LEGAL IMPLICATIONS OF THE 33 AMENDMENTS INTRODUCED BY THE PERSONAL INCOME TAX (AMENDMENT) ACT, NO. 20, 2011

The attempt to amend the Personal Income Tax Act, No 104 of 1993 (PITA) dates back to the recommendations of the Tax Study Group 2003 on the Review of the Nigerian Tax System. An executive Bill to amend PITA was presented to the National Assembly in 2005. The ***Personal Income Tax (Amendment) Act, NO 20, 2011***, (Amending Act) was eventually passed and signed into law by President Goodluck Ebele Jonathan on 14th June 2011. Having been in the legislative incubator for about seven years, the Act undoubtedly has a chequered history. Before the ink of the President's signature could dry, the Amending Act had started generating cocktails of controversies part of which I believe this great event has been put together to address partly through this paper.

This paper is divided into five parts. Part I introduced the paper while part two defines the key words in the topic and provides the theoretical framework within which the analysis that follow will be done. Part three focuses first on the controversy on the commencement date, an analysis of each of the section followed by brief comments. For reasons of coherence, all the provisions of the Amending Act on offences and penalties will be treated in part four while the paper is concluded into part 5 with suggestions.

2.0. Definitions and Theoretical Framework

The word "legal" means "created by, permitted by, in conformity with, or relating to law". Law generally gives rise to rights and liabilities. "Implication" means "the possible effects or result of an action or decision, a meaning or consequence implied by an action or statement, something that is inferred or deduced or entailed or implied, a meaning that is not expressly stated but can be inferred. A determination of the "legal implication" of the Amending Act entails ascertaining the extent to which its provisions are valid and the extent to which they give rise to rights or liabilities. The analysis of

the provisions of the Amending Act will be done in the context of some of the relevant provisions of the Constitution, statutes, case laws, principles and rules of law.

3.0. Analysis of key provisions and sections

3.1. Commencement Date

One of the key provisions of a statute is the commencement clause which will clearly state the exact date when the law will come into effect. That is, the date when it will begin to give rise to rights, obligations and liabilities. The commencement clause is usually stated immediately after the long title at the right margin of an Act at the top. The best or leading practice is for an Act to clearly state its commencement date.

The PITAA Bill was transmitted by the Clerk of the National Assembly to the President on the **2nd June, 2011**. The version of the Bill that was initially in circulation did not have any commencement date. This had initially generated controversy on when the provisions of the Act came or would come into effect. Some were of the view that the commencement date was 1st January, 2012[1] while others were of the view that it is the date it was signed into law. The former position was based on "administrative" convenience of a tax authority. It is submitted that the latter view is the correct one based on the provisions of section 2(2)(a) of the Interpretation Act,[2] which provides that in the absence of a commencement date, an Act comes into effect when it is signed by the President. The section is hereby reproduced for ease of reference:

> "2. Passing and commencement
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> (1) An Act is passed when the President assents to the Bill for the Act whether or not the Act then comes into force.
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> (2) Where no other provision is made as to the time when a particular enactment is to come into force, it shall, subject to the following subsection, come into force-

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[1] See a letter dated 29th December, 2011 by the Lagos State Internal Revenue Services. This was however before the new version was gazette. This writer understands that the position has been reviewed in line with the provisions of the Amending Act.

[2] Cap I31, LFN 2004

(a) in the case of an enactment contained in an Act of the National Assembly, on the day when the Act is passed;

(b) in any other case, on the day when the enactment is made.
(3) Where an enactment is expressed to come into force on a particular day, it shall be construed as coming into force immediately on the expiration of the previous day.

It is trite that any administrative action and decision that is contrary to the provisions of the extant law stands the risk of being declared null and void.

The controversy has now been put to rest as the commencement clause of the gazette version of the Amending Act clearly states that the Act commenced on 14th June, 2011 which is the date it was signed into law by President, Goodluck Ebele Jonathan.[3]

The Act was accordingly signed into law within the 30 days period prescribed by section 58(4) of the 1999 Constitution of the Federal Republic of Nigeria, which requires the President to grant or withhold his assent to a Bill **within 30 days of its presentation to the President by the National Assembly.**

Where the President withholds his assent within 30 days, i.e. the 30 day period lapse, the option opened to the legislature is to return the Bill to each of the Houses and have it passed into law by two-third majority without the assent of the President.[4]

The Implications

1. As at 14th June, 2011 when PITAA, 2011 was said to have commenced neither the taxpayer nor the tax authorities seemed to know about its existence.

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[3] Although the Act bears the 14th June, 2011 as the commencement, the truth, the whole truth and nothing but the truth is the fact that no one except the President knew whether the Bill was indeed signed into law on that date. This is because about 3 months after the Bill was supposed to have been signed into law, the Honourable Minister of Finance, Dr Ngozo Okownjo Iweala, the Coordinating Minister for the Economic Transformation Programme of this administration, promised at the opening ceremony of the International Tax Conference organised in commemoration of the 50th year anniversary of the Joint Tax Board (JTB) at Transcorp Hilton, Abuja from 5th - 7th September, 2011 that the Bill will soon be signed into Law. Similarly, a wide spectrum of stakeholders in taxation including the Chartered Institute of Taxation of Nigeria, Academic Staff Union of Nigerian Universities (ASUU) continued to call on the President to sign the Bill into Law.

[4] Section 58(5) of the 1999 Constitution provides: "where the President withholds his assent and the bill is again passed by each House by two-thirds majority, the bill shall become law and the assent shall not be required.

2. Since assessment for direct assessment is on the preceding year basis, taxpayers are entitled to compute their tax as from 14th June, 2011 in accordance with the new tax rates.
3. Since assessment under the PAYE Scheme (under which most of the taxpayers fall) is on current year basis, the cumulative tax payable over a period of 12 months had been done at the beginning of 2011 year of assessment and deducted till 31st December, 2011. If taxpayers and their employers had been aware of the fact that the Amending Act, necessary adjustment could have been made (on the tax to be withheld) with effect from July, 2011. It follows that those who were subject to higher tax may be entitled to refunds from tax authorities.
4. However, there is no express provision for payment of refund under the PITA except the newly introduced provision of s.17 of PITAA, 2011 with regard to withholding tax. Rather, the closest general provision is section 83 PITA on relief in respect of **error or mistake**. Section 83 provides thus:

> 83. Relief in respect of error or mistake
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> (1) If a taxable person who has paid income tax for a year of assessment alleges that an assessment made on him for that year was excessive by reason of some error or mistake in a return, statement or an account made by him or on his behalf for the purpose of the assessment, he may, at anytime not later than six years after the end of the year of assessment within which the assessment was made, make an application in writing to the relevant tax authority for relief.
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> (2) On receiving an application, the relevant tax authority shall enquire into the matter and shall, subject to the provisions of this section, give, by way of repayment of tax, relief in respect of the error or mistake as appears to be reasonable and just:
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> Provided that no relief shall be given under this section in respect of an error or a mistake as to the basis on which the liability of the applicant ought to have been computed where the return, statement or account was in fact made on the basis or in accordance with the practice of the relevant tax authority generally prevailing at the time when the return, statement or account was made.

(3) In determining an application under this section, the relevant tax authority shall have regard to all the relevant circumstances of the case, and in particular, shall consider whether the granting of relief would result in the exclusion from charge to tax of any part of the income of the applicant, and for that purpose the relevant tax authority may take into consideration the liability to tax of the applicant and any assessment made on him for other years.

(4) A determination of the relevant tax authority under the section shall be final and conclusive.(Emphasis ours)

If close attention is paid to the phrases underlined and the proviso to subsection 2, it will become clear that for a taxpayer to be entitled to a relief under this section the following conditions must be met:

(i) The taxpayer must make an application in writing to the relevant tax authority for relief,

(ii) the relevant tax authority shall enquire into the matter.

(iii) The relevant tax authority may take into consideration the liability of the taxpayer for other years

Therefore, it is simplistic to assume that a refund will be made as a matter of course. If the record and reputation of tax authorities as far as refunds is anything to go by, it is reasonable to expect that no refund will be paid until after a thorough audit might have been conducted into the affairs of an applicant. In this regard, it is not unlikely that the relevant tax authority may even come up with additional assessments where the audit reveals under assessment and under payment of tax in the previous years of assessment. Where however, the audit reveals overpayment, there is no reasons why a refund should not be made without much ado. Therefore, except a taxpayer is certain that he/she is above board, it may be advisable to simply allow the sleeping dog lie. Generally, I encourage taxpayers to take informed decisions on this issue by weighing the pros and cons.

The question is what happens where a taxpayer had paid less than he is obliged to pay under the new regime. Can the tax authority serve such taxpayers with additional

assessment? To do so will mean to increase the tax burden or exacting penalties under a law that neither the taxpayer nor the tax authority knew was in existence at the time it was said to have taken effect. To avoid this type of dilemma, it is advocated that application of the Amending Act should be prospective rather than 'retroactive' with regards to offences and penalties and increment of tax obligation, Hence, concession should be granted in this regard on the basis that ambiguities in tax laws should be construed in favour of taxpayers.

3.2. Clarification of the power of State to collect and not impose Personal Income Tax(PIT)

Section 2 of the Amending Act has corrected the unintended error in using the word "impose" in virtually all the subsections of section 2 of PITA which literally suggested that FIRS and SBIR had powers to impose PIT. This is achieved by substituting the word "impose" with the word "collect". This is a salutary change save for apparent grammatical errors in the new section. Tax is collected from a taxpayer and not on him. Accordingly, the marginal note should not read "persons **on** whom tax is to be collected". The marginal note will have to be amended to read "persons **from** whom tax is to be collected" or "relevant authority to collect tax". Furthermore, the word "imposed" (not impose) should have been substituted with the word "collected" (not collect).

A new section 2 subsection 1A has been inserted to reinforce the power of a relevant tax authority (RTA) in a State to collect tax from itinerant workers. Section 31 of the Amending Act has expanded the definition of itinerant worker ostensibly as an anti avoidance measure. The possible effect of this will be examined later in part four.

3.3. Temporary staff & Abolition of tax free payments - Section 3 of the Amending Act amends section 3 of PITA which is the charging clause. The Charging clause is the most central part of any tax legislation.

The phrase "temporary or permanent" has been inserted in section 3(b) PITA to qualify "employee" in order to put it beyond doubt that temporary workers are taxable. Accordingly, those who are undertaking National Youth Service Corps (NYSC), Industrial Attachment (IT), Interns and Contract staff etc are now clearly brought into the tax net. While these categories of people were not hitherto exempted from payment of tax, controversies have always arisen on their proper tax status. With this amendment, it is reasonable for the tax authority to seek to enforce compliance with the law going forward.

3.3. Abolition of tax free payment – Section 3

Certain payments called "non-taxable payments" or "tax-free payments" usually made to an employee were specifically exempted from tax under s.3(b)(i)-(xii) of PITA. These are:

(i) reimbursement;
(ii) medical or dental expenses;
(iii) the cost of any passage to or from Nigeria;
(iv) payment for children maintenance or education;
(v) rent incurred by the employer as BIK in s,4;
(vi) rent incurred by the employer as BIK in s.5,
(vii) rent subsidy or rent allowance - N 100,000 per annum;
(viii) transport allowance - N15,000 per annum;
(ix) meal subsidy or meal allowance - N5,000 per annum;
(x) utility allowance - N l0,000 per annum;
(xi) entertainment allowance of N6,000 per annum; and
(xii) leave grant – 10% per cent of annual basic salary;

The foregoing tax-free payments in s.3(b)(i)-(xii) of PITA have now been abolished except reimbursements. If all the benefits for an average taxpayer were added together, they will amount to about N200,000.00 (Two Hundred Thousand Naira only).

Accordingly, this is perhaps what forms the basis of the N200,000 component of the Consolidated relief allowance under sections 5 of the Amending Act.

3.4. Employment income derived from Nigeria - Section 4

Section 4 of the Amending Act amends s.10 PITA on when income from employment is deemed to be derived from Nigeria. This was necessary to clarify the erroneous impression that expatriate income will not be taxable in Nigeria simply on the basis that an expatriate has not spent up to 183 days in Nigeria by adding the provision which appear in capital letter below.

10. Employment

(1) The gain or profit from an employment shall be deemed to be derived from Nigeria if—

(a) the duties of the employment are wholly or partly performed in Nigeria, unless—

(i) the duties are performed on behalf of an employer who is in a country other than Nigeria AND THE REMUNERATION OF THE EMPLOYEEE IS NOT BORNE BY A FIXED BASE IN NIGERIA; and

(ii) the employee is not in Nigeria for a period or periods amounting to 183 days or more in any twelve month period commencing in a calendar year and ending either within that same year or the following year(INCLUSIVE ANNUAL LEAVE OR TEMPORARY PERIOD OF ABSENCE); and

(iii) the remuneration of the employee is liable to tax in that other country UNDER THE PROVISIONS OF THE AVOIDANCE OF DOUBLE TAXATION TREATY WITH THAT OTHER COUNTRY;

(b) the employer is in Nigeria OR HAS A FIXED BASE IN NIGERIA, unless the duties of the employment are wholly performed, and the remuneration paid, in a country other than Nigeria except during a temporary visit to or leave in Nigeria.

In sum, the amendments to section 10 of PITA, 1993 can be said to have added another layers of conditions for income from foreign employment to escape taxation in Nigeria. The question however is whether these amendments are far reaching enough on this area which is a constant source of friction between the tax authority and taxpayers. Future amendments may focus on the controversy on the persistent application of deemed income to expatriates income, among other things, will be resolved.

3.5. Introduction of consolidated relief allowance - Section 5

It is noteworthy that this amendment relates to only section 33(1) on personal relief. Therefore, all the allowances in subsections 2-6 have been preserved. The applicable principle is that nothing should be read into a tax statute. There is no doubt that this is one of the areas which future amendments will have to address to reflect the underpinning policy which gave rise to consolidated relief in the first instance.

Personal relief of N5,000 plus 20% of earned income which hitherto existed under the old Sec 33(a) of the Principal Act has now been abrogated, while a consolidated relief allowance (CRA) in lieu has now been introduced under the new Sec. 33. A taxable person is now entitled to the higher of a consolidated relief allowance of N200,000 or 1%of gross income plus 20% of the gross income.

It is apposite to refer to the Sixth Schedule to the principal Act which replaced the old with a new one which provides for (i) a **consolidated** tax allowance of a **flat** rate of N200,000 plus 20% of **gross income,** (ii) five specific tax exempt and (iii) tax rates.

There are a number of inconsistencies between the provisions of section 5 of the Amending Act and the Sixth Schedule. First, section 5 refers to "Consolidation Relief Allowance" while the Schedule refers to "Consolidated Relief Allowance. Second, section 5 provides for "a Consolidation Relief Allowance of N200,000.00 subject to a minimum

of 1 percent of gross income whichever is higher". The Sixth Schedule on its part states "a flat rate of N200,000 plus 20% of gross income". "1% of gross income" is missing in the Sixth schedule. Thus,section 5 gives a taxpayers with a gross pay above N20m a choice of using 1% of his income (which of course will be higher than N200,000.00) instead of a flat rate of N200,000 contained in the Sixth Schedule. It is submitted that the provisions of section 5 contained in the substantive part of the statute will override that of the Sixth Schedule.

Thus, the CRA has two components. The first component N200,000 or a minimum of 1% of gross income. The provision gives a taxpayer an alternative or a choice in computing the first component of his/her CRA. It seems that the policy is to grant a minimum allowance of N200,000.00 to everyone, especially the low and middle income earner. However, where the 1% of the gross income of a taxpayer is higher than N200,000.00, he/she is entitled to use the higher figure. The second component is 20% of the gross income of a taxpayer. Since the total income of each taxpayer will vary, the total amount of CRA will vary accordingly, from taxpayer to taxpayer.

The phrase "a minimum of 1 percent" has caused some people to come to the conclusion that the provisions prescribe a minimum tax. This could not have been as section 33 of the Principal Act which is amended by section 5 of the Amending Act has nothing to do with minimum tax. A separate section has been clearly made for a new minimum tax in section 7 of PITAA. It is agreed that the use of the phrase "minimum of" is confusing. The provisions would have clearly brought out the intention if the phrase "minimum of" has been omitted. Future amendment should take care of this error.

3.6. Presumptive Tax - Section 6

This section amends section 36 of the Principal Act on ascertainment of total income and rules relating to loss relief. The section creates a new subsection 6 which provides inter alia that:

> "Where for all practical purposes the income of the taxpayer cannot be ascertained or records are not kept in such a manner as would enable proper assessment of income, then such a taxpayer shall be assessed on such terms and conditions as would be prescribed by the Minister in regulations by order of gazette under a presumptive tax regime".

The purport of this amendment is not as clear as it may seem. Some have posited that the section is to provide a clear basis for deemed income. In that case the appropriate section to amend should have been the provision of the section on the power of the RTA to assess a taxpayer on best of judgment(BOJ). Also, the operation of BOJ or deemed income has thrown up many issues that one would have expected more far reaching provisions than what we have in section 6 of the Amending Act. Alternatively, the provisions would have been more appropriate for section 35 of PITA on the power of the RTA to require a taxpayer to produce documentary evidence to support his claim.

The fact that the new subsection relates to rules on loss relief might suggest that the provision will be triggered only where the claim of a loss relief will result in less or no tax.

A reference to a "presumptive tax regime" presupposes that such a regime presently does not exist and will be put in place by the Minister. A regime refers to "a method or system of organizing or managing something"[5] Until this is done by the Minister of Finance the proposed regime cannot be operated. This will however require a proper understanding of a presumptive tax and how it works. It would have been better to

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[5] Dictionary, p.1238.

provides such "terms and condition" in the law rather than leaving it to the Minister since they are likely to be substantive in nature.

Presumptive tax is a tax avoidance measure which aims at imposing tax on a gross receipt where no accurate record exists or taxpayer record shows fake loses or where it is difficult to ascertain the income of the taxpayer for failure to keep accurate records.[6] Accordingly, presumptive tax is adopted for the determination of the taxable profits of specific businesses where it is impossible or difficult to determine their taxes based on the actual state of their financial position. In practice, the tax may be applied to non-resident companies, shipping, aviation, retail, diamond businesses, businesses which provide labour for hire and transport businesses among others. This estimated income approach is expected to reduce areas of uncertainty and resultant tax litigation. However taxpayers have the option to maintain books of account and get their books of account audited.[7] In India elaborate provisions are made for presumptive tax under Sections 44AD, 44AE and 44AF of the (Indian) Income-tax Act, 1961, as amended.

Against this background, it would appear that a presumptive tax regime may be more appropriate under Companies Income Taxation. It would also appear to me that the idea already exists in the section under CITA in respect of businesses which are taxed based on turnover. It would have been appropriate in view to expand the scope of businesses to which turnover tax would be applied.

3.7. Minimum Tax - Section 7

This section has increased the minimum tax rate from 0.5% to 1%. Where after all deductions allowable under the Act, the taxable person has no chargeable income or

[6] See "What do you understand by presumptive tax system in India?". Available online at http://wiki.answers.com/Q/What_do_you_understand_by_presumptive_tax_system_in_India. Assessed on 3rd March, 2012.

[7] See "PRESUMPTIVE TAX PROVISIONS". Available online at http://www.indialiaison.com/presumptive_tax_provisions.htm. Assessed on 3rd March, 2012.

where the tax payable is less than 1 per cent of the total income, the person shall be charged to tax at the rate of 1 per cent of his total Income. Therefore, the current minimum wage of N18,000 per month will attract a minimum tax of N180 (One hundred and Eighty Naira Only). It is therefore erroneous that those earning below N300,000 have no tax obligation. Minimum tax reinforces the principle that payment of tax is a civic obligation of every citizen based on ability to pay. Sec 24(f) of the 1999 Constitution mandates every citizen to declare his income honestly and pay his tax promptly.

3.8. Double Taxation Agreements (DTAs) – Section 8

Section 8 of the Amending Act seeks to give Double Taxation Agreements (DTAs) effect "upon ratification by the National Assembly." It is necessary to have a glimpse of Section 38 of PITA which provided that the Minister may "by order" declare that arrangements specified in the order have been made with the government of any country, ...the arrangement shall have effect notwithstanding anything in any enactment". This provision is in conflict with the provisions of s.12 of the 1999 Constitution and a line of decided cases which affirmed a dualist principle that a treaty will only come into effect when it has been enacted into law. Therefore, there is a need to amend the provisions of s.38 otherwise it stands the risk of being declared null and void to the extent of the provisions of section 12 of the 1999 Constitution if challenged in the law court.

The question however is whether an appropriate amendment has been made by section 8 of the Amending Act. It is submitted that a mere ratification by the National Assembly is not sufficient to bring a treaty into effect in Nigeria. For a treaty to be brought into effect, a law domesticating the provisions of the treaty enacted in accordance with the provisions of the Constitution will be required to be made by the National Assembly. Therefore, rather than curing the defect in deference to the principle of supremacy of the constitution, the new amendment has introduced another layer of unconstitutionality.

Also, the new marginal note inserted seems to be confusing. It should have been "Double Taxation Agreement or Effect of Double Taxation Agreement rather than "Avoidance of Double Taxation Agreement". This is because the purport is not to avoid concluding a DTA but to attenuate or lessen the impact of double taxation through a DTA.

3.8. **Self Assessment Form – Section 9**

This amendment relates to self assessment form. Section 44 of PITA provided that "A taxable person required by this Act to file a return of income shall in the return calculate the amount of tax payable. The phrase "A taxable person required by this Act" presupposes that the obligation to file applies to some and not all taxpayers. However, the correct position is that all taxpayers are obligated to file returns without notice or demand under section 41 of PITA. However, section 45 provides a bonus of 1% for early filing of self assessment return. The bonus has not been removed as is the case under CITA.

Comment [u1]: Kunle is of the opinion that the use of the phrase "by this Act" creates a general application and definition of all tax payers under PITA and not a restricted notion of taxpayer under the section.(However I agree with your position)

The change introduced by the Amending Act in this regard is that a taxpayer now has to calculate his tax "*in the form as may be prescribed by the Minister by order of gazette".* The basis of this may be to harmonize or standardize the return. No such form had been prescribed and gazette by the Minister as at the time of presenting this paper to the knowledge of this writer. The concern is that where the Minister fails, neglects or omits to do the needful on time, the operation of self assessment may be technically put in abeyance. The reasonable thing to do in such a situation will be to resort to the existing or old form as may be prescribed by either the JTB or the RTA.

3.9. **Obligation of Professional bodies and Association** – Section 10(c).

A tax authority is expressly empowered to request governmental bodies, professional bodies, trade associations and any other organizations to provide "any information demanded of them" in the format prescribed by the tax authority (s.10(c).

The scope of this provision is pervasive. Pursuant to this provisions, a RTA may request for a list of its members and their addresses. We will have to await what other type of information a tax authority might require of a professional body pursuant to sub section 10(6) of the Amending Act.

3.10. Service of Notice of Assessment – Section 13

Section 13 amends section 57 PITA in such a way as to accommodate service of notice of assessment on taxpayers by registered post, courier service or electronic mail. Rules will have to be developed to determine at what point service is deemed to be effective with regards to electronic mail. Is it when it is sent, delivered or read? What will be the position for instance, where a taxpayer claims not to have accessed his/her mail? While it is good for tax administration to take full advantage of technology, it is suggested that e mail should be used in addition to the established mode of communication in official circles pending the development of adequate rules on e filing and communication.

3.11. Appeal to the Tax Appeal Tribunal – Section 14

Section 60 of PITA related to the establishment of the Body of Appeal Commissioner. Section 14 of the Amending Act amends section 60 of PITA by substituting a new section which provides that the Tax Appeal Tribunal (TAT) shall have the powers to entertain "all cases arising from the operation" of PITA.

The legal implications of the provisions are manifold. First, the power of the State Commissioner to establish a Body of Appeal Commissioners has been abolished. Second, where a Body of Appeal Commissioner exists (although no State Commissioner, to my knowledge had exercised this power till date) it is now bereft of any jurisdiction to continue to function in that capacity.

A cursory reading of the provisions might give the impression that the jurisdiction of TAT has been extended to cases arising from the operation of PITA. A close reading of

section 59(1) and para 11 of the Fifth Schedule to the FIRS (Establishment) Act, 2007 will reveal that TAT from inception had been vested with power to settle "disputes" and "controversies" arising from the operation of all the statutes listed in the para 11 of the Fifth Schedule including PITA. It would appear that the provisions of the FIRS Act in this regard is even more extensive that the present amendment.

The question is why is an amendment required to accomplish what the law already provides for? In practice, the FIRS Act has generated a controversy on whether indeed appeal against assessment should go to the TAT or BAC or State High Court. However, there is yet to be any judicial determination on this issue either by the TAT or the court. Thus, the aim of the amendment may be to put it beyond reasonable doubt that appeal now lies to TAT. One may need to await what the attitude of some State might be to the new development.

3.12. Repeal of provision on time for appeal, notice, procedure before BAC – Section 15

Section 15 of the Amending Act has now repealed section 61-67 of PITA on the following:

- 30 days grace period to appeal to the BAC after the service of the notice of the refusal of the relevant tax authority to amend the assessment as desired,
- contents of the notice required to be given to the RTA;
- right of a taxpayer to discontinue an appeal notwithstanding the notice;
- the power of the RTA to revise an assessment pending appeal;
- procedure before BAC;
- appeal lies to the High Court;
- right to appeal to the High Court of a State where no BAC has been appointed (s.65(2))
- obligation to pay tax notwithstanding a further appeal against the decision of the BAC;
- the provisions on assessment becoming final and conclusive and

- application of the appeal procedure under CITA.

There is no doubt that the policy to vest the TAT with jurisdiction on a "state" tax may be suspect in a federal system and give rise to inter governmental friction in the absence of consensus of stakeholders on the desirability of the policy. To our mind, it is doubtful if such a consensus exists. It is instructive that the provisions were not even contained in the exposure draft of the PITA Bill which formed the subject matter of the public hearing by the National Assembly. To that extent, it is arguable that many stakeholders were not even aware of the provisions until the Act was signed into law.

A critical review of section 15 of the Amending Act will reveal that some very important provisions that are central to the administration of PITA might have been inadvertently omitted. These include the framework for assessment becoming final and conclusive, service of notice of refusal to amend by the RTA etc. Thus, determination of the period of time within which a taxpayer can appeal against an assessment, one will require a cross reference to FIRS Act which to me is incongruent.

3.13. Deleting reference to "the FSB International Plc" – Sections 11 and 16 of PITAA deleted reference to the FSB International Plc in sections 49 and 70 of PITA on the basis that they have become irrelevant as the bank is no longer in existence,

3.14. Refund arising from WHT- Section 17

The restriction under section 73(4) of the Principal Act that withholding tax credit notes of a particular year of assessment can only be used to offset the tax liability of that year of assessment has been removed. Hence, withholding tax credit can now be used as a set-off against future tax liabilities without this restriction. Not only that, any excess payments due to a taxpayer from the operation of withholding tax system under sections 69-72 PITA shall be refunded by the tax authority within 90 days with an option to set off against future taxes. See also s.20(4) of the Amending Act.

It should be noted that there is no express provision for payment of refund under the PITA except the newly introduced provision of sections 17 and 20(4) of the Amending Act with regard to withholding tax. Rather, the closest general provision is section 83 of PITA on relief in respect of error or mistake.

3.15. Obligation on employer – Section 20(2)

Every employer is obliged to file a return of all emoluments paid to its employees in the preceding year not later than 31st January of every year. Failure attracts on conviction a penalty of N500,000 for a body corporate and N50.000 for an individual (20(a). There is the need to prescribe the form and contents of such a return to ensure compliance.

3.16. Tax Clearance Certificate (TCC) – Section 21

TCC is now required to state (disclose) the tax identification number (TIN). It follows that a taxpayer without a TIN will not be eligible for TCC. It is obligatory for Ministry, Department or an agency of Government or a bank to verify the genuineness of a TCC by referring same to the issuing tax authority. Two additional transactions will now require production of TCC viz: (i) change of ownership of vehicle by the vendor and (ii) application for plot of land. The penalty for obtaining TCC through misrepresentation, forgery or falsification increased from N500 to N50, 000 plus twice the tax payable or imprisonment for three years or to both such fine and imprisonment. (s,21).

3.17. The Joint Tax Board – Section 22

Appointment of the Chairman of the Joint Tax Board is now to be in accordance with section 11 of the Federal Inland Revenue Service (Establishment) Act, 2007. The State representatives of the JTB are now to be nominated by the Governor and no longer by the State Commissioner. Not only that, the State nominee shall be no other person than the Chairman/person of the State Board. The initial requirement was that

"the person must be experienced in income tax matters either by name or office." The JTB is now vested with power to appoint its own Secretary and no longer the Federal Civil Service Commission. While these amendments will undoubtedly strengthen JTB, the policy to establish JTB under a separate statute should be relentlessly pursued.

3.18. State Board of Internal Revenue – Section 23

The State Governor can now appoint the Chairman and directors of State Internal Revenue Service Board from outside the State Service, but they must be experienced in taxation and be a member of a relevant recognized professional body. Three other board members are also to be appointed on their personal merit, but representing each of the 3 Senatorial Districts of the State.

The provisions of the Principal Act and the amendment on the establishment and composition of State Board under PITA are remarkable. It seems incongruous in a federal system for the revenue agency of a level of government to be established under the law of another level of government. The current thinking is to establish a revenue authority under its separate law. A few States such as Lagos State and Adamawa State had followed this lead provided with the establishment of the FIRS Act. It is instructive to note that certain aspect of the State laws may even be better than the provisions of PITA in the sense that they address their peculiar situation or requirements. To all intents and purposes, the JTB has also been supportive of this new trend. Since the effort by some State to establish their autonomous Board has been rather slow, the intervention through the amendment of the PITA may alleviate some of the problems.

3.19. Funding of State Board – Section 24

The amendment seeks to introduce an efficient mechanism for funding State Boards of Internal Revenue (SBIRs) by allowing them to retain a percentage (not less than 5%) of the tax collected.

3.20. Power to Distrain – Section 29

Section 29 amends section 104 of the Principal Act by making the exercise of the power to distrain a taxpayer of his goods and properties subject to the application to a Judge of a High Court for the issuance of a warrant of distrain. Thus, power to distrain is now subject to the sanction of a High Court judge. Future amendment(s) should also clarify whether a company is a "taxpayer" under PITA for the purpose of exercising the power to distrain.

3.21. Power to make Regulation – Section 30

Section 29 of the Amending Act inserts a new section 106A on the power to make regulation generally for giving effect to the provisions of the Act on the recommendation of the JTB. In this regard, section 106A provides that:

> (2) "The National Assembly may, upon a proposal by the President, impose, increase, reduce, withdraw or cancel any rate of tax, duty or fee chargeable as specified in section 40 and Second Schedule of this Act and in accordance with Section 59 (2) of the 1999 Constitution."

It should be borne in mind that any proposal by the President to impose, increase, withdraw or cancel any rate of tax can only be constitutional if it is in the form of a Bill which will be subjected to the legislative procedure listed under sections 58 and 59 of the 1999 Constitution.

3.22. Definition of Itinerant worker – Section 31

Section 31 of the Amending Act has introduced a new definition or concept of itinerant worker. 'itinerant worker" was formerly defined to mean an individual who works at any time during a year of assessment (other than as a member of the armed forces) for a daily wage or customarily earns his livelihood in more than one place in Nigeria and whose total income does not exceed N600. The concept has now been defined in section 108 of the Principal Act as follows:

"Itinerant worker" includes an individual irrespective of his status who works at any time in any state during a year of assessment (other than as a member of the armed forces) for wages, salaries or livelihood by working in more than one State and work for a minimum of twenty (20) days in at least three (3) months of every assessment year."

The definition of the term "Itinerant worker" has thus been expanded to include any individual, irrespective of the level of income, so long as they work in more than one state for more than 20 days in at least 3 months of an assessment year.

It therefore seems that any person who works in more than one state for more than 20 days in not less than 3 months of the year may be taxed by any of the States. This may create challenges for companies especially in the oil & gas sector that have employees working between sites and head offices, that are located in different state tax jurisdictions.

Possible double taxation

3.23. Residency Rule and remission of tax to a branch office – Section 32

Residency rule obligates a taxpayer under PITA to pay tax to the relevant tax authority (RTA) of the territory where he/she resides. The RTA, depending on the facts of each case, may be the FIRS or a SBIR in accordance with the rules in the First Schedule, PITA. The rule is meant to address real problems including ensuring that a taxpayer pays tax as and when due to a RTA, avoiding double taxation and avoiding conflict of jurisdiction among tax authorities in respect of income of taxpayers.

Section 32 of the *Amending Act* amends the definition of "principal place of business" in the First Schedule of the Personal Income Tax Act (PITA). Paragraph 1 of the First Schedule to PITA defines "principal place of residence" in relation to an individual with two or more places of residence on a relevant date, both not being within any territory to mean:

(a) in the case of an individual with no source of income other than a pension in Nigeria, that place of those places in which he usually resides;

(b) in the case of an individual who has a source of earned income other than a pension in Nigeria, that place of those places which on a relevant day is nearest to his usual place of work;
(c) in the case of an individual who has a source or sources of unearned income in Nigeria, that place of those places in which he usually resides. (Emphasis mine)

Section 32 of the Amending Act provides that:

> "The First Schedule to the Principal Act is amended in Paragraph 1 by inserting a new sub-paragraph "(d)" after the existing paragraph (c) -
> (d) in the case of an individual who works in the branch office or operational site of a company or other body corporate, the place at which the branch office or operational site is situate: Provided that operational site shall include Oil Terminals, Oil Platforms, Flow Stations, Factories, Quarries, Construction Site with a minimum of 50 workers, etc"

There have been debates on the meaning and effect of this provision. Some have erroneously contended that this provision makes income liable to taxation where it is derived and not on the basis of residence. Thus, a branch of a company is said to be deemed to be the place of residence of all its employees. With due respect, this argument ignores the clear provisions of paragraph 1 of the First Schedule that:

> "place of residence" in relation to an individual, means a place available for his domestic use in Nigeria on a relevant day, and does not include any hotel, rest-house or other place at which he is temporarily lodging unless no permanent place is available for his use on that day"

Accordingly, it is arguable that "any hotel, rest-house or other place" that may be provided for the taxpayer near Oil Terminals, Oil Platforms, Flow Stations, Factories, Quarries, Construction Sites, etc will not qualify as residence to trigger the application of section 32 of PITAA.

It is my humble view that the provision has not altered in any way the general rule that every employer is obligated to FULLY remit taxes deducted from the emoluments of their employees who are resident in a State to the Board of Internal Revenue of the State where the taxpayer is resident by the 10th day of every month.

This position is based on the basis that tax law is to be interpreted literally. Nothing should be read in which is not clearly expressed by the legislators. There is no ambiguity in the provision of s.32 PITAA which warrants a departure from this rule. What is more. paragraph 1 of the First Schedule of PITA is an interpretation section only. The portion of Paragraph 1 which is amended by s.32 of PITAA, 2011 relates to the definition of the phrase "principal place of residence". The determination of principal place of residence comes into play where a taxpayer has two or more places of residence both or all not being within the same state. The provision therefore does not apply to a taxpayer with only one place of residence.

If the intention had been to amend the principle in Paragraph 3 of the First Schedule; that is an individual who holds a Nigerian employment "shall be deemed to be resident for that year in the territory in which he has a place or principal place of residence", it would have clearly done so by reference to the substantive section in Paragraph 3 and not just Paragraph 1 on interpretation of the key words in the Schedule.

It is submitted therefore, the provision of s.32 will not apply to the preponderant majority of employees, who have their only place of residence in only one State. The section will apply only in circumstances where an employee indicates in his/her record that he/she has places of residence in two States. The provision does not apply where the employee indicates that his or her only place of residence is in one state. Therefore, the provision of s.32 PITAA has not done away with the obligation of employers to remit tax based on residence of each employee. It is therefore incorrect to suggest that ALL the staff of a branch is now deemed to be resident in one place. Every employer

should please note that the remittance of tax to a wrong relevant tax authority does not discharge the obligation to the relevant State Board on Internal Revenue. Section 82 PITA imposes an obligation on an employer to account to the relevant tax authority. The obligation to withhold tax is not imposed on a branch office but the company as a legal entity.

3.24. Amendment of the List of Exempted Income – Section 33

The list of exemptions in the Third Schedule has been amended by deleting the official emoluments of the President, Vice President, Governor and Deputy Governor. Interest on loan granted by a bank for agricultural trade or business or fabrication of any local plant and machinery continues to be exempted. Reference to the Family Economic Advancement Programme in the section has been deleted ostensibly on the ground that the programme has become moribund.

Pension granted pursuant to the Pension Reform Act, or any enactment or law for the time in force are exempted. The following income are now exempted:

(a) bonds issued by Federal, State and Local Governments and their agencies;

(b) bonds issued by corporate including supra-nationals; and

(c) interest earned by holders of the bonds, and short term securities listed in paragraphs (a) and (b)

The initial exemption of President, Vice President, Governor and Deputy Governor is arguably inconsistent with the provisions of section 24(f). However, practical problems may arise in fully subjecting the emoluments (including BIK in particular) of these officials to tax. Furthermore, the list of exempted income has been static for too long. It is hoped that a measure of dynamism will be injected to make the list more dynamic and responsive.

3.25. Amendment of the Sixth Schedule - Section 34

The Sixth Schedule to the principal Act has been replaced with a new one which provides for (i) a **consolidated** tax allowance of a **flat** rate of N200,000 plus 20% of

gross income, (ii) five specific tax exempt and (iii) tax rates. The inconsistencies between this provision and that of section 5 of the Amending Act have been discussed.

4.0. Review of Offences and Penalties

The Amending Act contains a number of important provisions relating to offences and penalties. These provisions are important for taxpayers to know the boundary between what is permissible for purposes of tax planning and what is not. The offences and penalties will be treated in seriatim.

(i) Persons engaged in banking business

The first amendment to penalties is found in Section 10 of PITAA which amended Section 47(3) of the Principal Act. The amended section increased the penalty payable by any person engaged in banking business in Nigeria who contravenes the provisions of Section 47(1) of the Principal Act by failing to disclose or deliver the required information by a Tax Authority. Section 10(b) of PITAA increased the penalty from N500 and N500 for individual and corporate bodies respectively to N50,000 and N500,000 respectively. The increment, it can be argued, is to make the law to be at at par with the current reality.

Section 11 of PITAA amended section 49(3) of the Principal Act by increasing the penalty payable by a person engaged in the business of banking who fails to file a return to the relevant Tax Authority of the names and addresses of new customers. The penalties were increased by PITAA from N500 and N5000 for individuals and corporate bodies respectively to N50,000 and N500,000 respectively.

(ii) Failure by self employed to keep record

Section 12 of PITAA amended section 52(1) of the Principal Act by introducing penalty for failure or refusal of a person other than those in salaried employment to keep books of accounts which in the opinion of the relevant Tax Authority, are

adequate for the purpose of the tax. PITAA introduced penalty in the sum of N50, 000 and N500,000 for individuals and companies respectively.

(iii) Failure to deduct tax

Section 18 of PITAA amended section 74 of the Principal Act by substituting the section for a new section 74 which stipulates new penalties for failure to deduct tax as follows: under the old Principal Act failure of a person or corporate body to deduct tax, or after deducting, failing to remit the tax deducted within 30 days from the date the amount was deducted or when the time to deduct was due, attracted only a penalty of 10% of the amount of tax due or fine of N5000 whichever was higher. Under the Amending Act, the penalty is now 10% of the tax not deducted or remitted in addition to the amount not deducted or remitted plus interest at the prevailing monetary policy rate of the Central Bank of Nigeria.

(iv) Interest on late payment

Section 19 of PITAA amended section 77 of the Principal Act by making the interest payable by a person who fails to pay when the tax becomes due to be at bank based lending rate on annual basis. This makes the interest to be a compound interest rather than on simple interest.

(v) Failure by an employer to file returns

Section 20 of PITAA amended section 81 of the Principal Act by adding three new subsections (2)(3)(4). The new 20(3) stipulates that any employer that fails to file a return, with the relevant Tax Authority, of all emoluments paid to its employees in its employment not later than 31st January of every year in respect of all employees in its employment in the preceding year, shall be guilty of an offence and liable on conviction to a penalty of N50,000 for individuals and N500,000 in the case of a corporate body.

(vi) Penalty for incorrect returns

Section 21 of PITAA amends section 85 of the Principal Act by increasing the penalty for being guilty of giving false or incorrect information, misrepresentation and forgery for the purpose of obtaining tax clearance certificate to N50,000 from N500. PITAA also introduced an new (9) to Section 85 in which it is stipulated that any person who fails to comply with section 85(2) will be liable upon conviction to a penalty of N5,000,000 or to imprisonment for 3 years or both fine and imprisonment.
Section 26 of PITAA amends section 95(1) of the Principal Act by changing the penalty for making incorrect returns from 10% of the correct tax to a flat penalty in the sum of N20,000.

(vii) False statement in returns

Section 27 of PITAA amended section 96(1) of the Principal Act by increasing the penalty for false statement and returns from a fine of N5000 or imprisonment for five years or both to the fine of N50,000 for individuals and N500,000 for corporate bodies or to imprisonment for not more than 6 months. The fine payable where the offence under section 96 is committed by a person in relation to tax payable by, or repayable to him for year of assessment was also increased from N1,000 to N10,000.

(viii) Offence by authorized and unauthorized persons

Section 28 of PITAA amended section 97 of the Principal Act by increasing the penalty for offences by authorised and unauthorised persons to N100,000 from N1,000.

(ix) General offences

Section 25 of PITAA amends section 94 of the Principal Act by increasing the penalty for offences under the Act for which no other penalty is specifically provided. The implication of the new provision is that a person shall be liable on conviction to a fine of N5000 from N200 and where the offence is the failure to furnish a return, statement or information or to keep records required, he is liable to pay a further sum of N100 from N40 for every day during which the failure continues.

5.0. Conclusion

Attempt has been made within the limited time allowed to discuss legal issues arising from the Amending provisions. Due to constrain of time, attention has been given to some issues than others either because of the intensity of the controversy on them and their relative importance. Such provisions include the commencement date, taxation of income from foreign employment, residency rule and offences and penalties. There are a few of the provisions where the intention of the legislature might not have been well captured in the Amending Act. The Amending Act contains a number of errors ranging from constitutional to mechanical accuracy which a more careful and deliberate consideration should have avoided. Until the errors are amended through the appropriate legislative process, we have to live with them. However, I sincerely hope that all hands will be on deck to initiate and timeously pass another Amending Act into Law. Meanwhile, executive actions should be expedited on matters within the competence of the Minister including the prescription of self assessment form and making of regulations on presumptive tax. In the final analysis, it is my fervent hope that all stakeholders in taxation will join hands to use all the experiences garnered in the making of the Amending Act to improve and deepen fiscal legislative process in Nigeria for our collective good.