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AN ANALYSIS OF THE PROPRIETY OR OTHERWISE OF CHARGING AD-VALOREM STAMP DUTY ON LOAN AGREEMENTS

Introduction

Under the Stamp Duties Act (**"the Act"**)¹ stamp duty is payable on any instrument executed in Nigeria or relating irrespective of where executed, to any property situated in or to any matter or thing done or to be done in Nigeria². Instruments that are required to be stamped under the Act must be stamped within 40 days from first execution for instruments charged at flat rates or within 30 days from first execution for instruments charged ad-valorem. Non - stamping of the instruments within these specified timeframe attracts either payment of a penalty or a fine and penalty respectively³.

The Act stipulates in the Schedule to Section 3 (**"the Schedule"**), the various items chargeable to duty either at flat rates or at ad-valorem rates. In the said Schedule, **"Loan Capital"** is clearly listed as an item chargeable to duty and the charge is to be at ad-valorem rate. There is however, no mention of **"Loan Agreement"** in the Schedule, thus raising the issue as to the legality of the requirement to stamp Loan Agreements and even more so at ad-valorem rate as is presently required by Federal Inland Revenue Service (**"FIRS"**).

Loan Capital

For the purpose of clarity, Loan Capital is defined in Section 102 (5) of the Act as **"any debenture stock, other stock or funded debt by whatever name known or any capital raised by any corporation, company or body of persons formed or established in Nigeria which is borrowed or has the character of borrowed"**

¹ Stamp Duties Act Cap S8, Laws of the Federation of Nigeria 2004

² Section 22 (4) of the Act

³ Section 23 (1) and (3) of the Act

money, whether it is in the form of stock or in any other form, but does not include any overdraft at the bank or other loan raised for a merely temporary purpose for a period not exceeding 12 months”.

The above definition clearly envisages that Loan Capital is a debt raised by a company through the issuance of its own **“debenture stock, other stock or form of funded debt”** to an investor. It is these types of instruments evidencing such debt raisings that are contemplated by the Act and investors such as high net-worth individuals, venture capital companies and institutional investors but certainly not banks and other financial institutions that grant overdrafts or other form of loans in the ordinary course of business (excluding investments in loan capital). Loan capital instruments are chargeable to duty ad-valorem however given that Loan capital raising is not common in our jurisdiction, this perhaps explains why despite the fact that it is listed in the Schedule, it is not among the items listed by the FIRS as attracting stamp duty.⁴

Loan Agreement and Security Document

A Loan Agreement is an agreement between a lender and a borrower which documents in detail, the entire terms (amount, tenor, interest rate, fees, security/collateral. conditions precedent, conditions subsequent, special conditions, covenants and the administrative processes etc.) for a Loan. It usually captures and expands the abridged terms in the Term Sheet and the Offer Letter and further restates the security/collateral for the loan as stated in the Offer Letter but does not create a security or charge on any property, asset or any form of security pledged.

Loan Agreements are similar to any other agreement between parties to a given transaction in that they are not required to be registered or filed with any registry or the Corporate Affairs Commission (“CAC”) (in the case of corporate borrowers) for it to be valid, effective and enforceable. It need only be stamped for the purposes of admissibility in evidence in court and given that it is a mere agreement and not a security document, it should be stamped at a flat, nominal rate in accordance with extant laws.

A Security Document is a Deed or other form of document creating a security interest or legal charge over a property, asset or any form of security pledged as collateral for a loan. The security document usually states the consideration (amount of the loan), the purpose of creating the charge, rights and obligations of the parties, control, use, management and administration of the charged property or asset pending crystallization of the loan and the process of enforcement and realization of the security in order to recover the loan in the event of default. The most common types of security documents are Deeds of Legal Mortgage and Deeds of Debenture.

Deeds of Legal Mortgages are required to be stamped and registered at the relevant Lands Registry in the state where such landed property is located. It also has to be registered at the CAC where the mortgagor is a corporate entity as required by the Companies and Allied Matters Act (“CAMA”)⁵. Deeds of Debenture are required to be stamped and registered at the CAC. By the provisions of the Act, security documents are chargeable to duty ad-valorem at specified rates.

Current assessment of Loan Agreement to Stamp Duty

There is the delineation by the FIRS of:

⁴ www.stampduty.gov.ng.

⁵ Section 197 CAMA

- (a) **“Loan Agreement”** which is charged at ad-valorem rate of **0.125%**; and
- (b) **“Loan Agreement as accompanying document to a Mortgage/Debenture”** which is charged at a flat rate of **₦500**⁶.

Again and more importantly, none of these two nomenclatures are known to the Schedule.

The underlined segment of the definition of Loan Capital above, is meant to be a distinguishing and an exclusion provision separating what constitutes Loan Capital which is chargeable to duty ad-valorem from overdrafts or other loans granted by banks and other financial institutions to customers for a period not exceeding 12 months.

The exclusion proviso did not expressly proceed to state if a document evidencing an overdraft or a loan from a bank should be subject to stamp duty and if so what rate should be applicable. It also did not expressly cater for the scenario where the tenor of a bank loan exceeds the 12 months maximum cap and if the related agreement should be subject to stamp duty at a particular rate. The duty head “Loan Agreement” in whatever form described, can be said to be arbitrarily imposed by the FIRS as it is not provided for in the Schedule.

The position of Courts in Nigeria for situations of this nature is to hold that where the provisions of a law are clear and unambiguous, no extraneous meaning or interpretation should be ascribed to same whether it be as a result of a lacuna except and until amended.⁷ Therefore, in the absence of any express provision in the Act, the reasonable inference is that Loan Agreements do not fall within the purview of the Act and as such should be stamped at a flat rate like every other mere agreement.

The legality of charging ad-valorem duty on Loan Agreement

For bank loans with tenors exceeding 12 months, FIRS current practice is to subject the governing Loan Agreement to stamping at an ad-valorem rate, the question arises as to the basis for such ad-valorem stamping? Can FIRS basis be said to be predicated on the fact that the tenor has exceeded 12 months, for the Act did not expressly provide this as a basis for stamping ad-valorem; or is the basis due to the fact that an effective security or collateral has been embedded and or created or assumed to have been embedded and or created somewhere in the Loan Agreement such that it could be inferred, that there is security or collateral benefit somewhere in the document in favour of the Lender.

Clearly, the misconception for stamping such agreements at ad-valorem stems from an FIRS assessing officer inferring that there may be embedded in the loan agreement, a charge clause which can effectively confer a security benefit to the Lender, thereby subjectively designating the document both a loan agreement as well as a security document.

On the flip side, where it is a loan agreement accompanying a security document, the security document is stamped ad-valorem while the accompanying loan agreement is stamped at flat rate given that both documents relate to the same transaction and cannot be the subject of double taxation.

In the case of a stand-alone loan agreements, for the inference that security/collateral may have been created or embedded therein to be drawn, certain characteristics must be present.

⁶ www.stampduty.gov.ng

⁷ *Joel Uwagba v. Federal Republic of Nigeria* (2009) 15 NWLR (Part. 1163) P. 91

- (a) ***By the nature/type of drafting and content, can it be reasonably inferred that a security benefit has been created; probably by the express insertion of a Charging Clause.*** Some Facility Agreements are drafted in this form especially where the security is Assets Debenture excluding land and/or landed properties. Once such agreements are stamped and filed at the CAC, a valid and effective Debenture would have been created and the Facility/Loan Agreement can therefore in that instance be stamped ad-valorem because of the Assets Charge Clause.
- (b) ***Can a Loan Agreement be drafted in such a way as to create a security such as a Legal Mortgage over a landed property which can be registered at a Lands Registry and enforceable as such at the time of realisation?*** Given the current style of drafting and processing of the registration of Legal Mortgages this can hardly be achieved; so, a Legal Mortgage embedded in a Loan Agreement may not be possible as such a document would certainly be unwieldy. It therefore rightly must be a stand-alone security document. So where the security for a loan is/or includes Legal Mortgage and a Loan Agreement is presented in respect of the loan, the assessing FIRS Officer should request for the security document so as to be able to properly assess the Loan Agreement to duty which in this case, should be at a flat rate while the related Deed of Legal Mortgage should be stamped ad-valorem.
- (c) ***In a situation where a loan is totally unsecured, or the security is Equitable Mortgage by mere deposit of title documents.*** In both cases, there would be no security document to accompany the Loan Agreement. It would either be that the Lender is taking full or partial risk of the loan and the FIRS has no powers to compel a Lender to take security/collateral. The Loan Agreement for such facility is to be stamped at a flat rate.

Next steps forward for the FIRS; Righting the Wrong

By the provisions of Section 116 (1) of the Act, the National Assembly may by resolution increase, diminish or repeal the duty chargeable under any of the heads specified in the Schedule. Section 116 (2) gives similar powers to State Houses of Assemblies in respect of documents or matters within the exclusive legislative competence of States.

From the foregoing, the FIRS should cease charging stamp duties on mere loan agreements and approach the National Assembly for a holistic review and amendment of the Act rather than seeking to surreptitiously amend the Stamp Duties Act through mere administrative actions and fiat which do not conform with extant laws. Failure to follow the above path, exposes the FIRS to possible legal suits.

Conclusion

Moving forward, there must be a consensus as to a clear demarcation between Loan Capital as a duty item provided in the Schedule and Loan Agreement (by whichever way described) which though not listed in the Schedule as a duty item has been foisted on businesses by the FIRS. Also, the fact that Loan Agreements (not Loan Agreement as accompanying a Mortgage/Debenture) with all the legal deficiencies in its creation is currently being stamped ad-valorem is of major concern and an impediment to doing business in Nigeria. It is hoped that the FIRS would as a matter of urgency settle this issue by either ensuring an amendment to the law to legalise its present practice (pending which the charges are suspended) or discontinue charging same in order to avert needless legal challenges or disruptions to the stamping process.

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