

The Personal Income Tax (Amendment) Act 2011: Implementation and Matters Arising!

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The President, Vice President, Governors and Deputy Governors could technically become bankrupt as their personal income tax liabilities will most likely exceed the cash component of their emoluments.

The Personal Income Tax (Amendment) Act 2011 was officially gazetted on Tuesday 31 January 2012 with an effective date of 14 June 2011. Many employers are yet to commence implementation while some have commenced but are yet to complete the process, only a few have fully implemented. Regardless of where you are on the implementation phase, there are a number of issues arising from implementation that are likely to affect you.

Generally employee benefits are "*all forms of consideration given by an entity in exchange for service rendered by employees*" including short-term benefits such as wages, salaries, holiday pay, sick leave and bonuses; long-term benefits such as long-term incentive plans and long-service awards; termination benefits such as redundancy payments; and post-employment benefits such as pensions and post-retirement medical insurance.

For tax purposes, employee benefits may include considerations given by any person to an employee or otherwise enjoyed by him solely by reason of employment and payment to his family or a third party on his behalf. The charging section (Section 3) of the amended Personal Income Tax Act (PITA) defines income chargeable to include "... any salary, wage, fee, allowance or other gain or profit from employment including compensations, bonuses, premiums, benefits or other perquisites allowed, given or granted by any person to any temporary or permanent employee other than so much of any sums or expenses incurred by him in the performance of his duties, and from which it is not intended that the employee should make any profit or gain".

Matters arising from implementation include:

Commencement – Based on the amendments as gazetted in January 2012, the commencement date is 14 June 2011 which is the date the bill was signed into law by the President. A number of challenges will arise from applying the new changes in retrospect including recomputation of pay-as-you-earn (PAYE) tax liabilities for 2011 for all staff. In particular employers need to consider impact of over or underpaid taxes in respect of disengaged employees. The new amendments also require employers to file a return of emoluments paid to employees by 31 January in respect of the previous year.

Old tax free allowances and consolidated relief allowance: Previously, tax free allowances include Housing of N150,000, Transport of N20,000, Personal allowance of N5,000 plus 20% of earned income, leave allowance at 10% of basic pay, Utility of N10,000, Meal of N5,000, Entertainment of N6,000, Children allowance not exceeding N10,000, Dependant relative of N4,000. The fixed components of these allowances add up to N210,000. However under the new PITA the old tax free allowances have

been replaced with a consolidated relief allowance of 20% of gross income plus higher of 1% of gross income or N200,000. However the relevant subsections of Section 33 on children and dependant relative allowances were not removed. This means that these allowances will continue to apply although the insignificant amount involved may not sufficiently justify the related administrative work.

Principal place of residence: Where a staff has more than one place of resident for any year, the principal place of residence, where applicable, will be the location of the branch office or operational site where such individual works provided there is a minimum of 50 workers at such branch or site. Some of the grey areas include the definition of a worker and what happens where the threshold is reached temporarily? Employers will have to reconsider the state of residence of their employees and decide whether to re-file taxes to the appropriate state tax authorities in retrospect.

Taxation of expatriates: An expatriate is now liable to tax in Nigeria if his employment costs are recharged to a Nigerian company or borne by a 'fixed base' in Nigeria; or he is in Nigeria for an aggregate of 183 days in any 12-month period (including leave and temporary absence); or where he is not liable to tax in another country which has a double tax agreement with Nigeria. Employers will have to carry out a review of the retrospective application of the law to expatriate staff bearing in mind their terms of employment, secondment arrangements and recharges even for expatriates who never performed their employment duties in Nigeria.

Interest: Under the old PITA, interest may be imposed on tax defaults but there was no prescription on how the interest should be applied. Historically tax authorities apply the interest at a flat rate on a one-off basis. The new amendments now explicitly require interest to be calculated on an annual basis. This means simple interest method whereby interest on tax due for a period is multiplied by the number of years outstanding. Where the period contains less than a whole year, then the interest must be prorated on a monthly or daily basis from the date the tax becomes due until it is paid.

Limitations of powers of the states: The word "**imposed**" in the charging section has been replaced with the word "**collect**". This implies that no state government or tax authority may impose tax on the income of any individual by limiting their powers to collection of taxes rather than imposition.

E-communication: Section 57 of PITA has been amended by adding electronic mail and courier service to the existing means of delivering assessment notices. The new law did not state whether taxpayers may also correspond with tax authorities via email including objection to assessments. The expectation is that this will be the case – if it is good for the taxman then it must be good for the taxpayer.

Withholding (WHT) refund: There is an amendment to Section 73 to create a refund mechanism for excess WHT remittances with respect to dividend, interest, rent and directors' fees to be made within 90 days or use as credit to offset future tax liabilities payable. Given that WHT on dividend is final tax, and WHT is either final tax on interest or not at all applicable while rent and director fees are liable to further tax with a remote possibility that the effective tax rate for landlords and directors will be less than the WHT suffered. It does appear therefore that this amendment is a cure for an ailment that does not exist. Refunds for excess WHT on business profit and PAYE would have been more relevant and desirable.

Taxation of President etc: the "official emoluments" of the President, Vice President, Governors and Deputy Governors are no longer tax exempt. This implies that the income of these officials (including allowances and benefits in kind) are now fully taxable. If properly implemented in line with the law as applicable to other individuals, the President, Vice President, Governors and Deputy Governors could technically become bankrupt as their personal income tax liabilities will most likely exceed the cash component of their emoluments.

Gratuity and pension - Gratuity and pension are part of an individual's "gross emolument" but the amendments now specifically classify gratuity and pension under the Pension Reform Act as deductions allowed. This does not mean that contributions to a gratuity or pension scheme on behalf of the employee by the employer should be included in gross emolument for the purpose of computing consolidated relief allowance. Such treatment will be wrong since the contributions have not been received or otherwise enjoyed by the employee and they do not constitute deductions from his emolument as envisaged under the new Schedule 6 of the amended PITA.

Reimbursements – amounts allowed are now limited to expenses incurred in performance of duties and from which it is not intended that the employee should make any gain or profit. Employers must consider what qualifies as expenses incurred in performing employment duties as distinct from activities which are the personal responsibilities of the employee. Cost of passage, medical reimbursement etc may no longer qualify.

Itinerant workers – an itinerant worker is now defined as an individual who works during a year of assessment (other than as a member of the armed forces) for wages, salaries or livelihood in more than one state for a minimum of twenty (20) days in at least three (3) months of every assessment year. This poses a challenge in terms of implementation as to the split of tax between the states. Also will itinerant workers be able to obtain TCCs from all states where they file and pay taxes?

Powers of the Minister - it is expected that the Minister for Finance will issue guidelines on the grey areas as soon as possible. The amendments empower the Minister to make regulations generally on the recommendations of the Joint Tax Board (JTB) for giving full effect to the provisions of the Act. Contrary to general belief, this does not include powers to amend the law - for instance the effective date cannot be changed by the Minister, the JTB or any tax authority.

National Tax Policy – Overall the amended PITA will reduce tax for the middle class with a marginal increase on the rich. Although the taxable income bands have been increased and the top tax rate reduced marginally from 25% to 24% the minimum tax rate has also been increased from 0.5% to 1% of gross income. Unfortunately this means about 100% increase in tax for the poorest of the poor. This in a way contradicts the National Tax Policy objective of reducing direct taxation including personal income tax.

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