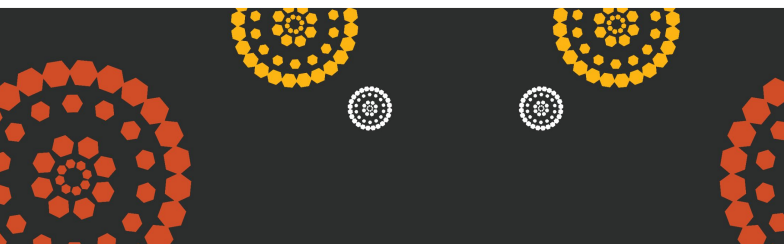


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Stamp Duties

Old wine in
a new bottle



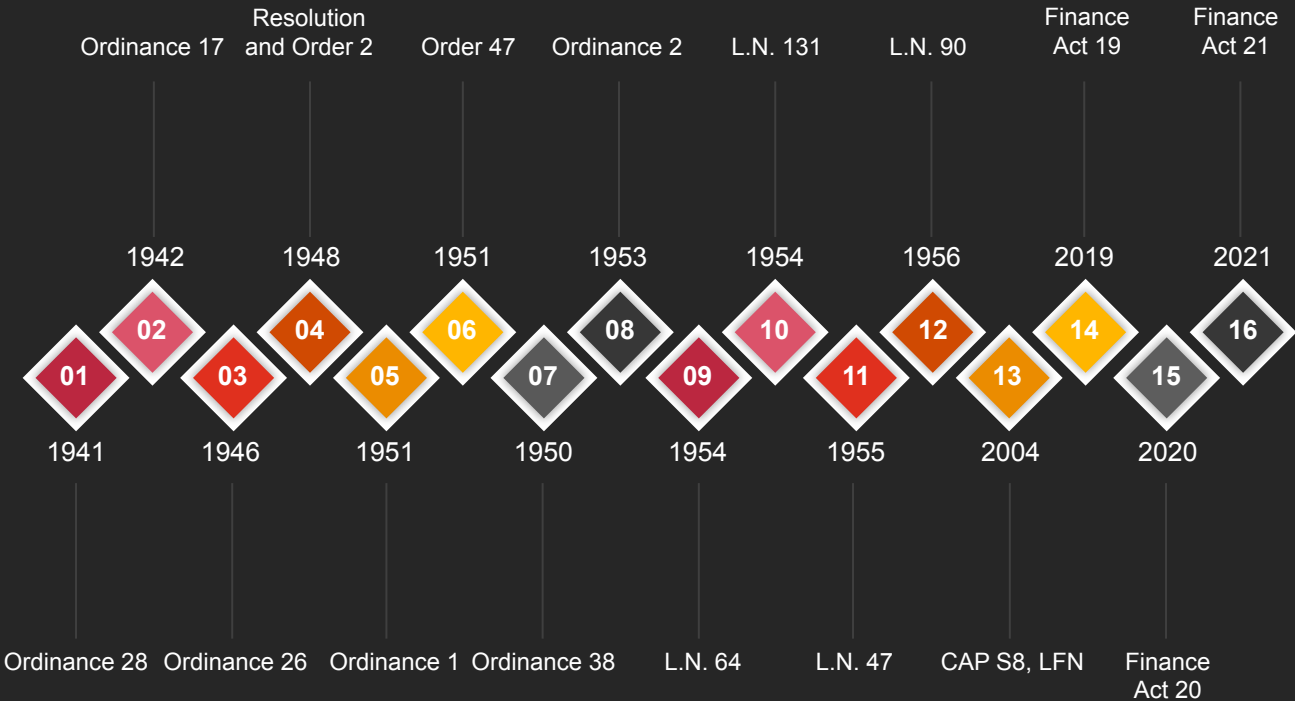
An Overview of Stamp Duties

A lot of people are familiar with the trope - do not put new wine in an old bottle/wineskin else the bottle will break and the wine will spill. Well, what about putting old wine in a new bottle? That seems to be the case of the Stamp Duties Act (SDA) which was enacted in 1939.

Pre-independence, specifically in 1939 through Ordinance 41, the colonial government introduced stamp duty into Nigeria’s legal system. It became known officially as the Stamp Duties Act No.5 of 1939. This legislation has changed over the years as depicted in the timeline below, with recent amendments by the Finance Acts. Over the years, stamp duty as a government revenue source has been relatively dormant. This civic duty has been “unenforced” on many Nigerians by the relevant tax authorities. Little effort was put into its enforcement in Nigeria, until recently.

The extent of public knowledge was that an unstamped document is not admissible in civil proceedings in Nigeria, save and except it comes under one of the exceptions provided in the SDA¹. This was the general perspective prior to increased activities by the Central Bank and the FIRS, and the inauguration of the inter-ministerial committee for the Audit and Recovery of Back-Years Stamp Duties. With that said, little is known about the origins of the SD.

Figure 1: Time graph showing the evolution of SD Legislation in Nigeria



1. Section 22 Stamp Duties Act 1939 Cap S8 LFN 2004 (as amended)

In the early 1620s, while searching for more revenue to prosecute the war with Spain, the Netherlands introduced stamp duty. Stamp duty as a revenue instrument was invented by a revenue collector - Johannes van den Brooks. By 1670, the British adopted the use of stamp duty and levied it on written instruments, and some physical objects like gloves, dice, hats, patent medicines and many other objects.² Like the Dutch in the 17th century, the Nigerian government through the Finance Act 2019 amended its Stamp Duty Act to generate more revenue. The amendment brought by the Finance Act enabled stamping of electronic documents and the setting up of an Inter-ministerial committee to audit and recover back years, and unremitted stamp duties from

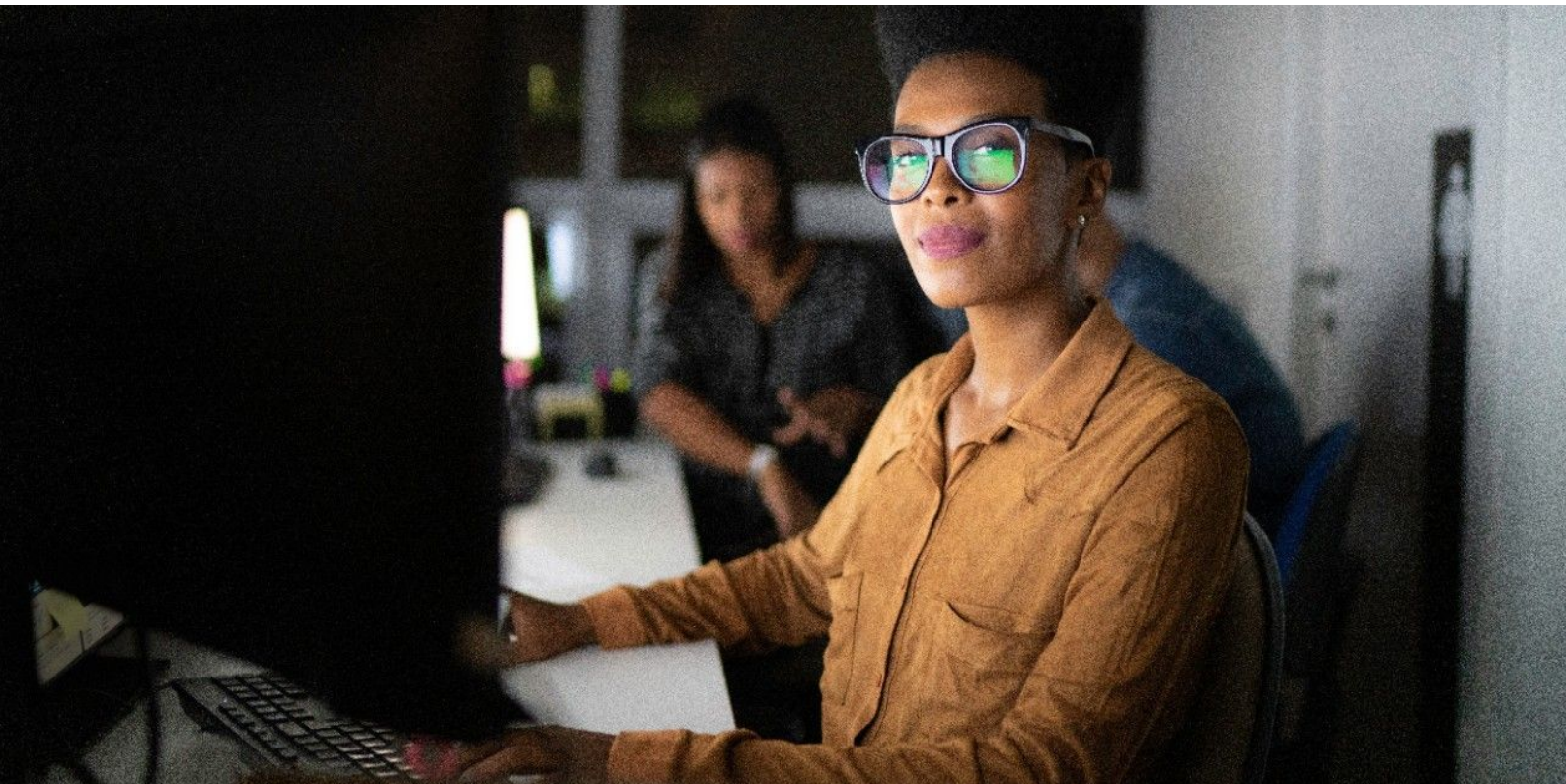
institutions like Deposit Money Banks (DMB), Nigeria Inter-Bank Settlement System (NIBSS), Central Securities Clearing System (CSCS), Corporate Affairs Commission (CAC) amongst others. Recent changes on the method and responsible agency for the collection of SD has led to disputes between the Federal Inland Revenue Service (FIRS) and the Nigerian Postal Service (NIPOST). The NIPOST believes it is responsible for the collection (although its establishment law does not support this claim) whereas the Finance Act placed the responsibility on the FIRS. In like manner, the 36 state governments are in court against the Federal Government to contest their right to administer and collect stamp duties on transactions involving individuals and persons within their territories.

Legislative Framework of Stamp Duties

The second schedule of the 1999 constitution of the Federal Republic of Nigeria has stamp duties as item 58 on the executive legislative list. Item 7 of the concurrent legislative list gives the state governments power to administer it as well subject to the conditions prescribed by the National Assembly.

In furtherance of these powers, the National Assembly enacted the SDA (as amended) which currently governs stamp duties activities in Nigeria.

Section 4(1) of the SDA bestows the authority to collect this tax on the FIRS on behalf of the Federal Government, for any instrument that has a company(ies) or a group of individuals as a counterpart. However, on instruments executed between individuals (individual to individual), the relevant state tax authority shall collect the stamp duty at a rate imposed by the State as agreed with the Federal Government.³ This seems to be consistent with the provisions of the constitution.



2. Source: <https://ore.exeter.ac.uk/repository/bitstream/handle/10871/27057/ButtY.pdf?isAllowed=y&sequence=3>
3. Section 4 (2) Stamp Duties Act 1939 Cap S8 LFN 2004 (as amended)

Knotty Issues

Electronic Money Transfer (EMT) Levy - who can collect?

In 2016, the Central Bank of Nigeria (CBN) introduced a circular⁴ mandating all Deposit Money Banks (DBMs) to implement a SD charge on electronic transfers exceeding NGN1,000. This was the subject matter of substantial controversies at the time and was consequently nullified by the Federal High Court⁵, even though the banks continued to collect it in defiance of the court judgments.

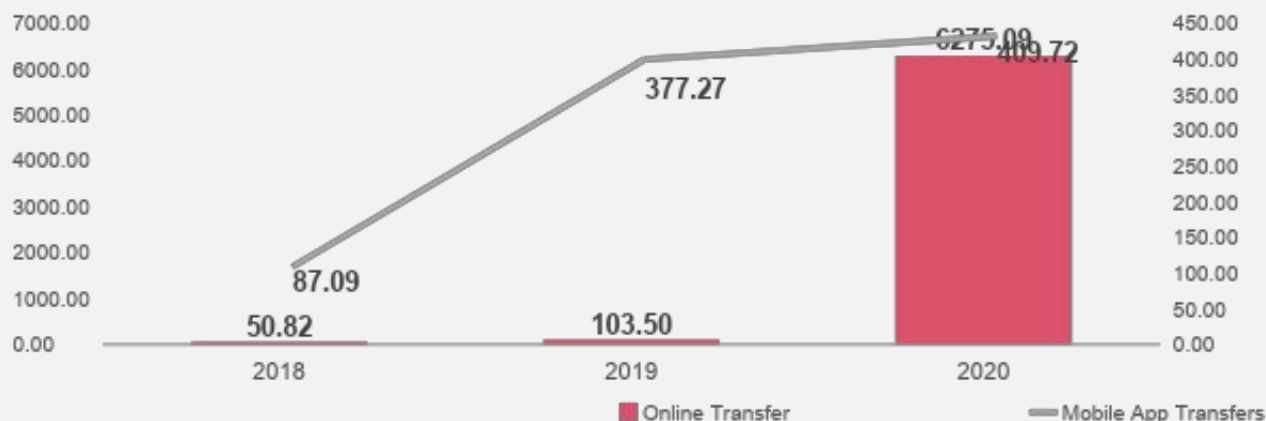
The Finance Act 2019 introduced some amendments into the SDA that gave legal backing to the collection of SD. One of such amendments was the introduction of the charge of N50 on electronic transfers.

This laid to rest the erstwhile controversy surrounding the validity of the CBN circular, thus legitimising the ₦50 stamp duty charge on eligible transactions, which would later come to be known as the Electronic Money Transfer Levy. The EMT levy was officially introduced through the Finance Act 2020.

According to data from the National Bureau of Statistics, the volume of electronic transfers (online) increased from 50.8 million in 2018 to 409.7 million in 2020 while mobile application transfers increased from 87 million to 6.27 billion in the same period.

Online/Mobile Application Transfers

Volume of online and Mobile App Transfers 2018 – 2020



Source: National Bureau of Statistics

In its report of 2020, the World Bank projected that Nigeria was likely to make about ₦462 billion from the EMT levy in 2021. However, according to the report, the FIRS remitted ₦114 billion as revenue from EMT out of the ₦6.4 trillion generated in the year.

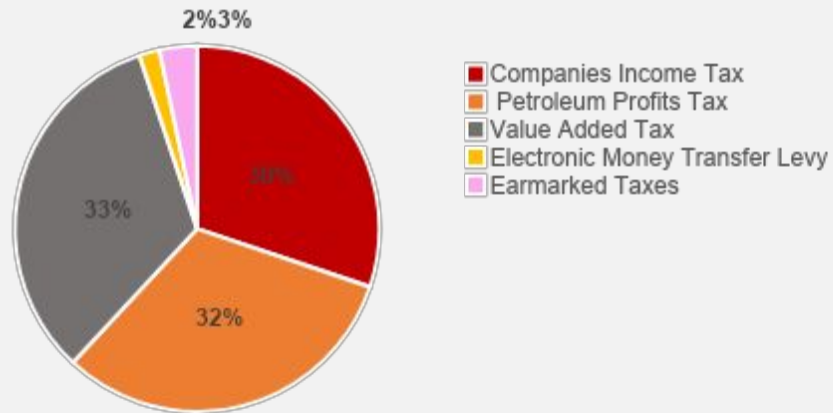
This represents only 2% of the total revenue generated. The Federal Government has disclosed that stamp duty if properly harnessed has a potential of generating a trillion naira per annum.

4. CBN/GEN/DBM/02/006

<https://www.cbn.gov.ng/out/2016/mpd/monetary.%20credit.foreign%20trade%20and%20exchange%20policy%20guidelines%20for%20fiscal%20years%202016%20to%202017.pdf> accessed on March 2, 2022

5. Retail Supermarkets Nigeria Limited v. Citibank Nigeria Limited & CBN FHC/L/CS/126/2016

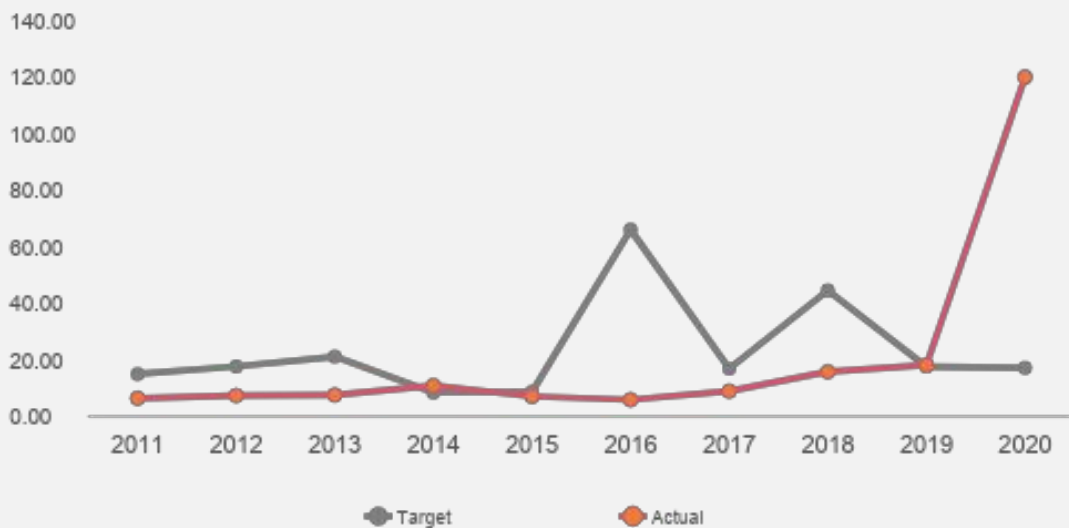
FIRS 2021 Revenue



The figure below shows a trend of what Stamp duty as a revenue source has contributed to Nigeria's coffers from 2011 to 2020. The average annual amount generated from stamp duty from 2011 to 2019 was less than ₦10bn.

However, following the amendment introduced by the Finance Act 2019, stamp duty revenue increased to ₦120bn in 2020. It should also be noted that back duty audits on banks was another key driver for the 2020 increment.

Stamp Duty Projections vs Actual Revenue (2011 - 2020)



Source: <https://www.firs.gov.ng/tax-statistics-report>

The sudden discovery of the potential provided by SD in driving revenue has drawn attention from various levels of government. As a famous rapper once sang - “the more money we come across, the more problems we see”, states are now calling for their fair share of the new gold mine that is SD. On this note, there have been disputes between the states and the FG bordering on the powers of the State Government (SG) to collect EMT levy on electronic transfers between individuals. The states’ argument is on the premise that some of the transfers are strictly between individuals and the Banks only act as agents and are not party to the transactions. Another question that may have to be answered is whether EMTS is a SD or a levy in line with Section 89(A) and if a levy, it should be in the residual list payable to States. However, if it is a SD, then why are the banks not granting the exemptions for certain receipts in the schedule to the SDA such as salary accounts, pension, government, etc? Do they have amounts to refund back to their customers as a consequence?

Another point to consider is the legality (or otherwise) of Section 89A(4) of the SDA (as amended by the Finance Act, 2021) which proposes a sharing formula for the EMT levy.

This is at variance with already established revenue allocation and distribution formula under s. 163 of the Constitution⁶. The phrase adopted “Notwithstanding ... any other law” may be deemed to be unconstitutional. In the case of Uyo Local Government v. Akwa Ibom State Government,⁷ “notwithstanding” used in a legislation was interpreted as excluding the impending effect of any other provision so that the said section may fulfil itself. It is a phrase which accords the said provision statutory pre-eminence and precedence over and above other provisions of any other enactment. The court referred to the prevailing provision of Section 1(3) of the constitution and held that the legislation shall to the extent of its inconsistency be void. The entire act was declared unconstitutional as a result of this provision.

Who is liable to pay?

There is no clear reference to the party liable to pay stamp duties on each transaction. However, a reading of the SDA, particularly section 23(3)(c) provides some coverage on the party liable to pay penalties in the event of default in stamping. By inference, one may assume that the party liable to pay the penalty in the event of default should also be the party upon whom the obligation to pay the stamp duty rests.

For ease of reference we have replicated the schedule on the party liable to penalty here:

Title of instrument as described in the Schedule	Person liable to penalty
Bond, covenant, or instrument of any kind whatsoever	The obligee, covenantee or other person taking the security
Conveyance on sale	The vendee or transferee.
Conveyances or transfers operating as voluntary dispositions inter vivos.	The grantor or transferor.
Lease	The lessee
Mortgage bond, debenture, covenant and warrant of attorney to confess and enter up judgement.	The mortgagee or obligee, in the case of a transfer or reconveyance, the transferee, assignee or disponent or person redeeming the security.
Settlement	The settler

6. 1999 Constitution of the Federal Republic of Nigeria (as amended)

7. Uyo Local Government v. Akwa Ibom State Government & Anor (2020) LPELR-49691(CA)



This list perhaps became the origin of why people historically deferred stamp duties until they had to present the instrument in a legal process. There are over 100 categories of instruments (including sub-instrument categories) provided in the SDA and the schedule to the Act as eligible for stamping. This list provided above only covers a handful of these instruments, leaving the balance of items where no party is defined as having an obligation.

FIRS Audit Methodology

As part of its primary duty to ensure the payment of the right amount of taxes due from any taxpayer, the FIRS conducts tax audits. But what methodology should be adopted in auditing stamp duty levy to

ensure compliance? Recent experience indicates that the FIRS adopts the approach of reviewing financial statements of taxpayers to determine their stamp duty liability.

The verification of reported taxes should take into consideration the nature of such tax or levy. Stamp duty is not a transactional tax which derives its value from financial statement entries. It is an instrument tax whose value depends on documents required to be "stamped" in a transaction. Where a transaction does not involve the use of any written or electronic instrument, it does not come within the contemplation of the SDA and does not qualify for stamping. Also, the SDA provides substantial exemptions and varied rates to apply to instruments even where these instruments fall under one heading.

Let us examine SD application on Bonds for instance:

Instrument	Ad Valorem SD rate
Mortgage, bond, debenture, covenant and warrant of attorney (being a collateral or substitute security)	0.075%
Mortgage, bond, debenture, covenant and warrant of attorney (being an equitable mortgage)	0.150%
Mortgage, bond, debenture, covenant and warrant of attorney (being the only principal or primary security)	0.375%
Mortgage, bond, debenture, covenant and warrant of attorney (reconvey, release, discharge, surrender, resurrender, warrant to vacate, or renunciation of any such security)	0.075%
Mortgage, bond, debenture, covenant and warrant of attorney (transferred, assigned or disposed to enter up judgement)	0.075%

Source: Schedule to the SDA

These little details are important for an appropriate application of SD and cannot be gleaned from a review of the financial statements of the company.

Another critical point to consider will be the applicable rate on qualifying transactions. Business transactions are formalised with contracts or agreements. The FIRS adopts a flat rate of 1% on contract agreements⁸. However, upon our careful review of the entire SDA and schedules thereto, there is no category of instruments upon which SD is charged at 1%. The

SDA includes a wide range of instruments which may meet the definition of a contract and each instrument type is charged according to its peculiarity. The SDA provides that SD should apply at a flat rate of 15kobo on an agreement that does not fall into any other category for stamping.

The implication of the FIRS' publication (which is at variance with the position of the law) is that taxpayers may be assessed and charged more than the SDA has prescribed.

8. Federal Inland Revenue Service, "Integrated Stamp Duties & Levies Services (ISDLS) - Services" https://stampduty.gov.ng/stamp_duty_charges accessed March 5, 2022

Conclusion

The Finance Act amendment was instrumental to a 561% increase in the actual collection of stamp duty by the FIRS from 2019 to 2020. This shows the importance of a reform for efficiency. An appropriate administrative reform in the collection of stamp duty should be geared towards nudging taxpayers to comply with the requirement of the law. This would include an efficient and accurate audit procedure that would ensure the FIRS harmonises its applicable rates with the provisions of the law. An arbitrary adoption of a rate without concrete evidence in the law would not only be illegal, but also increase the tax cost on businesses. Also, taxpayers may have to seek consultation and legal redress in resolving SD related tax audit issues thereby increasing the cost of doing business. That is without considering the time cost invested into such activities.

An offshoot of the ease of doing business process led to the integration of business registration at the Corporate Affairs Commission (CAC) with the FIRS Stamp duty office. This automated process made electronic stamping of CAC documents possible. A stamp duty calculator could also be useful if placed on the FIRS website.

We believe the digitization of Stamp Duty compliance should be extended to other sectors and taxpayers, giving them the capability to stamp documents electronically.

With such a process, it would be easy for the FIRS to track and trace documents that were stamped and compare this with physical evidence during the audit process.

We have considered the global best practices in the SD space by analysing the administration of instrument tax in several jurisdictions. Please see the table below. Nigeria may consider streamlining the application of SD accordingly. The current SDA includes a long line of instruments which raises a lot of questions. Did you know SD may be chargeable on cheques issued at 0.1%?

Finally, the SDA has been in existence since 1939 with no substantial change to its form. It suffices to say that the law is old, tired and might as well be retired. There is a need to revamp the law in its totality and it is unlikely that the Finance Act amendments will be sufficient to introduce the required change. We are of the opinion that the SDA should be repealed, and re-enacted if necessary.



What Applies in other territories

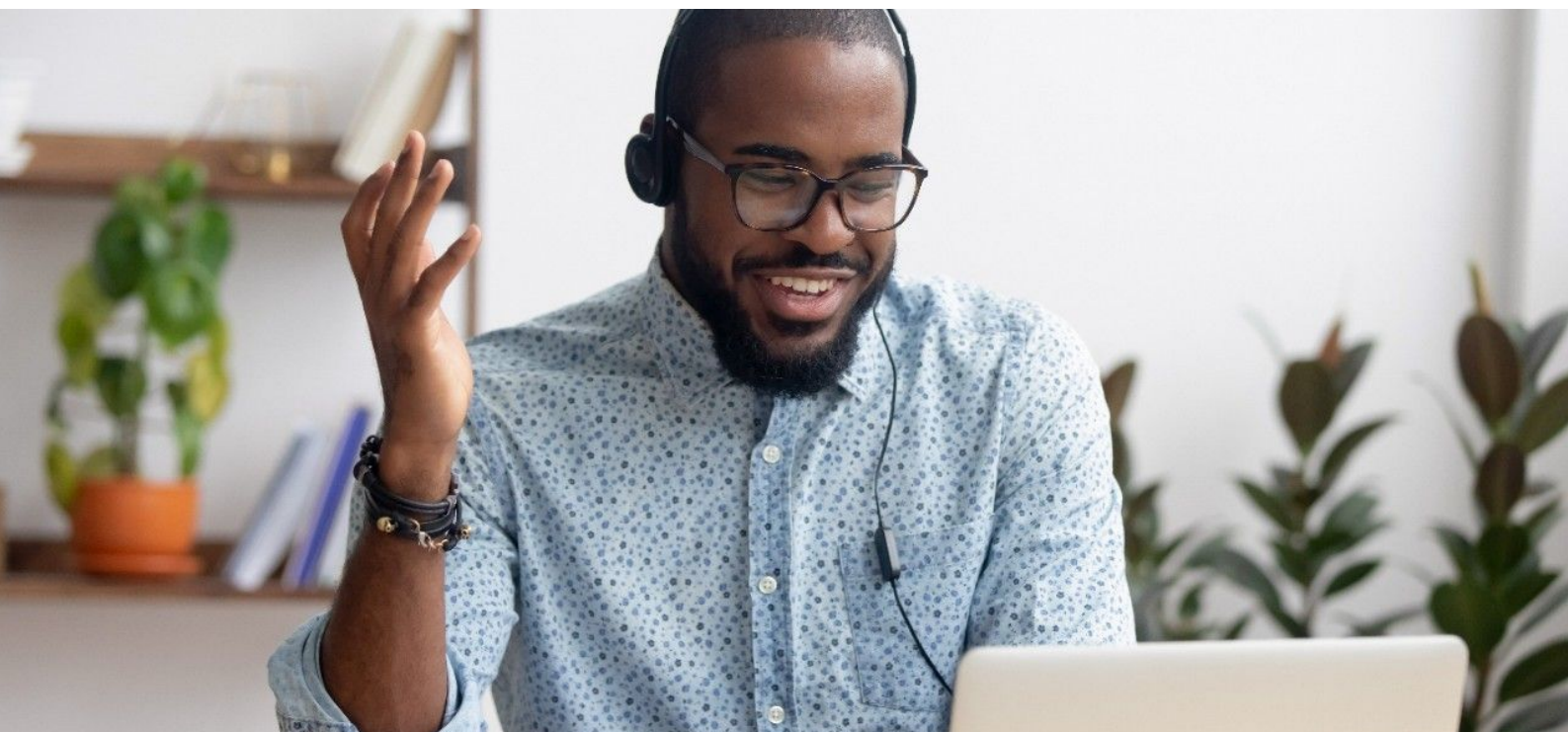
A review of applicable rates and practice in some other jurisdiction is in the table below:

Country	Tax Name	Style	Property or lease premium or transfer value	Rate
United Kingdom ⁹	Stamp Duty Land Tax	Increasing Portion	Individual	
			Up to £150,000	Zero
			The next £100,000 (the portion from £150,001 to £250,000)	2%
			The remaining amount (the portion above £250,000)	5%
			Owning more than one residential property attracts additional	3%
			Non-UK resident additional Surcharge	2%
			Corporate Bodies	
			Residential properties costing more than £500,000	15%
			Surcharge	3%
Germany ¹⁰	Real Estate Transfer Tax	Fixed rate	Varies by region	
			Bavaria and Saxony	3.50%
			Hamburg	4.50%
			Baden Württemberg and others	5%
			Berlin and Others	6%
			Brandenburg and Others	6.50%

9. <https://www.gov.uk/stamp-duty-land-tax/residential-property-rates>

10. <https://taxsummaries.pwc.com/germany/corporate/other-taxes>

Country	Tax Name	Style	Property or lease premium or transfer value	Rate
Ghana ¹¹	Stamp Duty	Range	Type of transaction and instrument dependent	0.25 to 1%
			Initial stated capital	0.50%
Angola ¹²	Stamp duty	Fixed	VATable persons are exempted from Stamp duty.	1%
Kenya ¹³	Stamp duty	Varies	Transfer of immovable property -Urban	4%
			Transfer of immovable property -Rural	2%
			Creation or increase in share capital	1%
South Africa ¹⁴	Securities transfer tax (STT)	Fixed rate	Taxable amount is the security's consideration, based on the purchased price or market value of the security.	0.25%



11. <https://taxsummaries.pwc.com/ghana/corporate/other-taxes>

12. <https://taxsummaries.pwc.com/angola/corporate/other-taxes>

13. <https://taxsummaries.pwc.com/kenya/corporate/other-taxes>

14. <https://taxsummaries.pwc.com/south-africa/corporate/other-taxes>

Recommendation

Finally, our recommendation on this subject would be the following:

- Stamp duty should apply only to a few instruments
- Instruments to be targeted should be those that do not attract VAT such as interest in land and stocks, shares and securities to avoid multiplicity of tax since SD was introduced before VAT
- Instruments targeted should be those that are targeted at wealth such as property and investments

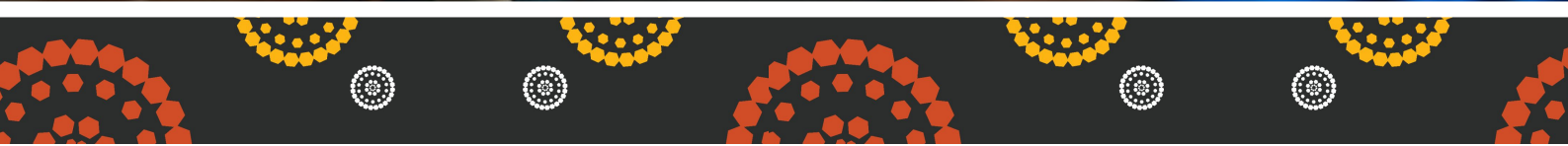
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