

Nigeria issues order on definition of significant economic presence in Nigeria

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Executive summary

Nigeria's Honorable Minister of Finance, Budget and Planning, Zainab Shamsuna Ahmed, recently issued an Order titled *Companies Income Tax (Significant Economic Presence) Order, 2020* (the Order) to provide guidance on the definition of Significant Economic Presence (SEP), in relation to taxation of income derived from Nigeria by foreign companies.

Section 13(4) of the *Companies Income Tax Act* (as amended by the *Finance Act, 2019*) (CITA) conferred the Finance Minister with discretionary powers to determine by an Order, what constitutes a SEP for a foreign company which provides digital services and technical, professional, management, or consultancy services in Nigeria. Accordingly, an Order clarifying the SEP provision has been issued by the Minister.

Specifically, the Order sets forth the relevant activities that potentially create a SEP in Nigeria, and in some instances, provides for monetary thresholds in addition to the said activities, as summarized below.

Detailed discussion

a) Digital services

The Order groups the digital services that may create a SEP in Nigeria into three categories:

Category 1 - Use of digital platforms

Pursuant to the Order, a foreign company will be deemed to have a SEP in Nigeria where in an assessment year, such foreign company derives gross income equal to or greater than N25,000,000 (or its equivalence in other currencies), from any of the following activities (or combination thereof):

- ▶ Streaming, or downloading services of digital contents to any person in Nigeria
- ▶ Transmission of data collected about Nigerian users, which has been generated from such user's activities on a digital interface, including a website or mobile application
- ▶ Provision of goods or services directly or indirectly to Nigerians through digital platforms
- ▶ Provision of intermediation services through digital platforms that link suppliers and customers in Nigeria

Category 2 - Use of a Nigerian domain name/ registration of a website in Nigeria

Under this category, a foreign company that uses a Nigerian domain name (.ng) or registers a website address in Nigeria, will be deemed to have a SEP in Nigeria.

Category 3 - Purposeful and sustained interaction

With regards to this category, where a foreign company has a purposeful and sustained interaction with persons in Nigeria by customizing its digital platform to target persons in Nigeria or reflecting the prices of its products, services or options of billing or payment in Naira, such foreign company will be deemed to have a SEP in Nigeria.

Based on the above, it is apparent that the income threshold of N25,000,000 is solely related to activities listed under Category 1.

Furthermore, the Order stipulates that the SEP provisions for digital services should not apply to foreign companies covered under any multilateral/consensus agreement to address tax challenges arising from digitalization of the economy to which Nigeria is a party, to the extent that such agreement is effective in Nigeria.

b) Technical, professional, management or consultancy services

Pursuant to the Order, a foreign company that provides technical, professional, management or consultancy services will be deemed to have a SEP in Nigeria, where such foreign company in respect of the said services, receives payment from a Nigerian resident or a fixed base/agent of a foreign company in Nigeria.

Thus, unlike digital services, no materiality/revenue threshold is applicable in this instance, except for the following activities which the Order exempts from constituting a SEP in Nigeria:

- ▶ Salaries or other remuneration made to an employee under an employment contract
- ▶ Payments for teaching in an educational institution or by an educational institution
- ▶ Payments made by a foreign fixed base of a Nigerian entity, given that such income should not be deemed to be derived from Nigeria

Implications

The following are the key implications from the Order:

a) Minimal/no materiality threshold

Although an income threshold is applicable for the services highlighted under Category 1 only, i.e., relating to the use of digital platforms, the threshold appears to be insignificant in comparison with the expected value to be derived from Nigeria, given the volumes of transactions that could possibly be consummated by in relation to such services within a year period.

Similarly, for technical, professional, management or consultancy services, except for the payments for the specific transactions highlighted under 2(b) above, all foreign companies deriving income from Nigeria for such technical, professional, management or consultancy services, will be deemed to have a SEP in Nigeria.

Consequently, it appears that most foreign companies deriving income from digital and technical, professional, management or consultancy services in Nigeria, should be subject to income tax in Nigeria.

b) Double Taxation Treaty (DTT) considerations

The existing DTTs with Nigeria do not specifically provide a nexus for the taxation of digital and technical, professional, management or consultancy services by such companies in Nigeria.

Furthermore, in 2017, Nigeria signed the Organisation for Economic Co-operation and Development's *Multilateral Convention to Implement Tax Treaty Related Measure to Prevent Base Erosion and Profit Shifting* (MLI). Nigeria also submitted its MLI position and listed the DTTs with the 19 treaty partners (including DTTs that are yet to be ratified).

Although the expectation is for the MLI to amend such DTTs upon finalization of the relevant resolution processes, it is important to note that the MLI is yet to be ratified in Nigeria, and even if it is ratified, it does not specifically address the tax challenges arising for the digitalization of the economy and the taxation of technical, professional, management or consultancy services by foreign companies in Nigeria.

As such, based on the Order, it appears that the SEP provisions under section 13 of the CITA (as amended and further clarified by the *Finance Act and the Order*, respectively) should currently apply to foreign companies that are resident in countries having an operative DTT with Nigeria, i.e., until such DTTs are amended either directly or through a multilateral/consensus agreement to which Nigeria is a party, to address tax challenges arising from digitalization of the economy (and presumably, taxation of technical, professional, management or consultancy services by foreign companies in Nigeria).

In closing, the Federal Inland Revenue Service is expected to issue further clarifications as to the application of the SEP provisions following the Order issued by the Minister, so as to provide guidance on other important taxation considerations such as profit attribution to such activities constituting a SEP for foreign companies in Nigeria.

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