could pettifog FIRS' ability to take enforcement actions, because it is trite that the FIRS can only proceed against a 'proper' defaulting party. However, one likely factor in FIRS' favour is the unconvincing, morally burdened defence of a party to an unstamped instrument that the default was because the **SDA** was unclear as to the responsible party.

2.3 Alternatively, the supposed lack of clarity effectively mean that the FIRS can proceed against either or both parties in such circumstance.⁴⁴ After all, the legislator is presumed not to legislate in vain: generally (unless absurd results will follow), effect must be given to legislation. Arguably, parties to a contract are impliedly all responsible for relevant regulatory compliance obligations of the contract if the law or the contract did not allocate such responsibility.⁴⁵



43. Cf. with tax gross-up clauses in contracts, in the absence of explicit provisions criminalising the practice (provided the Revenue receives the relevant withholding tax). See Afolabi Elebiju, 'Withholding Tax: A-Z of Grossing Up', in *Taxspectives by Afolabi Elebiju, THISDAY Lawyer*, 16.02.2010, p.14, also available online at: <https://lelawlegal.com/add11pdfs/Withholding-Tax-A-to-Z-of-Grossing-Up1.pdf> (last accessed 12.12.2020)

44. Oyesola Animashaun, et al, 'Changing Perspectives in the Law and Practice of Taxation in Nigeria', (1st ed., 2017), p.29.

45. See also section 110 **SDA**: "Proceedings for the recovery of any duty imposed by [SDA] or for the recovery of any debt due to the [FG] under [SDA] may be included in any proceedings for the recovery of a fine or penalty under [SDA]."

46. The risk appetite of contracting parties may come into play here. A conservative or risk averse approach would entail a party also ensuring that its counterparty is as interested in the overall compliance status of the contract.



of an amount from ₦10,000 and above attracts the SD of ₦50, liable to be paid by the recipient of the money. Because the provision effectively makes banks and other financial institutions statutory agents for remitting the SD amounts collected, there is no compliance exposure for recipient/account holders.

2.4 In this regard, **section 106 SDA** is pertinent. It provides that where someone who “is not the person whose duty it was by law originally to provide for the stamping of the document” renders himself subject to a fine, penalty or forfeiture, by the production of an unstamped or under-stamped document, such innocent party can obtain judgment, for the said amount against the responsible, but defaulting person. Whilst this raises the question of “how do we always know whose duty it is to stamp where the law fails to provide clarity?”⁴⁷ It may presuppose that **FIRS** can seek to recover SD from any party to a transaction, and such party, if he believes he is not the actual party to pay the duty, can obtain judgment against the proper party.

2.5 One clear example of a party bearing SD responsibility is reflected in transactions contained in **section 89(3) SDA** wherein electronic receipt or electronic transfer for money deposited in any bank

2.6 An illustration of the *oblique or indirect way of allocating SD responsibility* can be seen in the phraseology of **section 23(3) SDA** specifying persons who “shall be guilty of an offence and liable on conviction to a fine of twenty naira” where the specified instruments in **section 23(3)(c)** are unstamped within statutory timelines. Thus, **section 23(3)(c) SDA** provides that: “the instruments and persons to which the provisions of this subsection are to apply are as follows: -

47. It is noteworthy that unlike the **SDA**, other Nigerian tax legislation leave no room for doubt about the responsible persons for compliance obligations. For example, **section 1 Capital Gains Tax Act (CGTA)** makes clear that the person making a gain on disposal of capital assets is the one liable to **CGTA**. In the same vein, **VATA** defines and describes “taxpayer” for purposes of VAT compliance requirements. It is clear whose income is subject to tax or has WHT compliance obligations in (**CITA**), **Petroleum Profits Tax Act (PPTA)** and **Personal Income Tax Act (PITA)**.



Title of Instrument as described in the Schedule	Person liable to penalty ⁴⁸
Bond, covenant, or instrument of any kind whatsoever	The obligee, covenantee or other person taking the security.
Conveyancing on sale	The Vendee or transferee.
Conveyancing or transfers operating as voluntary disposition inter vivos	The grantor or transferor.
Lease	The lessee
Mortgage bond, debenture, covenant, and warrant of attorney to confess and enter up judgment	The mortgagee or obligee, in the case of a transfer or reconveyance, the transferee, assignee or disponee or person redeeming the security.
Settlement	The Settler.

2.7 The foregoing may be contrasted with the position taken in **FIRS SD Circular, SDPN₁** and **SDPN₂**. For example in **SDPN₂, Para 8 (Burden of Payment)** states in part “the burden of payment of stamp duties whether fixed or ad valorem is that of the beneficiaries of the contract...” “**the landlords... and other executors of chargeable transactions are only agent of collection** whose duty are to ensure that the stamp duties due on each transaction is remitted to the Federal or State Government Stamp Duty Account as at and

when due” and “it is the responsibilities of ... companies, landlords, executors, etc to ensure that service providers, contractors, tenants, etc pay stamp duties due on agreements, receipts and other dutiable instruments.”

2.8 **Para 10 SDPN₂** merely reiterates that failure to deduct or remit SD attracts penalty and interest as stated in the **SDA**. However, as earlier stated, public notices should not be taken as a reflection of, or having the force of law.⁴⁹

48. Typically, the transactions giving rise to dutiable instruments will attract two types of SDs: (a) SD on the instrument whether ad valorem or fixed; and (b) ₦50 stamp duty on receipts/transfers of ₦10,000 and above.

49. **Section 23(3)(c) Table** listing the lessee as the party to be penalised for non or late stamping is presumably predicated on the assumption that it makes sense to expect the tenant to pay stamp duty together with the rent. However, assuming there was no such Table and lessee is not specifically mentioned, it becomes an even field because arguably the landlord is also a “beneficiary” since he receives the rent, he is an “executor” of the instrument and *has as much, if not even more interest, in ensuring that the lease is stamped because of consequences such as inability to tender it in evidence during recovery/eviction proceedings.* So absent express or implied provision, the question of who amongst two contracting parties bears the SD burden may be a negotiation point. It is also possible for the costs to be shared (especially for big ticket transactions), and factored into the consideration accordingly. *It is actually not impossible for a lessee to actually request that the landlord lower his rent by the amount of the SD exposure, such that the lessee would still end up paying the same amount inclusive of SD. This is an approach that a taxpayer client can consider, albeit related correspondence and the lease itself must be appropriately nuanced, so this is not obvious to third parties (for example, by making express reference thereto).*

2.9 Another example of some clarity on SD responsibility is **section 62 SDA**: “Where by virtue of an Act, either (a) any property is vested by way of sale in any person; or (b) any person is authorised to purchase property, such person shall ... produce to a commissioner ... an instrument of the conveyance of the property in the other case, duly stamped with ad valorem duty payable upon a conveyance on sale of the property; and in default of such production, the duty with interest thereon at the rate of ten per cent per annum from the passing of the Act, date of vesting or completion of the purchase, as the case may be, shall be a debt to the Government of the Federation from such person.”

2.10 **Section 92 (penalties for offences in reference to receipts)** indicates clearly the person that would be guilty of an offence and would be liable on conviction to a fine of ₦20.⁵⁰ Given the new **section 89 SDA** whereby SD on receipts are automatically collected by banks, the force of **section 92** has been diminished, but the point being made is that it specifies the

responsible party for stamping receipts.

2.11 On its own part, **section 42 SDA punishes all parties in transactions involving unstamped bill or note**: (a) the issuer, endorser, transferor, negotiator, presenter, or payor shall be guilty of an offence and liable on conviction to a ₦20 fine; and (b) the receiver of such bill or note shall not be entitled to recover thereon, or to make the same available for any purpose whatever, subject to the stated proviso.⁵¹ However, by **section 42(2)**, the proviso “shall not relieve any person from any fine or penalty incurred by him in relation to such bill.”⁵² The same ‘sanction all parties’ approach is evident in **section 99** (transactions involving warrants for goods), **section 98** (unstamped stock certificate), and **section 96** (share warrant not duly stamped).⁵³



50. Failure to give a stamped receipt, or giving unstamped receipt or issuing multiple receipts for smaller amounts in order to avoid stamping obligation for a single receipt (where total sum is ₦4 or more, which would require stamping).

51. The proviso saves “any bill of exchange payable on demand or at sight or on presentation, or within three days after date or sight is presented for payment unstamped”, if the receiver affixes and cancels an adhesive stamp of 2 kobo thereon, and may thereafter pay the sum in the bill, “and charge the duty in account against the person by whom the bill was drawn, or deduct the duty from the said sum, and the bill shall, so far as respects the duty, be deemed valid and available.”

52. Cf. with obligation to execute and stamp contract note in **section 50 SDA**.

53. By way of example, under **section 99(3)**, “every person who makes, executes or issues, or receives or takes by way of security or indemnity, any warrant for goods not being duly stamped” can be liable to ₦40 fine upon conviction for the offence. For share warrants (**section 96**), the issuing company and its management risks conviction and a fine of ₦100.

Absent Express SDA Provision, Can Parties Vary or Displace their (Instruments') SD Responsibilities?

2.12 Another question is about the ability of contracting parties to allocate/transfer responsibility for SD payment and compliance. It would seem they are at liberty to do so where the SDA does not specify the responsible party⁵⁴ Definitely, a party with strong bargaining power can exert more influence in this regard.

2.13 However, parties cannot contract out of SD obligations or seek to totally evade such. In this regard, section 108 SDA provides that: “every condition of sale framed with the view of precluding objection or requisition upon the ground of absence or insufficiency of stamp upon any instrument... and every contract, arrangement, or undertaking for assuming the liability on account of absence or insufficiency of stamp upon any such instrument or indemnifying against such liability, absence or insufficiency, shall be void.”

2.14 In conclusion, where it is not clear

the particular party whom the SDA has affixed with the obligation to pay the SD, parties can by contract shift this obligation as they may deem fit or circumstances permit: **what is important to the FIRS is that the SD is correctly and timeously paid.** SD disputes with FIRS are unlikely if these two requirements are met, pursuant to a risk averse approach and good corporate citizenship considerations. Furthermore, the appointment of certain persons (such as landlords) as agents of collection can, if challenged, be justified or regularised (with requisite FG support) by the FIRS in reliance on sections 60, 61 FIRSEA; and 115, 116 SDA.⁵⁵

2.15 We are of the view that where the SDA is silent on who pays duty on an instrument, clients may consider negotiating it as a term of the contract. A party can seek to optimise its SD exposure (even if statutorily responsible for the SD costs, like where it is a lessee) by negotiating down the consideration such that with SD inclusive, the lessee's total cost would still be at a 'fair' level. That way the lessee achieves transaction compliance at reasonable cost.⁵⁶

54. See for example, the Court of Appeal (CA) decision in *Total v. Akinpelu & Ors* 5 All NTC 234 upholding a gross up arrangement in respect of withholding tax (WHT) obligation under sections 68(1) and 70, PITA as follows: “There is no provision in the law which prohibits the provisions in the deed agreement obligating the Appellant to pay the 10% withholding tax on behalf of the respondent. Since there was no such provision, it was therefore clear that the covenant undertaken by the Appellant in the deed had not become impossible of performance or frustrated. The Appellant was therefore obligated to pay the tax on behalf of the Respondent as agreed.”

55. Whilst not disputing that the above provisions grants the FIRS powers to make regulations regarding SD in Nigeria, such regulations must be limited to giving effect to the provisions of the SDA.

56. Such approach is especially useful when the property market is soft and landlords are under pressure to let their a vacant properties, or they desire reputable corporate tenants that will assure stable rent cashflow as well as use their properties decently.



Agents of Collection Issues

2.16 FIRS has attempted to fill gaps in the **SDA** by designating some parties to dutiable instruments as agents of collection of SD on such instruments; for example as landlords on leases and “other executors of chargeable transactions”. Whilst FIRS ability to impose such obligation may be questioned,⁵⁷ we believe it is pragmatic to facilitate ease of SD administration. Albeit, such imposed obligation may not be upheld by the courts - as proper exercise of FIRS' power to make regulations in furtherance of the **FIRSEA**⁵⁸ Apart from their questionable statutory basis, it is also doubtful whether the **FIRS Publications** amounts to regulations *stricto sensu*, since they were not gazetted.

2.17 Nonetheless, arguments that *since the appointed agents are actually parties to the relevant instruments, they would have a moral burden to challenge such appointment*, the appointment being ostensibly to help parties comply with mandatory **SDA** provisions, cannot be totally discounted. In our view, *it would be impolitic and reputationally injurious for corporates to challenge their agency*

appointment.⁵⁹ We understand that efforts are apace to amend the **SDA** vide submission of an executive bill in order to address all the gaps that would pose implementation challenges to the FIRS.



57. Some related questions here are *what sanctions can the FIRS enforce against a person it affixes with agent of collection status, upon such person's refusal to so act in the absence of statutory provisions to that effect?* Clearly, any purported sanctions outside the provisions of the **FIRSEA** and **SDA** would be null and void.

58. Cf. other laws like **VATA**, **PITA**, **PPTA** and **CITA** which have clear provisions for statutory agents like employers under **PITA** to deduct and remit employee taxes under the **PAYE** scheme, clients to deduct and remit WHT on vendor's invoices under **PITA**, **PPTA** and **CITA**; and taxpayers (vendors) accounting for VAT received from clients to the FIRS under **VATA**, etc.

59. Unlike an individual landlord who could challenge his appointment because **section 23(3)(c)** **SDA** specifies that the tenant (not landlord) is the party to be penalised for failure to stamp.



ability to “impose” SD on FIRS (see *Paras 1.9-1.10* of this herein). It is trite that in resolving conflict between inconsistent legislative provisions, those of the more recent enactment will prevail. Accordingly, as discussed in Section A (*Regulatory Overview of Nigerian SD Regime*), the **FA 2020** amendments have expanded the breadth of Nigerian SDs. However, the FIRS cannot purport to enforce any extraneous requirements

relative to the **SDA** amendments (we discuss this in further detail below).

3.1 The validity of recent developments in the Nigerian SD regime is topical issue, given potential FIRS enforcement actions, and taxpayer responsive or even proactive strategies, based on SD compliance implications for their businesses. We will categorise the most significant changes and opine on their validity into two: (a) substantive amendments to the **SDA** by the **FA 2020**; (b) amendments of *the Schedule*.

FA 2020 Amendments of the SDA

3.2 Our considered view is that almost all the substantive amendments to the **SDA** *vide* the **FA 2020** are generally unimpeachable as the sovereign legislative powers were properly exercised in effecting the amendments. However, our only reservation is the conferment of

3.3 The **section 89(3) SDA** amendment that imposes ₦50 SD on receipts and bank transfers can be used to illustrate the above point. Prior to enactment of **FA 2020**, the Central Bank of Nigeria (CBN) tried to achieve an equivalent result on deposits of ₦1,000 and above through a circular (*the CBN Circular*) it issued to all banks and financial institutions in Nigeria in January 2016.⁶⁰

3.4 Upon challenge, the **CBN Circular** was invalidated by the Court of Appeal (CA) in *Standard Chartered Bank Nigeria Ltd (SCBNL) v. KIS Ltd & 22 Ors*;⁶¹ the CA overturning the FHC decision in *KIS Ltd v. 22 DMBs*⁶² held that it was improper to charge

60. CBN, ‘Collection and Remittance of Statutory Charges on Receipts to Nigeria Postal Service under the Stamp Duties Act’, 16.01.2016: <https://www.cbn.gov.ng/Out/2016/CCD/SCAN0001.pdf> (accessed 17.07.2020).

61. (2016) 27 TLRN 1.

62. Suit No: FHC/LJ/CS/1462/2013.

SDs on cash deposits or electronic transactions. The CA further held that the provisions of **the CBN Circular** being inconsistent with **the Schedule** is therefore invalid, null and void. Apparently, the lessons learnt must have informed the enactment of **section 89(3) SDA** in 2020.

SD New Regime Implementation Clarifications: FIRS Circulars and Public Notices

3.5 As noted above, the FIRS has issued **SD Circular, SDPN1 and SDPN2 (FIRS Publications)** with a view to sensitising the populace about the new SD regime. While these publications indeed provide helpful clarifications on **SDA** provisions, they also embody rule making which may be open to challenge for being at variance with extant **SDA** provisions.

3.6 Unless a statutory basis such as **section 4(1) SDA** can be held to justify FIRS protrusion beyond 'clarifications', it is trite that a circular or guideline cannot amend an **Act** or **Law**. From a delegated legislation point of view, the **FIRS Publications** would be void to the extent of any inconsistency with provisions of **SDA**, the enabling legislation. In **Sedco Forex International Incorporated v. FIRS**⁶⁵ the TAT held that:

"The FIRS Circular is not a subsidiary legislation and therefore has no force of law."

3.7 Many items in the **FIRS Publications** are quite divergent from **SDA** stipulations. **SDPN2** prescribes some SD rates which are not supported by **the Schedule**. For example, **SDPN2** assesses tenancies/leases to 6% *ad valorem* SD whereas the **Schedule** actually provides for 0.78% - 6% depending on lease tenor, **with 6% only applicable at the highest range on lease terms that exceed twenty one (21) years or are indefinite**⁶⁶ Recently, the FIRS' twitter account purportedly represented that SD for leases is as under **the Schedule**. Whilst in our view, it is doubtful whether that tweet is sufficient to countermand the **FIRS Publications**, that issue is now moot. This is because the FIRS has now fully walked back from its earlier posture - its website now displays, and the FIRS in practice charges, real estate related property SD rates consistent with the **Schedule**.⁶⁷

3.8 *The pertinent question is whether the FIRS can validly exercise discretion to pick the top figure of a prescribed SD band, in disregard of the threshold parameters? We think not.* Another incongruent example is the imposition of 1% *ad valorem*

65. (2015) 18 TLRN 42. See also the FHC and CA decisions in *Halliburton WA Limited v FBIR* and *FBIR v Halliburton WA Limited*; and *Global Marine International Drilling Corporation v. FIRS* (2013) 12TLRN 01.

66. The SD rates in the **FIRS Publications** are in tandem with those on FIRS Stamp Duty website, albeit inconsistent with the figures stated in the **Schedule**.

67. See FIRS tweet of 29.07.2020 at <https://twitter.com/firsNigeria/status/1288382142502797319>: "Dear Tenants! Stamp Duty on rent is NOT a basis for rent increase. You should know this. **Additional payment is just a 0.78% of your rent sum (in case of agreement between 1 to 7 years) which you should walk into a bank, pay and get your receipt. Know your right and inform others.**"

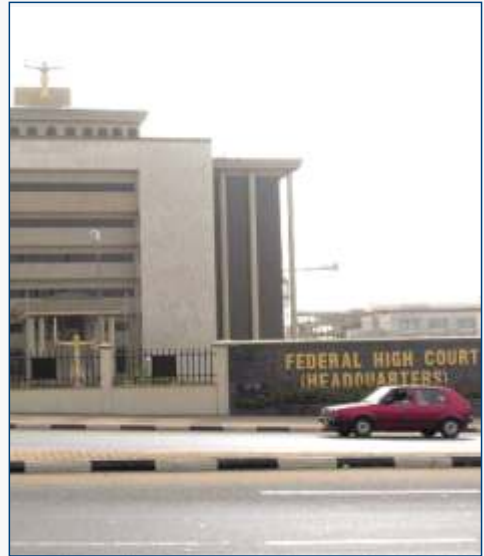
68. See: https://stampduty.gov.ng/stamp_duty_charges (last accessed 12.12.2020).

rate for all contracts (not specifically chargeable to duty), instead of the erstwhile nominal rate of 10 kobo in *the Schedule*.

3.9 Another area where FIRS may experience vigorous taxpayer pushback is if it, vide the *FIRS Publications*, tries to fiddle with SD exempt instruments in the *SDA* by making erstwhile exempt instruments dutiable.⁶⁹ Incidentally, *section 56(b) FA 2020* included additional items on the exemption list in *the Schedule*.⁷⁰

'Turf Wars'? : *FIRS v. NIPOST*

3.10 Questions have arisen whether the use of adhesive stamp is not tantamount to postage stamp that is under the exclusive preserve of the Nigerian Postal Service (NIPOST). Given the amended *section 4(1) SDA*, the question would seem to have been settled but in response to the FIRS' view of its entitlement to use electronic stamps and FIRS (non-postage) adhesive stamps, NIPOST is not letting up.⁷¹



3.11 We understand that NIPOST (through its agent) is currently in litigation, having instituted an action at Abuja Division of FHC on 30th June 2020.⁷² From available reports, they are seeking amongst others, *injunctive reliefs to restrain FIRS from carrying out any act in minting, production, distribution, selling and retailing the use of adhesive stamps and or electronic stamps to denote receipts,*

69. Exempt instruments in *the Schedule 1* include, but are not limited to: Affidavit or declaration made for the purpose of being filed in any court in Nigeria or before any judge or officer of such court; Agreement or memorandum for the hire of any labourer; Bill or note issued by the CBN; Letter or Power of Attorney or proxy filed in a High Court in Connection with probate jurisdiction of the Court; and all documents relating to the transfer of stock and shares.

70. These include: shares, stock or securities and all instruments relating to Regulated Securities Lending Transactions.

71. *Section 5 NIPOST Act, Cap. N127, LFN 2004* provides that NIPOST shall have the power to provide, prescribe the amount of postage stamps and the manner in which it is to be paid; notably the functions and powers of NIPOST (*vide sections 4 and 5 NIPOST Act* respectively) does not include collection of SDs. Apart from *Standard Chartered (supra)*, the FHC also held in *NBC v. NIPOST & Bethda International Merchant Nigeria Limited Suit No. FHC/ABJ/CS/869/2015* (Kolawole, J (judgement delivered 13.04. 2017) that NIPOST is not authorised by either the *NIPOST Act* or *SDA* to enforce the collection of SDs. The Court held further that *NIPOST's* engagement of agents to enforce *SDA's* provisions, by way of enforced sale of postage stamps, is beyond its statutory powers.

72. *Suit No: FHC/ABJ/CS/701/2020 First October General Merchant Nigeria Limited & 1 Ors vs. FIRS*. They are seeking declaration that by *section 5(d) NIPOST Act*, and *sections 2, 11(1)(2) &(3) and 89 SDA* as amended, NIPOST is the sole statutory agency empowered to mint, produce, distribute and regulate the of adhesive postage stamps in Nigeria on the adhesive paper or electronic form.



documents and registrable instruments in Nigeria⁷³ The Senate also reportedly intends to facilitate an amicable resolution between the two agencies⁷⁴ The President can also resolve the matter by making regulations pursuant to **section 115(d)**.⁷⁵

3.12 **Our short view on this issue is that pending judicial or other resolution, taxpayers will be acting prudently if it regards FIRS as the regulatory agency to interface with, and is accountable to, in respect of all its SD compliance issues.**

Limitation Period for SD Enforcement Actions

3.13 Part of recent SD developments in the news was the FG's mandate for the FIRS to recover back SDs, leading to the pertinent question of the limitation period within which the FIRS can institute action to recover retrospective SDs. **Section 114 SDA** answers the question by stating that: **"all proceedings for the recovery of any duty, fine, penalty and debt due to the Government of the Federation imposed by this Act, may be commenced or prosecuted**



at any time within five years after the offence committed by reason whereof such duty, fine, penalty or debt shall be incurred."⁷⁶

3.14 Given the express provisions of **section 114 SDA**, general rules of limitation and exceptions thereto (such as fraud and wilful neglect), will not apply⁷⁷— so the applicable period is five (5) years. *Because there are no exceptions that could stop time from running, the 5 year limitation is ironclad.* It is also noteworthy that **FIRSEA** has no limitation period provisions, ostensibly relying on applicable substantive tax law limitation provisions (of generally six years, but **SDA's** is five years).

73. Zhihwi Dauda, 'An Overview of the Stamp Duties Administration in Nigeria with the Finance Act 2019 Amendment', 15.07.2020: <https://thenigerialawyer.com/an-overview-of-the-stamp-duties-administration-in-nigeria-with-the-finance-act-2019-amendment/> (accessed 15.07.2020).

74. Sunday Aboriseda, 'Senate to Intervene in NIPOST, FIRS Stamp Duty Dispute', *The Punch*, 22.06.2020 <https://punchng.com/senate-to-intervene-in-nipost-firs-stamp-duty-dispute/> (accessed 15.07.2020).

75. **Section 115(d)** contemplates regulations "relating to the substitution of adhesive stamps for impressed stamps... or of revenue stamps for postage and revenue stamps."

76. Note that **section 111 SDA** provision that "all duties, fines, penalties and debts due to the Government of the Federation imposed by this Act shall be recoverable in a summary manner in the name of the Attorney General of the Federation or of the State" is no longer relevant, given provisions of the **FIRSEA** discussed in this Opinion.

77. Exceptions such as fraud, concealment, etc. should stop time from running for limitation purposes, but they have been excluded in the **SDA**. See for example, **section 36(4) PPTA** which provides fraud, wilful default and neglect exceptions to six year limitation period for FIRS issuance of tax assessments.



3.15 Consequently, any SD recovery/enforcement action brought after five (5) years, would be statute barred, stripping the courts of jurisdiction. In *Adetula v. Akinyoso*,⁷⁸ the CA held that a successful plea of limitation period makes a plaintiff to become destitute of an otherwise valid right of action and therefore ineligible for judicial relief.

3.16 Another point to note is that **the new SD rates announced by FIRS, if they were to be upheld can only be regarded as coming into effect upon issuance, and not retrospectively**⁷⁹ Tax like SD, being 'expropriatory', is rarely enacted retrospectively. Accordingly, enforcement actions for back SD liability would be on the basis of erstwhile rates; otherwise same could be successfully challenged on constitutional and fairness grounds.⁸⁰

The 'Sales Agreement' Conundrum

3.17 The **FIRS Schedule** (Item No. 42) refers to "Sales Agreements" with 1.5% *ad valorem* duty, prompting a review of whether such *ad valorem* rating exists under **the SDA Schedule**. Whilst typically contracts for services cannot be validly

regarded as "sales agreements" under the **SDA**, "agreement, letter or memorandum made for or relating to **the sale of any goods, wares or merchandise**" will qualify as sales agreement. The difficult question (which is not helped by haphazard **SDA** drafting), is whether sales agreement are subject to *ad valorem*, nominal or totally exempt from SD?



78. [2017] 16 NWLR (Pt. 1592), 492.

79. There is also the possibility of attacking the **FIRS Publications** from due process or 'form' and 'formality' perspectives: if they purport to be 'regulations', they would need to be gazetted.

80. As expressed on its face, the **FA 2020's** Commencement Date is 13th January 2020. **Assuming (without conceding that) the FIRS' new (higher) SD rates are valid, they can only be effective from the time they were issued or published.** Retrospective application of a higher SD rate would certainly be considered unconstitutional and prejudicial of taxpayers by the courts and likely to be struck down accordingly. It is trite that tax provisions (being 'penal', unless conferring benefits), cannot apply retrospectively.

3.18 In our view, the provisions arguably support a risk averse approach (consistent with FIRS position that sales agreements are dutiable *ad valorem*) and also an aggressive approach that due to draftsman's errors, sales contracts are either nominally stampable or totally exempt. Unfortunately, this is not a question we can ask FIRS (since they have made their position clear), and the matter appears not to have been submitted for judicial determination yet. We consider them these *alternative views seriatim* below:

I – Ad Valorem Treatment of Sales Agreements

3.18.1 **Section 58 SDA** deems certain contracts to be chargeable *as if they were conveyances on sale*. Thus **58(1)** provides that: **“Any contract or agreement under seal, or under hand only, for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except property locally situated out of Nigeria, or goods, wares, or merchandise, or stock or marketable securities, or any ship or vessel or part interest, share, or property of or in any ship or vessel, shall be charged with the same ad valorem duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest or property contracted or agreed to be sold.”**

3.18.2 The **“goods, wares, or merchandise”** phraseology after a comma (“,”) and “or” that follows the exception: **“except property locally situated out of Nigeria”** means that the intention was to make sale contracts relating to “goods, wares or merchandise” subject to the same *ad valorem* treatment as if they were conveyances on sale. If the exception was meant to include “goods wares or merchandise”, then the more reasonable approach would have been not to include it at all. Furthermore, in that context, “or” after the exception was not conjunctive, but disjunctive, so “goods, wares or merchandise” were not meant to be affected by the preceding “except”.

3.18.3 The **Item 3** listing of such contracts under **‘Exemptions’** to “Agreement or any Memorandum of an Agreement under hand only and not otherwise specifically charged with any duty...” in **the SDA Schedule** to which the omnibus rate of ₦0.15k applied was to remove any doubt that they could have been dutiable at ₦0.15k. Furthermore, the substantive provisions referenced in this part of the **SDA Schedule** were **sections 28-30**, and not **section 58**.

3.18.4 Given the revenue policy underpinnings of the **SDA**, it would be incongruous that sales contracts relating to “goods, wares or merchandise” would not require much more express provision to justify the huge revenue leakage such SD

exemption represents. Whilst the FIRS may not necessarily be right, their position is an indication that the government probably did not intend for such sale contracts not to be dutiable.

3.18.5 Understandably, treating sales contracts as *ad valorem* dutiable reduces conflicts with the FIRS. Whilst this approach translates into more transaction costs for taxpayers in the short term, it may prove to be cheaper if FIRS were to prevail in any contest on not following the approach, as the taxpayer would then incur penalties and interest. If **section 58(1)** applies, the counterparty equivalent to a “purchaser” would be responsible for SD, since the transaction is chargeable as it were conveyance on sale.

II – Nominal Duty or SD Exempt Treatment of Sales Agreements

3.18.6 It is trite that *taxpayers are not obliged to pay more than the statutorily provided quantum of taxes*⁸¹; and also that the Revenue should not benefit from ambiguities in the tax law. Accordingly, it is arguable that contracts of sale are not liable to *ad valorem* treatment or even dutiable at all as shown below.

3.18.7 The greatest indication that sales agreements are not subject to *ad valorem* treatment if not totally SD exempt is **section 30 SDA** stipulation that “the exemption numbered (3) under the heading ‘Agreement or any Memorandum of an Agreement’ in the Schedule to this Act shall not apply in the case of any such instrument” in order to ensure that hire purchase agreements would be stamped. **Section 30** titled, ‘Hire purchase agreement to be stamped’ recognises that the exemptions referred to are effective. Thus it is unarguable that the other two exemptions excluded by **section 30** are unfettered.

3.18.8 A proper construction of **section 58(1)** will show that the focus is on instruments under hand only, targeting the sale of any equitable estate or interest in any property whatsoever (except those located outside of Nigeria, and goods, wares or merchandise, etc) so they are chargeable with the same *ad valorem* duty, as if they were an actual conveyance on sale of the estate, interest or property contracted or agreed to be sold. Hence in **the SDA Schedule**, under the heading “conveyance or transfer of sale of any property”, the reference is to **sections 52-64 SDA**.

81. Undeniably, tax planning is an important competitive tool. Per Lord Tomlin, **CIR v Duke of Westminster [1936] A.C. 1**: “everyman is entitled, if he can, to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure that result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax.” See also, *Justice Learned Hand*, in **Helvering v. Gregory 69 F. 2d (2nd Cir. 1934)**: “... there is not even a patriotic duty to increase one’s taxes”.



regarded as “sales agreement”. Where a historic contract bundles both sales and service, the FIRS may want to assess it as 1.5% *ad valorem*, rather than the split treatment (part *ad valorem* vs part nominal), that **section 8 SDA** requires⁸³ *If the contract specifies different consideration for sales (equipment/merchandise), and services (rather than a gross sum for both components), then a case for the separate treatment becomes more compelling.*

3.18.9 Assuming there is any conflict between **section 58(1)**⁸² and **the SDA Schedule**, it does not necessarily follow that the conflict would be resolved in favour of the former because **section 3** is also a substantive provision giving the **SDA Schedule** life. Being thus part of the **SDA** (through **section 3**, rather than as subsequent subsidiary legislation), **the SDA Schedule** is not necessarily inferior to **section 58(1)**.

3.18.10 Having considered both arguments, our view remains that *it may be safe to err on the side of caution that sales agreements are dutiable ad valorem*. Incidentally, this is not an instance of the FIRS purporting to create new categories of dutiable instruments. We envisage judicial intervention to clarify this treatment soon, as the FIRS begins to ramp up its enforcement drive.

3.18.11 Contracts involving sales of equipment or merchandise would be



82. The *ad valorem* prescription for conveyances on sale under the **SDA Schedule** is 1.5%: “For every N50 and also for every fractional part of N50 of the amount or value of the consideration for the sale”, the duty is ₦0.75k.

83. By **section 8(a) SDA** unless otherwise provided, an instrument containing several distinct matters shall have each distinct matter separately charged with duty in respect of each of its considerations as if it were a separate instrument.

4.1 In the light of the SD policy and regulatory changes discussed in this Booklet - especially the new regulatory emphasis on SD collections as a significant contributor to budgetary funding, and potentially more significant financial penalties for breach - our Conclusions and Recommendations are discussed here under. Please note that we would be happy to provide implementation support as appropriate.

Health Check/SD Compliance Status Review & Concomitant Actions



4.2 ***Taxpayers needs to conduct a comprehensive SD health check as part of its housekeeping initiatives in order to form a picture of its historic SD compliance status.*** This would entail reviewing the SD treatment of the key categories of contracts and procurements (presumably focusing more on the big ticket

transactions), and arriving at potential exposures, which could be rendered based on worst, mid and best case scenarios. *Counsel can work with the client's in-house team in reviewing key contracts to determine the related SD exposures; we will expect requisite information in this regard.*⁸⁴

4.3 ***Given that penalties accrue with time, any identified (clear) cases of non-compliance (for example unpaid stamp duties or under-stamping) should be resolved immediately.***⁸⁵ Self-resolution ahead of any FIRS SD audit puts the taxpayer in a stronger position than otherwise, in addition to being a good reinforcement for the company's positive tax governance perceptions.

4.4 *The cumulative findings from the health check could inform the strategy to be employed, leveraging the scenario analysis above. Accounting and other provisions may need to be made, counterparties may need to be leaned upon to regularise the SD status of contracts, and some particular contracts (involving huge SD amounts), may require in-depth SD advisory review to develop resolution strategies.*

⁸⁵ Illustrations from the **FIRS Publications** may be deployed as mock comparators during the SD health check exercise. See for example, **Illustration 3 in FIRS SD Circular** on SD applicability to a lease agreement which was not formally drafted but terms were only stated through email correspondence: "The mail trail becomes the instrument through which the lease transaction was conducted. As such, to perfect that instrument, the parties must take steps to ensure that it is properly stamped by paying the necessary duties and obtaining the relevant acknowledgement that such duties have been paid."

4.5 Contracts' counterparty engagement may include withholding payments or declaring upfront that (back) SD would be deducted from a vendor's next milestone payment. Sometimes, where the client may choose to bear the SD liability in order to ensure the relevant transaction has no SD issues, the client may be able to claim reimbursement from the relevant counterparty.

4.6 Part of this exercise will entail reviewing the SD clauses of client's contracts to make necessary amendments with a view to risk-proofing, on a go-forward basis. In that regard, Counsel can review and made input towards finalising revised versions of client's SD tax precedent clauses for sign-off, prior to eventual adoption. *During contract negotiations, specific attention must be paid to who is responsible for what in terms of SD compliance and where the client is not the party responsible, performance or payment milestones could be tied to SD compliance.*

4.7 Going forward, it may also be expedient to review the client's contracting process and document management system to build in requisite SD control mechanisms, including but not limited to SD checklists. For example, no contract would be signed off if it lacks clarity on line of sight for SD compliance and related benchmarks. It could also become a rule of thumb that

(where appropriate), contracts that are ripe for execution are signed, since time begins to run for fine and penalty purposes, from the date of execution. *Avoiding SD penalties must be made a critical success factor in client's contracts management.* One approach that could help in achieving such result is to bundle services into contracts, to avoid multiplicity (and sometimes duplicity) of contracts.⁸⁶

SD Optimisation Techniques: Leases and Other Examples

4.8 It may be argued that having a renewal clause on agreements such as leases would shield subsequent leases from SD. Will a continuing (renewal) lease be deemed as a different transaction from the original one? In the persuasive Indian case of **Punjab National Bank v. Vijender Kumar & Anor**,⁸⁷ the Delhi High Court held that parties cannot rely on an extension



86. There is a possibility (albeit not guaranteed), that such contracts may enjoy more favourable SD treatment overall than if the services were in disparate contracts.

87. RFA10/2013.



clause to avoid payment of applicable SD for the total lease term contemplated under the original Lease Deed, simply by paying SD calculated on the initial lease term. Thus, where a lease agreement is to be extended beyond the original period in which SD was obtained for, the extension would require additional SD charges.⁸⁸

4.9 Incidentally in Nigeria, under **the Schedule**, longer leases attract higher SD, so **it is more efficient to execute short term leases (of under seven years) with renewal options, so that the lower SD rate will apply to the original lease and each short term renewal**; there is no retrospective SD “claw back” based on the eventual cumulative tenor.⁸⁹ Another variant of this is to utilise shorter leases (of less than three (3) years), since these will implicate lower transaction costs owing to their exemption from registration under the **Land Registration Law of Lagos** (and equivalents in other States). The risk though is that the landlord could review rent upon renewal (not a major problem as long term leases too could be subject to periodic rent reviews), or may not renew the lease beyond a few terms, thereby prejudicing long term availability of the property⁹⁰ However, client's negotiation leverage could help

mitigate these risks.

4.10 **The foregoing assumes that the new FIRS SD rates will not come into play.** If otherwise (i.e. position is as per the **FIRS Publications**), long term leases do not implicate higher SD exposure, since all leases irrespective of tenor are chargeable at 6%. Such huge disparity (lowest band in **the Schedule** is 0.78% and maximum is 6%), is why we believed that taxpayers would have challenged the FIRS rates; and that there is high prospect of success in that regard. Be that as it may, a key element of client's responsive strategy will depend on whether offending items in the new FIRS SD rates (per **SDPN2**), would be struck down. If a taxpayer is not willing to bell the cat, it may support industry groups to be in the vanguard of such challenge. To all intents and purposes, until FIRS formally reverses itself on the lease/tenancy SD rates in the **FIRS Publications**, taxpayers cannot accord much weight to the FIRS' recent tweet purportedly affirming that SD for leases is as under **the Schedule**⁹¹ Thankfully, the FIRS has now turned full course and issues around potential challenge of FIRS new SD rates on real property transactions are now moot.⁹²

88. Re: our earlier discussion on '**Nigerian SD Overview**', the **SDA** has tried to respond to SD tax planning in this area by **charging duties separately on many transactions, albeit same are in the same instrument, thus treating each one distinctly**. Also where several instruments relate to a single transaction, the **SDA does not treat only one as dutiable and then exempt the others. Rather, it gives the parties freedom to designate which one is the principal instrument and then charges the others** (may be at but not necessarily at nominal rate, as one would have expected). The significant exception here is in respect of settlement where the second instrument will be stamped at ₦1 (section 95). Per section 70(3), if the rent reserved under an instrument duly stamped is increased, duty will be payable on the increase.

89. This assumes that FIRS' **SDPN2 6% ad valorem** rate for all leases irrespective of tenor is overturned. If it does not then tenor becomes irrelevant except for cashflow considerations/long term property availability considerations. Under **the Schedule**, **short term leases (of 7 years and under)** attracts 0.78% (₦0.39k for every ₦50); over 7 years up to 21 years is 3% (₦1.50 for every ₦50); and for terms exceeding 21 years or indefinite, the duty is 6% (₦3 for every ₦50).

90. **It would be important to word the renewal as an option**, otherwise section 54(1) **SDA** may be implicated - **resulting in cumulative ad valorem assessment (if the lease can be read as being for 20 years or less), but with periodic rental payments ascertainable for the total lease tenor**. Based on **the Schedule** rates in the preceding footnote, such would be 3% (instead of 0.75% for short term leases of 7 years or less).

91. See footnote 67 (under **Para 5.7 to 3.7** herein, *supra*).

92. Structuring considerations along the lines discussed above may still be relevant in the event that a newly enacted **SDA** reflects the new FIRS SD rates on real estate transactions.

SD Optimised Fee Structures

4.11 Another way to optimise SD could be to take advantage of the fact that *ad valorem* rates contemplate certainty of the transaction amount (which is expected to be reflected in the executed instrument). But the reality is that whilst contract fee amount may be known at the point of executing the contract, often cost reimbursement may only be projected, albeit with prescriptions on qualifying costs, etc. It may thus be possible to stamp the contract for the fee consideration only as reimbursable costs would only be known at the end of the contract, and the **SDA** arguably does not have provision to bring back such contract to stamp the reimbursement costs. Taxpayer's approach could vary depending on what part of the contractual aisle client is: vendor or client; and whether or not in some cases, the contracting reality may demand an all-inclusive contract amount.

4.12 Alternatively, if a conservative reimbursable cost estimate (comprising part of the consideration for SD purposes) is subsequently exceeded, is there any need to go back and stamp for the reimbursable cost differential? We think in such case there is minimal risk, not only because the reimbursable cost differential presumably have low visibility (compared to a fee increase), but at the point of signing and stamping the contract

documents, it could not be said to be understamped to subsequently warrant fine and penalties, even if client were to stamp for the reimbursement differential.⁹³ We however recognise that it may be prudent to err on the side of caution and fully recognise reimbursable costs as part of the consideration for SD purposes. However, **because this approach may be considered too aggressive, we are loath to recommend it.**

4.13 Our commentary in **Appendix 2 (Comparative Table of SD Rates)**,⁹⁴ which can be a reference material to be updated in line with regulatory changes, encapsulates some SD cost saving measures in respect of respective instruments. **Where feasible, taxpayers can validly engage in "SD rate shopping" whereby they can utilise instruments with lower SD exposure to execute its transactions, rather instruments subject to higher rates, provided use of such alternative instruments would not be considered artificial and fictitious transaction.** Such can be on the basis of: firstly, flat rate vs *ad valorem* and then lower *ad valorem* vs higher *ad valorem* rates. In this wise, appropriate drafting may be able to credibly cast the character of a lower rate instrument on particular transaction documents, since the law is that instruments are dutiable based on substance, rather than form: **Oughtred v. IRC (supra).**

93. Note that although **SDA** did not expressly exempt cost reimbursements from being calculated as part of transaction amount for SD assessment purposes, VAT and WHT does not apply to cost reimbursements. Cf. however, **section 70(3)** analogy where if the rent reserved under an instrument duly stamped is afterwards increased, duty will be payable on the increase.

94. **Appendix 2** is not included as part of this Booklet, but is available on request.

95. Check **CITA** and **SDA**.

4.14 The **SDA** contains penal provisions that may impact listed entities, albeit the conduct in view is not directly attributable to personnel of such listed entity. Examples are **section 72** (on letters of allotment), **section 73** (proxies and voting papers), and **sections 76-79** (marketable securities). It is imperative that the listed taxpayer's legal function devises a mechanism by which it oversees the SD compliance of the operations of its Company Registrars and other capital market professionals working for the listed taxpayer.

4.15 Given the indicated FIRS aggressiveness concerning SD compliance and the "wide ranging" **SDA** amendments, **the room to manoeuvre in optimising SD exposure has largely been limited to avoiding fines and penalties, aside from potential challenge on any dubious SD assessments**⁹⁶ Even prior to its amendment, **the SDA had many anti-SD avoidance provisions**, many of which have been discussed earlier in this Paper. A huge omission was the failure of **FA 2020** to mitigate SD exposure on transfer of property between associated companies as it did for VAT and CGT on group restructurings.⁹⁷ An attempt to utilise a licence to effectively enjoy the benefits of a lease is met by the requirement that such

licences would be dutiable as leases.⁹⁸

4.16 Taxpayers can also leverage favourable provisions like **section 58(6) SDA** which recognises taxpayer's ability to get a refund of SD paid on a real estate contract that was subsequently annulled or rescinded. The refund provision of **section 23 FIRSEA** may also be called in aid as necessary, whilst ability to utilise SD credits should also be part of future **SDA** reform focus.

We are available to provide client bespoke, sector specific SD advisory services or act as a high-level sounding board on SD related issues and also to provide necessary advisory implementation support towards optimising clients' SD exposure and risk management.

96. For example, given the extension of **SDA** to cover electronic contracts, and the fact that oral contracts is an impossibility in current business realities – as performance of such contract may ultimately have electronic footprint, and thereby be brought into the SD net.

97. Regrettably **section 105 SDA** makes such relief conditional on 90% stake in the associated company. Cf. the far more lenient amendments to **VATA** (new **section 42** vide **section 45 FA 2020**), and **CGTA** (new **section 32** vide **section 49 FA 2020**).

98. See **section 64 SDA**. Arguably a license not regarded as coupled with a grant would be dutiable under the omnibus flat rate of ₦0.15k (under **the Schedule**) or 1% (per **SDPN2**). Either scenario is subject to lower SD for leases under **the Schedule** and **SDPN2** respectively.



Next Steps

December 2020

Questions and Pathways:

Recent Issues in Nigerian
Stamp Duties' Regulatory Framework

Given the many issues in the **SDA** as amended *vis a vis* FG's more aggressive collections intent through stamp duties, and the fact that unlike FA 2020, there are no proposals in the newly transmitted **FA 2020 Bill** (which will form the basis of the forthcoming **FA 2021**), it is safe to surmise that the FG intends a wholesale overhaul of the **SDA** in the near future. This would mean repeal of the current **SDA** and enactment of a new, comprehensive successor legislation.

Presumably, such opportunity would be used to cure identified defects of the **SDA**: to provide more clarity, fill gaps and more importantly, increase the new **SDA's** financial penalties to more realistic levels. Come what may, the government has sent serious signals that stamp duties compliance would no longer be business as usual, and it would be prescient for especially corporate taxpayers to have the same attitude.

DISCLAIMER: We hope you find this **Stamp Duties Booklet** an interesting read. Please note that it does not represent legal advice, and cannot be relied upon without our consent and in the absence of a client relationship with us. If you have any enquiries, we would be delighted to help. Please contact us via email at: info@lelawlegal.com or a.elebiju@lelawlegal.com. You may also reach us via mobile at +234 703 244 8845 or +234 703 818 6924.

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The Firm acknowledges the input and contribution of its Associates: *Gabriel Fatokunbo, Frank Okeke, Chuks Okoriekwe, Titilade Adelekun Ilesanmi, Oluwapelumi Odetoyinbo, Omovefe Oghotomo, Blessing Agoruah, Gabriel Omoniyi, Eyimofe Ogunbiyi, Aamatulazeez Azeez and Sam Ngwu* to the making of this Booklet.