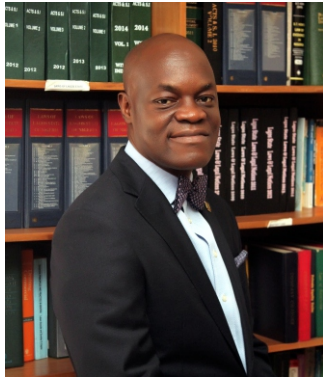




Are Stocks and Shares Really Exempt from Capital Gains Tax?

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a.elebiju@lelawlegal.com

Introduction

I was quite taken aback recently when the underlying assumption for a statement, so often made in tax circles (and in uncountable advisory opinions!), that its veracity had come to be taken for granted, was questioned. A colleague had been asked whether in view of section 32 CGTA (*Capital Gains Tax Act, Cap C1, LFN 2004*) and the wording of section 30 CGTA, stocks and shares are really exempt from CGT. Almost as a reflex action, I answered that they were, but the views of the enquirer that my colleague reported, gave me pause. After a quick check, I affirmed that section 30 CGTA does indeed exempt private sector stocks and shares. In concluding with my affirmation; I stated: "I will look at this more (especially the legislative sequence), next week."

The CGT impact on potential deals is usually a key consideration for investors and could influence transaction structure, to optimise same. Whether or not CGT applies would affect the economics of investments. So whilst seemingly dealing with a "no brainer", I felt it was nonetheless worthwhile to thoroughly examine the legislative history, towards dispelling any apparent or *prima facie* doubts on the widely held (and correct) view that private sector stocks and shares are exempt from CGT.

The 'Exemption' Provisions and Analysis

Section 30(1) provides that "gains accruing to a person from a disposal by him of Nigerian government securities, stocks and shares shall not be chargeable gains under this Act."

Section 30(2) defines "Nigerian Government securities" to "include Nigeria Treasury bond, savings certificates and premium bonds issued under the Savings Bonds and Certificate Act."

The doubts whether section 30 CGTA actually exempts

private sector stocks and shares from CGT could presumably be because: (a) "stocks and shares" in section 30(1) is preceded by "Nigerian Government securities" without a semicolon (";") or "or" in between. On this view, the provision must be read conjunctively, rather than disjunctively; and (b) since section 32 only provides for CGT exemption in respect of gains arising from merger and acquisition transactions arguably, such carve out for M&A transactions, means CGT is generally applicable.

Before delving into legislative history, the "doubt" is mitigated by the fact that section 30(2) defines only Nigerian government securities, evidencing a standalone category, such that the subsequent reference to stock and shares is not qualified by "Government". In effect, this displaces the *esjudem generis* rule of interpretation that would have otherwise applied to say "securities, stock and shares" are all qualified by "Government." On the other hand, it is noteworthy that the original CGT legislation (Decree No. 44 of 1967), also defined "Nigerian government securities" in similar terms, even though stocks and shares were then expressly stated to be CGT exempt.

Section 315 Investment & Securities Act 1999 (ISA) comprehensively defines "securities" to mean amongst others, "debentures, stocks or bonds" issued by a government or a body corporate. It has been pointed out that neither the *Companies and Allied Matters Act (CAMA)* nor the ISA has definition for stock other than that "'share' includes stock." According to my colleague Charles Eluomma: "this, I think means that the stock has the character of shares except where the peculiarity of a particular transaction (investment) requires that a distinction be made between both terms." In my view, once section 30(2) CGTA has defined Government securities (out of a list of three), it follows that the remaining two (stocks and shares) can be either public or private sector instruments.





The Legislative Sequence

CGT became part of Nigerian tax regime in 1967. The original legislation, CGT Decree no. 44 of 1967 stipulated in section 1(1) that "...there shall be charged a tax to be called capital gains tax for the year of assessment 1967-1968 and for subsequent years of assessment in respect of any capital gains ...". Amendments to this legislation have largely reflected the nation's trajectory from an initially open to a closed economy (exemplified by indigenization policy and exchange control legislation) and finally to a liberalized investment attracting economy (exemplified by the legislative and other reforms from the 1980s). Consequently, in putting any doubts to rest on this issue, it would be apposite to look at the legislative sequence in detail.

Section 32 CGTA which provides that "a person shall not be chargeable to tax under this Act, in respect of any gains arising from the acquisition of the shares of a company either taken over, or absorbed or merged by another company as a result of which the acquired company loses its identity as limited liability company, provided that no cash payment is made in respect of the shares acquired", was not an original provision of the CGTA. It was an amendment provision vide section 49, Finance Miscellaneous Taxation Provision (Amendment) Decree No. 3 of 1993.

Whilst section 37, FMTP(A) Decree No. 18 of 1999 reduced the CGT rate from 20% to 10%, section 2 FMTP (A) Decree No. 19 of 1998 enshrined the current section 30 CGTA by deleting erstwhile sections 3(d) and 10 CGTA, Cap. 42, LFN 1990. The CGTA 1990 LFN provisions respectively included "stocks and shares of every description" amongst assets chargeable to CGT and subjected shares disposed in closely held landowning company of not more than five

shareholders to CGT, if the selling shareholders had substantial interest or was in control over the company.

The latter part of Decree 19 of 1998 amendment (section 2(b)), stipulated: "in section 31(1) by inserting immediately after word "securities" "the words stocks and shares." Section 2(b) Decree 19 thus reversed the purport of section 2(a) Finance (Miscellaneous Taxation Provisions) Decree No. 47 of 1972.

The 1972 legislation had included "stocks and shares of every description" amongst chargeable assets and deleted "stocks and shares or other" from section 31 CGT Decree No. 44 of 1967 listing CGT exempt securities. Section 31(1) CGT Decree originally provided that "gains accruing to a person from a disposal by him of stocks and shares or other Nigerian Government securities shall not be chargeable to gains under this Decree."

Conclusion: Shares and Stocks Are Exempt

When taken in totality, the CGTA amendments show that stocks and shares of whatever description are exempt from CGT. Assuming there was any incongruity in the current wording of section 30(1) CGTA, a review of the legislative history puts beyond doubt the exemption intent. The foregoing shows that Government securities had always been CGT exempt; before 1972, stocks and shares were similarly exempt. The 1998 amendment (resulting in present section 30(1)), brought back the exemption, which therefore cannot relate to only Government issues.

It may be rightly said that the foregoing debate is even academic, given the long established regulatory practise, post section 30(1) CGTA amendment, of regarding private sector stocks and shares as exempt

from CGT. This is a tandem with official policy to deepen the Nigerian capital market, encourage local and foreign direct/portfolio investment and continue to properly position Nigeria in the competition for global capital.

Section 32 CGTA is now apparently superfluous; it is trite that as between two equivalent, but conflicting statutory provisions, the latter in time (section 30) prevails. The retention of section 32 CGTA in our statute books is due to draftsman's oversight. I humbly submit that section 32 CGTA should be formally repealed at the earliest opportunity. In addition, instead of its current two subsections, section 30 CGTA should just read: "30. Gains accruing to a person from a disposal by him of securities, stocks and shares (howsoever described), shall not be chargeable gains under this Act." These proposals should permanently settle any doubts as to the CGT exempt status of stocks and shares.

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