



By: Rotimi Akapo of Advocaat Law Practice

“Multiple Taxes, Levies and Regulations in the Nigerian Telecommunications Industry”

With elections looming and the need to deliver on earlier campaign promises, there is renewed revenue generation drive by all tiers of government. The telecommunications industry is a major source of tax revenue for governments¹ and operators are frequently subjected to audits by tax authorities to confirm compliance with their tax obligations.² However, taxes and levies on operators in the telecommunications sector impacts on the services provided by operators in terms of service adoption, pricing, investment decisions, quality and affordability of services. There is an intrinsic link between high taxes and levies and investments in infrastructure and equipment by operators, quality of services and the affordability of the service by the subscribers.³

¹ About \$13billion was raised by governments in the Sub-Sahara region of Africa in the form of taxation in 2016. See *Taxing Mobile Connectivity In Sub-Saharan Africa. A Review Of Mobile Sector Taxation And Its Impact On Digital Inclusion* by GSMA at page 6. MTN Nigeria claims to have paid over 2 trillion naira to the Nigerian government since 2001

² This is illustrated by the recent \$2billion tax bill imposed by the Nigerian government on MTN Nigeria through the office of the Attorney General. MTN Group's share was reported to have lost more than 17% of its value after the announcement by the government. The conflict between governments and ICT operators with respect to tax issues is however not limited to Nigeria as in 2016 Apple Inc. was ordered by the European Commission to pay about \$16b in back taxes to Ireland, although Apple has appealed the decision.

³ It was reported that in 2011 when the RUTEL tax on telecoms services was increased from 2% to 5% in Senegal mobile subscriber's penetration growth slowed and it dipped further when CODETE, a tax on operator turnover was increased from 3% to 5%. *Supra* note 1 at page 3

Multiple Taxation and Regulation

As a result of the nature of their services, telecommunications services providers have presence in different locations across the country in order to provide services and support to their subscribers. This sometimes leads to conflicts with several governmental agencies, communities and tax authorities on the taxes and levies payable on their operations. The National Tax Policy defines tax as “any compulsory payment to government imposed by law without direct benefit or return of value or a service whether it is called a tax or not”⁴ and further provides that there is multiple taxation where “the tax, fee or rate is levied on the same person in respect of the same liability by more than one State or Local Government Council.”

The Taxes and Levies (Approved List for Collection) Act 1998 Act No. 21, Cap T2 Laws of Federation 2004, provides a list of taxes and levies that the various levels of governments in Nigeria can collect. In 2015 and pursuant to the provisions of the Act, the Minister of Finance issued the Schedule to the Taxes and Levies (Approved list for Collection) Act (Amendment) Order 2015. Ironically, even though the expectation was that this action would simplify the taxes and levies, it further compounded the issues

by increasing the list of taxes from 39 items to 55.

The tax burden of a typical telecommunications service provider includes not just the general taxes and levies imposed on all companies in the country, but also a myriad of sector-specific and other “bespoke” taxes and levies that further reduces their profitability. The concerns are not just on sector specific taxes and levies but the imposition of duplicated taxes by different tiers of government.

General Taxes and Levies

These are the usual taxes and levies imposed on every company incorporated in Nigeria. They are backed by law and all companies are required to comply with the provisions of the law in this regard. These taxes include **Companies Income Tax**,⁵ **the Capital Gains Tax**,⁶ **Withholding Tax**,⁷ **Personal Income Tax**,⁸ **Stamp Duty**,⁹ **National Industrial Training Fund (NITF)**,¹⁰ **Employees Compensation Scheme**,¹¹ **The Tertiary Education Trust Fund (TETFUND)**,¹² **National Housing Fund**,¹³ **Contributory Pension Scheme**,¹⁴ **Customs Duties**,¹⁵ **Tenement Rates/Land Use Charge**,¹⁶ **Business Premises**

⁴ The National Tax Policy approved by the Federal Executive Council on February 1, 2017 paragraph 1.2

⁵ Pursuant to the Companies Income Tax Act, Cap C21 Laws of the Federation of Nigeria (LFN) 2004 as amended by the Companies Income Tax (Amendment) Act (CITA) No 56 2007

⁶ The Capital Gains Tax Act Cap C1 LFN 2004

⁷ See the provisions of sections 78-81 of CITA, 69-72 PITA and WHT regulations. Also the definition of the terms offered by the court in *Nigerian Breweries Plc v Oyo State Board of Internal Revenue* (2012) LPELR- 8672 (CA)

⁸ Personal Income Tax Act, (PITA) Cap P8 Law of the Federation of Nigeria 2004

⁹ Stamp Duties Act Cap S8, LFN 2004 (as amended)

¹⁰ Industrial Training Fund Act Cap 19 LFN 2004 as amended by the Industrial Training Fund (Amendment) Act 2011 No. 19

¹¹ The Employee Compensation (ECA) Act 2010

¹² Tertiary Education Trust Fund Act No. 16 2011

¹³ National Housing Fund Act Cap N45, LFN 2004

¹⁴ The Pension Reform Act (PRA) 2014

¹⁵ Customs and Excise Management Act Cap C45 LFN 2004

¹⁶ 4th Schedule item 1 (j) see also Part iii Item 2 of the Taxes and Levies (Approved List for Collection) Act Cap T2 LFN 2004

Registration Fees,¹⁷ Town Planning and Building Permits¹⁸, Infrastructure Maintenance Charges¹⁹, Signages and Mobile Advertisement,²⁰ Aviation Clearance Permit Fees,²¹ Environmental Impact Assessment/ Audit fees²².

The combination of these taxes and requirements to contribute to funds, compensation and pension schemes can be substantial outgoings by companies and impact their profitability.

Sector Specific Taxes and Levies

In addition to the general taxes and levies certain sector specific taxes and levies are further imposed on operators.

Annual Operating Levy (AOL)

This is an annual levy payable to the Nigerian Communications Commission (NCC) by all holders of Individual Licences issued by the NCC. The NCC has published the AOL Regulations 2014 to provide, amongst other things, a framework for the effective and efficient administration of the levy. The Regulation provides that AOL for a Network Operator is to be assessed at two and a half percent (2.5%) of the operator's net revenue. Non-Network Operators are assessed at one percent (1%) of their net revenue.

¹⁷ Schedule to the Taxes and Levies (Approved List for Collection) Act (Amendment) Order 2015. It has however been decided by the Federal High Court (FHC) recently that telecommunications mast/base stations do not constitute "Business Premises" in respect of which "Business Premises Registration fees" or "Environmental Support fees" can be collected by State Government.

¹⁸ Pursuant to the different state Town Planning Laws and also Section 135 of the NCA

¹⁹ Instructive in this respect is the decision of the Federal High Court in Registered Trustees of Association of Licenced Telecommunications Operators of Nigeria (ALTON) V A.G Lagos FHC/L/CS/517/06

²⁰ 2015 amendment to the Taxes and Levies Act

²¹ The Nigerian Civil Aviation Regulations 2009

The National Cyber Security Fund

The Cybercrime (Prohibition, Prevention etc) Act 2015 provides for the establishment of the National Cyber Security Fund (the Fund).²³ The contributors to the Fund as specified in the Act include "GSM service providers and all telecommunication companies" and internet service providers.²⁴ They are required to directly remit a levy of 0.005 per cent of all electronic transactions undertaken by them to the Fund which is to be domiciled at the Central Bank of Nigeria. The office of the National Security Adviser is required to keep proper records of the monies in the Fund.

National Information Technology Development Fund (NITDF) Levy

Generally referred to as the Information Technology (IT) Tax and managed by the National Information Technology Development Agency (NITDA) pursuant to the NITDA Act.²⁵ It is payable by the companies specified in the NITDA Act,²⁶ (inclusive of telcos and ISPs) with a turnover of (One Hundred Million Naira) N100 million naira (approximately \$328,000.00) and above. The amount payable is one percent (1%) of the profit before tax of each year of assessment.²⁷ Contributions to the NITDF are tax deductible for income tax purposes.²⁸

²² Some states reject E.I.A reports/audits conducted by the Federal Ministry of Environment and insist on conducting their own audits with the attendant fees and expenses

²³ Section 44 (1)

²⁴ Second Schedule to the Act, the other companies are Banks and other Financial Institutions,

Insurance Companies, Nigerian Stock Exchange.

²⁵ Act No 28 of 2007

²⁶ Third Schedule of the Act which specifically states(i) GSM Service Providers and all Telecommunications companies; (ii) Cyber Companies and Internet Providers;

²⁷ Section 12 (2) (a) NITDA Act

²⁸ Section 13

Right of Way Charges

There have been several unsuccessful attempts by the Federal government to have an effective, standardized national right of way acquisition process and fee.²⁹ In an attempt to provide clarity the Federal Government in 2012 approved Right of Way fees for access to federal highways. The Lagos State Government has also fixed Right of way charges at five hundred (500) naira per linear metre of optic fibre laid. Other states however charge wildly differing rates, ranging from N500 to N4000 per linear meter.

In addition, States have continued to insist on a right to demand and receive Right of Way (RoW) for Federal Highways, bridges and similar infrastructure running through their States based on their interpretation of the Supreme Court decision in ***Attorney General of Lagos State and ors v Attorney General of the Federation & Ors***³⁰ where the court affirmed the right of the States to regulate physical planning and development control of land within their states.

In addition, Section 135 of the NCA recognizes that operators may require State and or local government approvals in erecting or maintaining network facilities. This is notwithstanding the fact that ROW fees might have already been paid to the Federal Government for access to federal highways. Further complicating matters are the frequent disputes between the Federal Ministry of Works and the National Inland Waterways Authority (NIWA). The latter demands RoW fees on bridges and other infrastructure built by the former, and on which the former has already charged RoW fees, on the grounds that such infrastructure passes over waterways over which they have jurisdiction. Added to the mix is the fact that State Waterways Authorities often bill for the same routes as NIWA. So to install network infrastructure on bridges running across federal highways, operators might be required to pay ROW fees to the Federal Government, State Government, NIWA and State waterways authorities.

²⁹ Stakeholders all agree that the inefficient manner in which right of way issues are being handled in Nigeria is a major obstacle to the achievement of the broadband target of thirty percent (30%) penetration by the end of 2018, the achievement of

high speed broadband capacity and the attendant socio-economic benefits of same.

³⁰ (2003)12 NWLR Part 833, 1-253

Conclusion

The operators allege that there are over 38 different taxes and levies on their operations by the various tiers of government in Nigeria and different government agencies and this they consider a threat not only to their businesses but a threat to further investments in the industry. Government clearly has a right to impose taxes on businesses that operate and benefit from the public amenities, infrastructure and social services it provides. The expectation however is that a balance can be struck between the legitimate expectations of government and the certainty and fairness businesses expect for them to pursue and achieve their business objectives. Taxes in the telecommunications industry should be aligned with other industries and in line with international best practices. Uncertainties over taxes and levies affect investment decisions and the anticipated taxes and levies are expectedly built into the cost of services and products and ultimately passed on to subscribers.

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