The Tax

Anthology

Journal of The Tax Club

University of Lagos

Volume 4

August 2019

Publication of:

The Tax Club, University of Lagos, Akoka.

Contact:

Faculty of Law Building,

Faculty of Law,

The University of Lagos.

www.thetaxclubng.com

unilagtaxclub@gmail.com

FOREWORD

The Tax Club, University of Lagos was set up to basically develop the interest of students and youths in taxation. The Club strives to build this interest through tax enlightenment, tax training, tax competitions and tax research. This, we have done through our programs and several other initiatives of the club.

The Tax Anthology is a yearly journal publication of the Tax Club borne out of the idea of contributing to the existing knowledge in the tax sphere. The idea was premised on the realization that taxation in Nigeria is still developing and as a result, the club took it upon itself to contribute to this space. In order to ensure that we have robust and all-inclusive publications, contributions have been received from tax experts and interested members of the club. It is currently the most diverse students published journal containing articles, essays, case notes and reports from students from a wide range of faculties including Law, Management, Accounting, Sciences and from professionals working in as Law firms, Tax Advisory and Regulatory firms.

Our heartfelt appreciation goes to the chairman of the Federal Inland Revenue Service Dr. Babatunde Fowler, the head of the Federal Engagement and Enlightenment Team, Alhaji T.K Oseni, Mrs. Angel Fadahunsi and the entire staff of FIRS for their invaluable support of this project in form of direction and commitment to the Tax Club and the their effort at improving Tax education and awareness.

We also appreciate Professor Ige Bolodeoku, Professor Abiola Sanni, Dr. Olumide Obayemi, Dr. Abiodun Folarin and Mrs. Ihuoma Ilobinso for their immeasurable assistance despite their respective busy schedules.

We appreciate the executive members and the committee under the leadership of Tolulope Olayiwola, the Director of Research of the Tax Club and Oluwatobi Olakanye, the Editor-in-Chief for the effort and time put into ensuring that this work is properly and carefully edited. The selfless devotion and hard work put into the editing of the manuscripts to ensure it is of the highest and best standard amongst academic writing is highly appreciated.

To the contributors to this work, the club is immensely grateful for always yielding to her calls and sharing your knowledge for the greater advancement of taxation in Nigeria.

Olabode Akindele
President - 2018/2019 Academic Session
The Tax Club,
University of Lagos.

EDITORS' NOTE

The Tax Club, University of Lagos has always strived to be a repository of knowledge in the world of taxation. As an allusion to the famous words of Benjamin Franklin, only three things are certain in the Tax Club; an adventurous tax walk, an impactful National Tax Debate and the intellectual Tax Anthology.

The Tax Anthology is a compilation of outstanding articles and essays on various issues and developments in taxation with a particular focus on Nigeria. In light of nascent advancements in science and technology which have certain effects on taxation, it is important that we not only make efforts to constantly develop ourselves by finding solutions to the tax issues that they come along with, but we must also look ahead towards discussing and countering future problems that might arise due to these developments. In order to achieve this, The Tax Anthology looks at the past, current and future issues facing the Nigerian tax system, develops ideas and recommend solutions to solving these issues as well as proposals for the implementation of these solutions.

The Tax Anthology 2019 aims to achieve one mission which is to expose the intricacies of taxation to Nigerians through the **LENS** of the Tax Club, University of Lagos. This simply means:

- **Learning** from the feet of young minds, professionals and legal experts in the field of taxation.
- **Exposure** to emerging tax issues, advancements in tax enforcement and administration

- **Nurture** and unlock innovative ideas and solution from young minds. In regard to this, we encourage students to undertake extensive research for the articles submitted to be published in the Tax anthology.
- **Sharing** tax knowledge from all areas of taxation both in the public and private sector. In order to achieve this, we partner with the Federal Inland Revenue Service (FIRS) to secure nationwide publication, distribution and circulation of the journal.

In all things, we must give thanks. We are grateful to God for His grace and guidance in the completion of the 2019 edition of the Tax Anthology. We especially thank the hardworking editorial team, particularly Aduloju Isaac, Munirah Yaqoub and Rachel Ogidan. We also wish to thank the Tax Club's Executive team of 2018/2019 led by Akindele Olabode for their support towards the publication of the anthology. Finally, our deepest gratitude goes to the Federal Inland Revenue Service (FIRS) for their continuous support to the Tax Club, University of Lagos and for publishing this year's journal.

The Tax Anthology 2019 has a scintillating mix of young ideas, professional minds and legal experts which makes it an all-encompassing journal of tax knowledge that can be easily understood by people from all spheres and walks of life. We can assure readers that it is an interesting and enlightening piece of literature.

Olakanye Oluwatobi M.
Editor-in-Chief,
The Tax Anthology 2019
Tolulope Olayiwola P.
Director of Research,
The Tax Club, UNILAG

CALL FOR PAPERS

The Tax Club, University of Lagos welcomes entries from all areas of Taxation and entries could either be for the academic online forum; www.thetaxclubng.com or the Tax Anthology. The entries could be; Articles, Essays, Reports, Case review, statute review or book review.

All entries must comply with the citation model as stipulated on the website. For more information, please visit; www.thetaxclubng.com or send an E-mail to unilagtaxclub@gmail.com.

TABLE OF CONTENTS

THE RELEVANCE OF CERTAINTY IN TAX LAW

ESTHER EZE

1.0 INTRODUCTION

According to Benjamin Franklin, the only things of certainty in this life are death and taxes, but permit me to add this; I believe that of equal importance to the certainty of paying taxes is the certainty of what to pay, where it is to be paid and how it is to be paid. That taxes are to be paid is not sufficient certainty to the taxpayer. Rather, the "when, where, how and what" to be paid which border on the administration of taxes on the taxpayer is of substantial importance. Adam Smith addressing the canon of certainty said:

The tax which each individual has to pay ought to be certain and not arbitrary. The time of payment, the amount to be paid ought all to be clear and plain to the contributor and to every other person[1].

The following can be deduced from the above statement: Mr Smith refers to the taxpayer as a "contributor", meaning that paying taxes is to be seen from a better perspective than being an exaction. It is a contribution and because it is compulsory, the taxpayer becomes an involuntary contributor. However, because he should understand that he is contributing for the purpose of raising revenue for the state, the question he asks the tax authority is this: *"Can you explain to me in clear and simple terms, the modalities of my contribution?*"

This article will attempt to consider the relevance of certainty in the administration of taxes and the consequences where this fundamental canon is not upheld. In this age where development is marked by investment and foreign participation within a particular polity, it would be detrimental to an economy to have frameworks - legal

[1] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations.*

and otherwise - which are marked with uncertainties capable of deterring the investor or causing such persons to consider activities by which they can circumvent the prevalent tax laws thereby defeating the revenue-generating objective of taxation.

1.0. WHY IS CERTAINTY IMPORTANT?

Certainty is a principle that must underlie any good law. In fact, at some point, every student of law is informed about the significance of certainty in the law. In the course of a legal practitioner's career, he comes to understand and appreciate the relevance of certainty, for it is upon this that the foundation of his craft is built, and by the level of predictability certainty affords, he is able to organize whatever activities, relationships and transactions that are incidental to his craft. In the words of Honourable Justice G.T. Pagone,[2] "without a reasonable level of certainty, contracts would be worthless, and ongoing ordinary relations would be at risk of whim and fancy."

The Association of Chartered Certified Accountants (ACCA) believes that certainty is a key requirement for the proper operation of a good tax system and without it, neither the government nor the taxpayer can effectively budget or plan for their future actions.[3] This is definitely true because with a level of certainty comes some level of predictability, which in every way assures the taxpayer that the existing framework is stable enough to regulate his affairs.

Additionally, a reasonable conclusion that one can arrive at with regards to upholding certainty in tax matters is that it has the potential to reduce the desire to evade or avoid tax. The truth is that the mind-set of the majority of taxpayers is that taxes are levies compulsorily imposed or taken from something that the taxpayer has by definition, earned or owned. Some other persons have viewed the concept of taxation as the principal way in which the ruling classes in organized communities have oppressed,

[2] BA, Dip Ed, LLB (Monash), LLM (Cantab); Justice of the Supreme Court of Victoria; Professorial Fellow, Melbourne Law School, The University of Melbourne.
[3] Jason Piper (Technical Manager, Tax and Business law, ACCA) "Certainty in Tax" available at: https://www.accaglobal.com/content/dam/acca/global/PDF-technical/tax-publications/tech-tp-cit.pdf (accessed 13 March 2019).

fleeced and expropriated some of their subjects.[4] With this kind of disposition towards taxation, uncertainties revolving around tax matters (the legislations and their administration) will only serve to reinforce the perception that taxes and the concept of taxation are instruments of oppression and nothing more.

2.0. ISSUES WHICH CHALLENGE CERTAINTY IN TAX LAW

Anything that seeks to challenge the certainty of something attempts to cast a shadow of uncertainty over it, and this is applicable in the sphere of tax law and its administration. Sometimes, these issues are intrinsic or extrinsic to the tax framework; deliberate or not deliberate, or even orchestrated by the taxpayer as a result of loopholes within the tax framework which may be exploited to his advantage and by the general desire to reduce his tax liability. At this point, we would consider a few of these issues.

2.1. Poor Drafting of Tax Statutes.

Uncertainty may arise as a result of the way the tax statutes are drafted. In explaining this first problem, I will borrow the words of David M. Walker:

> *Not the least evil features of the modern tax system are; the army of unproductive civil servants concerned with the assessing and collecting of taxes,* ***the enormous volume and constantly changing detail of the chaotic and largely incomprehensible body of verbiage called the law of taxation,*** *the incomprehensible and frequently incorrect assessments, and the utterly irrational nature of the whole topic.*[5]

I consider this one of the most intrinsic issues to the tax system. When the words of the statutes are incapable of being understood, it will create uncertainty as to the meaning of the provisions of the statute. This is not just a matter of tax law, but one that touches on the law generally. It is therefore important that the law generally and by extension, tax legislations be communicated simply. That the law should be made simple does not

[4] David M. Walker, The Oxford Companion to law (1980) 1208 - citation taken from Tax Certainty by The Hon. Justice G T Pagone.
[5] David M. Walker, The Oxford Companion to law (1980) 1208.

connote brevity, for if the law is too brief, it may be lacking necessary details which in turn creates exploitable loopholes. In other words, the law must be concise. In the law being concise, the issue of volume arises but volume shouldn't pose a problem if the essence of the volume is to give clarity and meaning to the law.

2.2. Judicial Interpretation of Tax Statutes

In explaining this issue, Honourable Justice G.T. Pagone stated:

Another cause of uncertainty in tax law arises not from the discipline of the law producing an answer different from other disciplines, but because within the law there are strongly held, divergent views about the law itself.

It is possible and most times it occurs that, the law says one thing which when interpreted in light of facts that invoke such provision may give rise to different interpretations. This is one of the reasons why a panel of about seven persons could be divided in their application of the provision of the tax law to the fact before them. Another problem that arises out of this is where two different interpretations of the same provision are giving in two different matters. The implication of this is that it inhibits the predictability that the taxpayer might have if the interpretations were consistent.

In line and closely related to the second issue is the *purposive interpretation,* which we could call the "mischief rule". It is the rule which aims at ascertaining the intention of the legislator in drafting the statute. The mischief rule entails looking beyond the mere wordings of the statutes. The problem with purposive interpretation is that it involves subjectivity that is, trying to ascertain the 'mind' of the draftsman where the words are insufficient to do so. This would lead to a lot of inconsistency as the taxpayer is unable to predict the outcome in such circumstance.

2.3. Deliberate/Discretionary Uncertainty.

This is also known as Uncertainty by Design. This is a creation of the legislature occasionally used in some cases to address the problem of tax avoidance. The wordings of the tax statutes or certain provisions of the tax statutes may be couched to deliberately lack precision, or may be couched broadly so as to prevent the taxpayer from taking advantage of circumstances not expressly mentioned by the statute, by arranging his affairs under the things perceived to be excluded for the purpose of evading or avoiding tax liability.

Additionally, a couple of reasons exists as to why discretion is to be given in tax legislation regardless of the desirability of certainty and predictability. One of them can be to have tax outcomes depend upon commercial, business or economic considerations.

2.4. The Conduct of Taxpayers.

In the IMF/OECD March 2017 Report,[6] it was discovered that the conduct of taxpayers can give rise to uncertainty. According to the report, where taxpayers pursue aggressive tax avoidance strategies that are likely to be challenged if identified by the tax administration, there is likely to be an increase in tax uncertainty for both taxpayer and the tax authority.[7]

Other issues challenging the certainty of tax statutes include but are not limited to the disparity between legal and (accounting and economic) analysis in ascertaining what amounts to income and capital, uncertainty around dispute resolution mechanisms, policy implementation and administrative uncertainty etc.

[6] IMF/OECD Report for the G20 Finance Ministers (March 2017) "Tax Certainty" available at: https://www.oecd.org/tax/tax-policy/tax-certainty-report-oecd-imf-report-g20-finance-ministers-march-2017.pdf .

[7] ***Ibid.*** p. 23.

It is said that the first step to solving any issue is identifying the cause of the issue. Having identified a few of the issues, we may proceed to consider if and how they may be addressed.

4.0 ADDRESSING THE PROBLEM OF UNCERTAINTY

A good place to start in attempting to resolve the issue of uncertainty in tax laws is to know that, *"whoever hopes a faultless tax to see, hopes what ne 'er was or is, or e'er shall be."*[8] Despite the desirability of certainty, absolute certainty is unattainable; for the draftsman and administrators are but men who are limited and fallible in every way. Rather, what may be hoped for is a level of certainty which is to be consistently improved upon based on the knowledge that, what may at some point have been clearly and expressly written, may with time and development become obscure thereby creating uncertainty.

Attempting to resolve issues of uncertainty is not in creating new solutions, but in giving effect to and implementing already existing suggestions. In light of this, here are some existing suggestions to reasonably addressing uncertainty in tax laws:

1. **On tax policy design and legislation:** According to the OECD/IMF March 2017 report to the G20 Finance ministers, tax policy design represents the earliest stage of at which certainty can be tackled. In light of this, there is a need for a well-developed tax policy and legislation design as well as a functional monitoring framework. One way in which this can be achieved is by having consultations with taxpayers so as to take into consideration the prevalent reality while drafting these legislations.
2. **On tax administration:** There is indeed no doubt that tax administration is at the heart of the implementation of tax laws. It is therefore a no brainer that clear and coherent legislation is not enough to guarantee tax certainty if it is not [8]

[8] Sir Josiah Stamp, ***The Fundamental Principles of Taxation in the Light of Modern Developments: The Newmarch Lectures for 1919*** (1929) 198 (referring to M'Culloch's adaptation of Pope), quoted in Hon. Justice G.T Pagone, 'Tax Uncertainty'.

supported by sound and effective administration. The OECD/IMF March 2017 report in addressing the issue of uncertainty in tax administration split it into two:

a) Avoidance of disputes through a more transparent relationship between businesses and the tax administration. For example, the issuance of timely rulings and technical interpretations which will help clarify the administration of taxes and improve the taxpayers' understanding of the legislation and its requirements; and
b) Effective and timely resolution of disputes

3. **Consistency** in judicial interpretation of tax statutes as this helps the taxpayer predict reasonably what the outcome will be in a certain circumstance.

It is not enough for ideas to be created to solve this problem; of greater importance is embracing these suggestions by strategic implementations based on the impact it has within a jurisdiction.

5.0. CONCLUSION

Conclusively, resolving uncertainty is a poor second best to avoiding it in the first place. In light of this, tax systems should be designed so as to reduce the possible incidence of such dilemmas by allowing a business to pursue comfortably the course that offers the greatest overall benefit to society.[9]

[9] Jason Piper (Technical Manager, Tax and Business law, ACCA) "Certainty in Tax".

RIGHTS AND OBLIGATIONS OF TAXPAYERS[1]

PROF. TEJU SOMORIN[2] FCTI, D.LITT

& PhD Taxation & fiscal policy

"Tax is the price which taxpayers pay to enable a Revenue Authority achieve its objectives " - Somorin (2015)[3]

1.0 INTRODUCTION

Taxpayers are the single most important group of stakeholders in the tax system. They are so important that they are recognized in the National Tax Policy Document (2012) and the Revised National Tax Policy (2017). Even though Taxpayers' Responsibilities are fundamental to the functioning of a viable tax system, they must be balanced with Taxpayer Rights in an equitable and justifiable manner. It is significant to note that a taxpayer is an important variable in the achievement of the objectives of a Revenue Authority. It is important at the onset to try to understand the three key words, Rights, Privileges and Obligations. Indeed the difference is that rights are given to people to protect their basic freedoms, whereas responsibility is given to those in charge to uphold those rights. It is our obligation to pay tax but our right to demand good governance. Right is based on the privilege granted to an individual. Rights are what

[1] Being a presentation to COSOMAS, Caleb University on February 7th, 2018

Professor of Taxation, Head of Taxation Department, College of Social & Management Sciences (COSOMAS) CALEB University, Imota Lagos.
BA (Hons), MTAX, MPA, FCIPA, FIoE, CNA, ACIarb (UK), Member, Institute for Fiscal Studies(UK), Graduate, Nigeria College of Accountancy, Certificate in Speech Writing, Doctor of Letters in Nigerian Tax System (D.litt), PhD Taxation& Fiscal Policy, Doctoral Fellow, IPFM. Council Member & Life Doctoral Fellow, European Institute of Financial Directors (EIFD) and Honorary Senior Member, Chartered Institute of Bankers of Nigeria (HCIB). *Coordinating Dean & Immediate Past President, Chartered Institute of Taxation of Nigeria (CITN); Immediate Past President, West African Union of Tax Institutes (WAUTI); Chairman, Caretaker Committee, Association of African Tax Institutes (AATI); and Retired Coordinating Director FIRS.*

[3] Somorin, O.A. (2012). ***TejuTaxReference Book.*** Lagos: Malthouse Press Limited.

we gain from the society. Obligations are what we do for the society. Generally, the two terms that have been adopted in Taxation are "Rights and Obligations". Even the OECD issued its report on "Taxpayers' Rights and Obligations. For this paper, I have altered my topic from the topic which included "privilege" to read "**Taxpayers' Rights and Obligations"** to be in line with best practices.

2.0 WHO IS A TAXPAYER?

But who exactly is a taxpayer?

The taxpayer is anyone who is subject to tax on income irrespective of whether he pays the tax or not. The taxpayer may be an individual, company or organization liable to pay tax[4]. What this implies is that the role of the taxpayer is not contingent on the actual payment of taxes since tax evaders are also liable to pay. The term has also been variously defined as follows**:**

- A **person,** company or organization.
- A **person** whose income is subject to tax; one from whom government demands a pecuniary contribution towards its support[5]
- A **person** that is assessed, who pays or is liable to pay a tax and pays a tax. He is the client of the Tax Authorities;
- The **US Internal Revenue Code** in **Section 7701(a)(14)** defines "taxpayer" as "any **person"** subject to any internal revenue tax, and
- **Section 7701(a)(1**) defines "**person**" to include an individual, trust, estate, partnership, or corporation.
- Business entities are also taxpayers, which means their revenues and expenditures are subject to taxation,
- Virtually every human being is a taxpayer at some point. People pay taxes when they pay for goods and services, which are taxed.
- The term taxpayer often refers to the workforce of a country who pays for government projects through taxation.
- FOR TAX PURPOSES, A TAXPAYER IS A PERSON.

[4] TEJUTAX Reference Book, on the Nigerian Tax System, General Terms, Volumes 1&2.
[5] Black's Law Dictionary at pg. 1459

2.1 WHO IS A PERSON?

The term "Person" under Income Tax Acts has wide meaning and interpretation than the normal meaning of person the way we know it.

"PERSON" includes a company and any unincorporated body of persons; **Section 2 of the PPTA**)

- Individuals, (President, Governors, Civil Servant, Members of the National Assembly, Minister, Teacher, Clerk etc.)
- Non-Governmental Organisations
- Communities
- Trustees
- **Companies** Engaged In Petroleum Operations, **Section 2 of The PPTA** Where **"Company"** Means Any Corporate Body Incorporated Under Any Law In Force In Nigeria Or Elsewhere;
- Religious Bodies-Churches, Mosques
- Banks, Insurance Companies, Financial Institutions
- Small- Sized Traders
- Retailers, Manufacturers
- Importers, Exporters

The taxpayers are specified under **Section 2 of the Personal Income Tax Act (PITA)** as:

- Employees of companies earning salaries, wages, commission
- Directors of companies earning allowances, fees and other remuneration
- Partners in a professional firm of Accountants, Doctors, Lawyers, Secretaries, Surveyors etc.
- Traders engaged in businesses in their names
- Other persons on whom tax is to be imposed are Itinerant workers, Communities
- Families and Trustees.

2.1.1 NON-GOVERNMENTAL ORGANIZATIONS

Non-profit or Not-for-profit organizations are also taxpayers and they can generally be classified as:

- ***Governmental Institutions*** e.g. Federal, State, Local Government,
- ***Educational Institutions*** e.g. Universities, Polytechnics, Colleges, Primary and Nursery Schools.
- ***Health Institutions*** e.g. Voluntary Agency Hospitals, Clinics, Dispensaries and Rehabilitation Centres.
- ***Ecclesiastical Institutions*** *e.g.* Churches, Mosques, Scripture Union, Christian Association of Nigeria, Baptist Union etc.(provided they engage in trade or business)
- ***Professional Organisations****:* includes Accountancy, Medical, Legal, Engineering, Nursing etc. professional bodies, e.g. Nigeria Bar Association, Institute of Chartered Accountants of Nigeria, Nigeria Medical Council, Chartered Institute of Taxation of Nigeria, etc. subject to the exemption provided in the law.

These class of taxpayers may enjoy exemption from income tax, but they are subject to VAT being a consumption tax and withholding tax. I**t** is mandatory under **section 55 of CITA** for every NGO to file a tax return every year. In addition to its obligation of filing, NGOs are statutorily required to:

i) Keep accurate records of their employees;
ii) Maintain proper books of accounts
iii) Deduct Pay As You Earn (PAYE) from their employees' salaries and remit the same to the appropriate tax authority.
iv) Deduct withholding tax (WHT) on payments made to its contractors/suppliers and remit same to the appropriate tax authority in accordance with the laws; such remittance is to be accompanied with a schedule of deduction;
v) Pay tax as when due on non-exempt activities; and
vi) Pay Value Added Tax (VAT) on goods and services consumed except those purchased exclusively for its humanitarian projects or activities;

Failure to comply with the above requirements will attract the appropriate penalty under the law.

3.0 FOCUS ON TAXPAYERS

3.1 TAX REFORM (1978)

Attention was focused on taxpayers for the first time in the history of the Nigerian tax system at Paragraph 4.11 page 44 of the Report of the Task Force on Tax Administration (1979) where the following recommendation was made:

*"More publicity should be given to **taxpayers** about what they are expected to do to satisfy their tax obligations. Similarly, the government should mount special publicity programmes aimed at enlightening taxpayers on the use of tax revenue"*

3.2. TAX REFORM (2003)

The second time focus was given to a taxpayer in the history of Nigerian tax system was in the Report of Prof. Dotun Philips. According to Philips[6], "Taxpayers are the single most important group of stakeholders in the tax system. They are the bedrock of the tax system and the source of all revenue generated by tax authorities." Whilst presenting his Report on the topic "TAXATION IS A BUSINESS and the TAXPAYER IS KING", Philips remarked as follows:

"Throughout our work, the Study Group held the basic view that in any successful tax system, the taxpayer is king, much like the customer is king in any successful business "[7].

3.3 NATIONAL TAX POLICY

The Revised National Tax Policy[8] specifically states that one of the guiding principles of Nigerian taxation shall be Low Compliance Cost and the financial and economic cost of compliance to the taxpayer should be kept to the barest minimum. Furthermore,

[6] Chairman of the Study Group on the Nigerian Tax System (2002)
[7] pg 348 of *Nigerian Tax Reform in 2003 and Beyond*
[8] Chapter 2, Paragraph 2.1Revised National Tax Policy(2017)f

the Policy provides that the Federal and State Tax authorities should respond promptly to the changing business environment as it affects tax administration and develops a workable framework to meet the taxpayer demands in this respect.

3.4 JOINT TAX BOARD FOCUS ON TAXPAYERS

Taxpayers should take advantage of the incentives contained in the Voluntary Assets and Income Declaration Scheme (VAIDS) recently launched by the Government and called on taxpayers to declare their assets and income for tax assessment. Administration of VAIDS should be vigorously pursued in full collaboration between the taxpayers and tax authorities so as to reap the benefit of the scheme to the nation.

3.5. MISSION STATEMENT OF OGUN STATE INTERNAL REVENUE SERVICE

To help taxpayers to discharge their tax obligations by providing efficient top quality service and applying the tax laws with integrity and fairness to all.

3.6 FEDERAL INLAND REVENUE SERVICE (FIRS)

Numerous Information Circulars and Guidelines to assist Taxpayers

3.7 LAGOS STATE INTERNAL REVENUE SERVICE (LIRS)

Since August 2017, the LIRS has issued eleven (11) Public Notices in various national newspapers aimed at providing clarity to taxpayers on LIRS' interpretations of provisions of the Personal Income Tax Act, as amended (PITA) on specific issues and the level of tax compliance required of every employer and employee in Lagos State. The notices issued by LIRS are intended to provide clarity to **taxpayers** on the seeming ambiguities in the tax **laws** and consequently increase their earnings potential from PIT. The notices also impose additional compliance requirements on taxpayers. The Notices issued include Valuation of accommodation provided by employers, what constitutes reasonable removal expenses and Exemption of compensation for loss of employment.

3.8 CATEGORIZATION OF TAXPAYERS

Taxpayers can be classified into two major categories

(a) individual and
(b) Companies/corporation.

INDIVIDUAL

Individual taxpayers can be classified as either a citizen or an alien (an alien is a person who resides within the borders of a country and is not a national of that country). A citizen can further be classified as either a resident citizen or a non-resident citizen.

COMPANIES/CORPORATIONS

Corporations can be classified into

(a) Domestic,

(b) Foreign.

A foreign company is either resident foreign or non-resident foreign corporation. A resident foreign company is a foreign corporation engaged in trade or business in the country. A non-resident foreign corporation is a foreign corporation not engaged in trade or business within the country but deriving income from sources in the country. The classification depends on the given country and may vary.

3.8.1 As Per Attitude

Taxpayers can be categorized based on their attitude toward compliance as such:

Will pay taxpayers:

Taxpayers who pay voluntarily and do not need to be compelled.

Will not pay taxpayers:

Taxpayers who are unwilling to pay no matter how hard the Tax Authorities attempt to elicit compliance from them[9].

[9] Festinger, L. (1957). ***A Theory of Cognitive Dissonance.*** New York: Harper & Row.

Cannot pay taxpayers:

Taxpayers that do not have the ability to pay. They lack the ability to pay regardless of their level of willingness to comply.

3.8.2 As Per Size

(a) Large Taxpayers

(b) Medium Taxpayers (Newly Introduced In Firs)

(c) Small Companies

In Nigeria, Small companies are those companies having an annual turnover of one

million naira (N1, 000,000.00) or less and are taxed at 20% of total profit for the first five years of commencement of business. A lower rate of tax of 20% is payable by the small companies in the preferred sector of the Nigerian economy for the first 5 years of commencement of business. Dividends received from small companies in the manufacturing sector are excluded from tax in the first five years of their operation.

3.9 TYPES OF TAXPAYERS

There are four types of taxpayers:[10]

(i) Social Taxpayer: They are taxpayers influenced by social norms. They feel guilty when they under-report and escape detection and feel ashamed when they under-report and get caught. Also, they are very sensitive to peoples' beliefs, especially those close to them. They react emotionally and strongly to perceived changes around them. If they perceive that others pay taxes, they tend to pay too. On the other hand, a reduction in others' contribution reduces their willingness to pay.

(ii) Intrinsic Taxpayer: The motivation of the "Intrinsic Taxpayer" includes among others, the feeling of obligation, which motivates a person without being forced. They are sensitive to institutional factors. For example, the behaviour of government or tax administrations. Positive actions by the government are intended to increase taxpayer's

[10] Gangl, K., Hofmann, E. & Kirchler, E. (2015). Tax authorities' interaction with taxpayers

positive attitudes and commitment to the tax system, tax payment and thus compliant behaviour.

(iii) Tax Evader: At the other extreme, are the "Tax Evaders". They have low tax morale or no tax morale. They always compare the expected value of evading taxes with the value of being honest.

4.0 TAXES YOU ARE LIABLE TO PAY

- Personal income tax in respect of

(i) Pay-As-You-Earn (PAYE) and

(ii) Direct Taxation (Self-assessment).

- Withholding Tax(individual only)
- Capital Gains Tax(individual only)
- Stamp duties on instrument executed by individuals
- Pool betting and lotteries, gaming and casino taxes.
- Road taxes
- Hotel occupancy and restaurant consumption tax
- Development levy (individual only) not more than N100 per annum on all taxable individuals.
- VAT(On consumption)

4.1 TAXES AND LEVIES COLLECTIBLE IN KANO STATE

- Taxes from employment (through the **Pay** As You Earn)
- Direct Assessment;
- Withholding **Tax**;
- Stamp Duties;
- Capital Gains **Tax,**
- Motor Vehicle Registration Fees,
- Driver License fees,
- Motor Vehicle license; Proof of Ownership fees, Learners' Permit fees, and fees for Vehicle number plates.

The Kano State government in 2017 introduced a 5% consumption tax payable on the consumption of goods and services in any hotel, restaurant, eatery, bakery, takeaway, suya spot, shopping mall, store, event centre etc.

4.2 TAXES AND LEVIES COLLECTIBLE IN LAGOS STATE

- Personal Income Tax,
- Withholding Tax(Individuals only),
- Capital Gains Tax (Individuals only) and
- Stamp Duties on instruments executed by Individuals.
- Pools Betting and Lotteries, gaming and casino taxes,
- Road Taxes,
- Business premises registration fee;
- Development Levy (Individuals only),
- Naming of Streets registration in the State Capital,
- Right of Occupancy fees on lands owned by the State Government in urban areas of the State. Market taxes and levies where the State Finance is involved and
- Hotel Occupancy and Restaurant Consumption Tax.

5.0 EMERGING TREND: TAXPAYERS' RIGHTS AND CHARTERS, AND SERVICE DELIVERY STANDARDS

A global emerging trend in revenue tax administration in recent times has been an increasing recognition that taxpayers have '**rights'**, as well as '**obligations'**', that should be respected in the way revenue authorities go about their activities. In a number of countries (e.g. Netherlands and Russia), these rights have been codified in tax laws, while in others (e.g. Australia, Ireland, New Zealand, Singapore, and South Africa) they have been elaborated in administrative documents, sometimes referred to as '**taxpayers' or 'service' charters.**

5.1 BASIC RIGHTS ATTRIBUTABLE TO TAXPAYERS

To demonstrate empathy by RAs to taxpayers, the OECD in 1990 following a survey of all its member states published a Briefing Paper on Taxpayers Rights and Duties and

identified the following that is considered to be the basic rights attributable to taxpayers, which were found to be present in all of the OECD tax systems:[11]

- The right to be informed, assisted and heard;
- The right to appeal;
- The right to pay no more than the correct amount of tax;
- The right to certainty;
- The right to privacy; and
- The right to confidentiality and secrecy.

A survey of practices of revenue authorities in OECD member countries in 2004 found that around two-thirds of Revenue Authorities had formal statements (e.g. charters) specifying taxpayers rights and/or the services they could expect.

6.0 TAXPAYERS' SERVICE IN NIGERIA

6.1 FEDERAL INLAND REVENUE SERVICE

In April 2011 the FIRS created the Taxpayer Service Department (TPSD) in a bid to become more taxpayer- focused, to enhance voluntary compliance, which is a prerequisite for the established Self-Assessment Regime.

6.1.1 TAXPAYERS SERVICE POLICIES, PROCESSES AND PROGRAMMES DEPARTMENT (TSPPPD[12])

FIRS created the TSPPD at the headquarters to ensure the effective delivery of service to taxpayers. Its main objective was to put in place and entrench relevant policies, processes and programmes that engender effective and efficient taxpayer service as an integral part of tax administration within the Service. The key responsibilities of the Department are: [11] [12]

[11] TEJUTAX, Reference Book on Nigerian Tax System, Volume 2
[12] Paragraph 2.2 of FIRS Handbook on the Implementation of Self-Assessment Tax Regime in Nigeria (First Edition, September, 2011)

- Develop policies, oversee and evaluate the provision of taxpayer service in the field offices.
- Develop and monitor the implementation of taxpayer charter.
- Identify taxpayer service needs in collaboration with the Tax Operations Group (TOG) and develop strategies to ensure that the needs are met.
- Ensure effective engagement with stakeholders such as trade associations/taxpayer groups/professional groups etc., in collaboration with the Tax Operations Group (TOG), for the purpose of gathering feedback and widening the tax base.
- Develop taxpayers' education programmes for implementation by Taxpayer Service Units.
- Develop modes of providing assistance to taxpayers through call centre, telephone facilities and other electronic means.
- Develop the content of taxpayer' guides on tax matters for use by taxpayers thereby proactively filing the gaps in tax information.
- Accumulate and disseminate frequently asked questions and answers.
- Set and monitor the effective implementation of standards in taxpayer service and ensure that remedial measures are put in place with regards to observed gaps and deviations from the standard set.
- Creation of the Office of the National Taxpayer Advocacy
- Tax Matters Radio programme: It is a taxpayer education and enlightenment programme, which guides taxpayers on their tax/civic obligations. It is broadcast on 56 stations nationwide in English, Yoruba, Hausa, Igbo and Pidgin languages.

6.1.2 TAXPAYER ASSISTANCE IN NIGERIA[13]

A Taxpayer may require any of the following services from a Tax Office:

- Issuance of TIN and relevant educational and informational materials;

- Ensure the prompt issuance of Tax Clearance Certificate;
- Provide guidance/explanatory notes for the completion of tax forms;
- Familiarize the taxpayer with his/her rights;

[13] FIRS-Handbook on the Implementation of Self-Assessment Tax Regime in Nigeria, September, 2011, (paragraph 2.4)

- Respond to taxpayers questions on the tax law and other administrative procedures;
- Operate a nationwide telephone answering system for taxpayer's questions.
- Operate a robust web site where taxpayers may obtain information on various topics and download tax forms, instructions, and other explanatory publications;
- Increase the range of electronic services offered;
- Consult widely with taxpayers and /or their representatives prior to the implementation of changes; and
- Design products more from the taxpayers' perspective

6.1.3 ILLEGAL ASSISTANCE TO TAXPAYERS

- Certain assistance to taxpayers by officers is condemnable and therefore uncalled for. Such illegal assistance includes using inside knowledge to the advantage of taxpayers and to the disadvantage of the Revenue Service divulging tax information or secret, rendering of professional service/advice to taxpayer by tax officers for monetary or other rewards.

6.2 KNOW YOUR RIGHTS AND OBLIGATIONS UNDER THE NIGERIAN TAX LAW[14]

It is your right to:

- Be given a taxpayer identification number (TIN), free of charge immediately on request, failing which reason will be provided
- Object to a disputed tax assessment as specified by tax laws
- Appeal against a notice of refusal to amend an assessment as specified by tax laws
- Be issued a tax clearance certificate (TCC), or denial within two (2) weeks of your application, free of charge
- Be sure of the identity of any person claiming to be an official of the Rivers State Board of Internal Revenue (RSBIR)

It is our duty to:

- Educate you on how to comply with the tax laws and procedures

[14] Available at https://www.riversbirs.gov.ng/taxpayer-obligations/ (Accessed on 4/2/18)

Provide you with accurate and up to date information

- Provide you with prompt professional guidance and impartial treatment
- Provide you with a timely response to your enquiries and complaints
- Treat your tax affairs with confidentiality within the ambit of the law

It is your obligation to:

- Register as a taxpayer and obtain a taxpayer identification number (TIN)
- Assess yourself to tax
- Make full voluntary disclosure of your income earned within and outside Nigeria
- Declare and pay in full taxes on or before the due dates, through approved collecting banks, into approved government accounts, and obtain e-tickets
- File returns to taxes on or before the due dates as specified in the tax laws
- Keep accounting books and records of your business
- Cooperate with any authorized officer of the RSBIR while on official business.

7.0 EXCERPTS FROM 2015 TOWARDS GREATER FAIRNESS IN TAXATION - A MODEL TAXPAYER CHARTER[15]

This is a product of The Asia-Oceania Tax Consultants' Association (AOTCA[16]), The Confederation Fiscale Europeenne (CFE)[17], The Society of Trust and Estate Practitioners (STEP[18]) and West African Union of Tax Institutes (WAUTI).

[15] Available at http://www.taxpayercharter.com (Accessed 23rd July, 2019)
[16] AOTCA was founded in 1992 by 10 tax professionals' bodies located in the Asian and Oceanic regions. It has expanded to embrace 20 leading organizations from 16 countries/regions with 330,000 individual members. More information on www.aotca.org
[17] It was founded in 1959 as the umbrella organization representing the tax profession in Europe. CFE's members are 27 professional organizations from 21 European countries with more than 200,000 individual members. More information on www.cfe-eutax.org
[18] STEP is the worldwide professional association for those advising families across generations. STEP members help families plan for their futures: from drafting a will or advising family businesses, to helping international families and protecting vulnerable family members. STEP has over 20,000 members across 95 countries. They include lawyers, accountants and other trust and estate specialists. More information on www.step.org

7.1 BACKGROUND

The OECD issued its report "**Taxpayers' Rights and Obligations**: A Survey of the Legal Situation in OECD Countries" in 1990.

The report outlined the Taxpayer Charters adopted in OECD member states, and it also indicated guidelines as to the desirable international model of Taxpayer Charters. Currently, many states in the world have introduced Taxpayer Charters in the forms of law or administrative statement. Under these circumstances, AOTCA, CFE and STEP agreed to start a joint project on Taxpayer Charters with the objective of collecting information on the current status of Taxpayer Charters in the countries/regions which the respective organizations cover. WAUTI was invited to join later.

The Preliminary Report of this project was issued in May 2013 and proposed a **Model Taxpayer Charter** based on careful and thorough studies including the result of a survey collected from 37 countries/regions. This report was circulated widely to tax authorities, international organizations such as the OECD, EU and UN, and tax professionals' organizations around the world including WAUTI. The Final Report of the Model Taxpayer Charter was compiled based on these collected opinions and suggestions.

Considering the balance of taxpayers' **rights and obligations**, it proposes 20 principles for the Charter. These principles are the basis for the more detailed provisions of the Charter which follow. The ultimate purpose of the Taxpayer Charter is that there must also be a clear **balance between taxpayer obligations and taxpayer rights.**

7.2 KEY PROVISIONS IN THE CHARTER

• ARTICLE 1. INTRODUCTION AND PURPOSE

1. This Charter sets out the rights of a Taxpayer in connection with Tax levied by the State and the obligations of a Taxpayer to the State.

2. This Charter recognizes the sovereignty of the State to levy Tax in accordance with its laws and to administer and enforce such laws.

3. The **rights of a Taxpayer under this Charter and the obligations of a Taxpayer** are to be taken together with each given appropriate weight such that one does not override the other.

4. The overriding purposes of this Charter are to foster a relationship of mutual trust, respect and responsibilities of Taxpayers for their obligations to the State, and on behalf of the State as to the rights of Taxpayers, to codify the behaviour and duties of the Tax Administration, and through these means to reduce the costs of compliance, increase voluntary compliance, and **ensure that all Taxpayers are treated fairly, equally and without bias or preference.**

• ARTICLE 4. FUNDAMENTAL PRINCIPLES

Rights: As a Taxpayer, you have the right to:

(I) FIRST RIGHT: INTEGRITY AND EQUALITY

The Tax system shall be designed and administered fairly, honestly and with integrity, according to the law, without bias or preference.

Responsibility: Be truthful in all Tax matters including legally required disclosures.

(II) SECOND RIGHT: CERTAINTY

The Tax system will be designed and administered to provide as far possible certainty, clarity and finality in one's Tax affairs.

Responsibility: Provide information on a timely basis as and when reasonably required.

(III) THIRD RIGHT: EFFICIENCY AND EFFECTIVENESS

The Tax system will be designed and administered fairly and cost-effectively taking into account the attainment of its purposes.

Responsibility: Be cooperative in dealings with the Tax Administration, filing Tax returns and information reporting, the conduct of an audit, and payment of Taxes.

(IV) FOURTH RIGHT: APPEAL AND THE RIGHT TO DISPUTE RESOLUTION

In cases of disputes as to Tax liability an independent, objective, speedy and cost **Responsibility**: Pay Tax on time without deduction or offset subject to the right to appeal. Maintain accurate financial records and supporting information for such period as may be reasonably required.

(V) FIFTH RIGHT: APPROPRIATE ASSISTANCE

Taxpayers who face difficulties in carrying out their responsibilities as Taxpayers will be given appropriate assistance by the Tax Administration.

Responsibility: Comply with the law

(VI) SIXTH RIGHT: CONFIDENTIALITY AND PRIVACY

Responsibility: A Taxpayer's affairs and records will be kept confidential and private except in the case of public hearings in litigation or criminal prosecutions.

(VII) SEVENTH RIGHT: PAY CORRECT AMOUNT OF TAX

A Taxpayer is required to pay no more than the amount of Tax based on Tax laws.
Responsibility: Exercise an appropriate degree of care and diligence in taxation matters.

(VIII) EIGHT RIGHT: REPRESENTATION

A Taxpayer may be represented by a person of the Taxpayer's choosing. Be held accountable for the correctness and completeness of the information supplied to the Tax Administration whether or not another person has been engaged to prepare, assemble and/or submit the information on your behalf

Responsibility: Retain responsibility for advisors

(IX) NINTH RIGHT: PROPORTIONALITY

Enforcement action including audits, collections, reassessment, penalties and prosecutions will be proportionate to the circumstances.

Responsibility: Treat Tax Officers with courtesy and respect, noting that abuse of Tax Officers in the performance of their duties is never acceptable.

(X) TENTH RIGHT: HONESTY

Ensure that all legitimate cross border compliance requirements are met. Comply cross border In the absence of any evidence to the contrary to be presumed honest.

- **ARTICLE 14: PRIVACY AND CONFIDENTIALITY**

1. The Tax affairs of a Taxpayer shall be confidential and private and shall not be disclosed other than to the Tax Officers who are charged with handling the affairs of the Taxpayer.

2. The affairs of the Taxpayer shall not be assigned to Tax Officers who have a connection to the Taxpayer or are specifically known to them, outside of their dealings as a representative of the Tax Administration. Towards greater fairness in taxation - A Model Taxpayer Charter 12

- **ARTICLE 17: TAX LEGISLATION**

1. Tax legislation shall be **written in clear and unambiguous language** such that a Taxpayer without specialized professional knowledge shall be able to understand the general provisions of the Tax law with reasonable time, effort and study except for areas that would reasonably require specialized knowledge.

2. Legislation shall be introduced only through the due process of law, and **shall not be effective until the legislation is enacted into law** but may apply from the date of announcement if substantially unaltered.

3. Where Tax legislation makes reference to other laws, those laws shall be referred to in the Tax legislation with sufficient particulars to enable an understanding of their general content and not merely incorporated by cross-reference.

4. **Provisions of Tax law which are no longer of relevance shall be removed** from the Tax legislation.

- **ARTICLE 18: RETROACTIVITY OF LEGISLATION**

1. Legislation shall not be retrospective unless it is relieving in nature.

- **ARTICLE 19: DOUBLE TAXATION AND RELIEF**

1. Legislation shall provide for relief of double taxation, through an exemption or Tax credit mechanism or as may be suitable in the circumstances.

- **ARTICLE 21: VOLUNTARY DISCLOSURE**

1. A confidential process shall exist whereby a Taxpayer **may come forward voluntarily to a Tax Officer to correct deficiencies in past Tax Filings, whether the deficiencies were willful and deliberate evasion, done in circumstances amounting to gross negligence, negligence, or carelessness or through inadvertence or otherwise.**

2. Where a Taxpayer comes forward with voluntary disclosure, **it must be complete in all** material respects failing which it shall be invalid.

3. Under **a voluntary disclosure, penalties may be reduced or waived**.

4. Reasonable deadlines may be imposed by the State in respect of a voluntary disclosure such that the process is **completed within a reasonable period of time.**

- **ARTICLE 22: LEGISLATIVE PROCESS AND CONSULTATION**

1. The legislative process for taxation shall provide for the opportunity for interested and affected parties and subject matter experts to provide comment prior to the passage of Tax legislation.

• **ARTICLE 23: TAX LEVIED ONLY BY VIRTUE OF LAW**

1. Tax shall be levied only by virtue of law.

• **ARTICLE 24: EQUALITY OF TAXPAYERS**

1. All Taxpayers shall be equal before the law. Towards greater fairness in taxation - A Model Taxpayer Charter 16

• **ARTICLE 30: TAX AVOIDANCE**

1. Tax avoidance legislation **shall be drafted with sufficient clarity** that its scope can be readily understood and discretion shall not be granted to Tax Officers beyond the specific words of the Tax avoidance legislation.

• **ARTICLE 31: TAX EVASION AND DISHONESTY**

1. Tax evasion being dishonesty is never acceptable and will be subject to penalties and possible prosecution.

• **ARTICLE 32. CORRUPTION**

1. Systems, checks and balances, **supervision and oversight** will be in place to prevent corruption in the Tax system including bribery and intimidation with a suitable whistle-blower mechanism as an additional prevention and detection methodology

2. The Tax system **shall not be used for targeting political opponents** or their organizations.

3. Information obtained in a criminal manner shall not be used by a Tax Authority.

8.0 RECOMMENDATIONS

GOAL: TO IMPROVE RELATIONSHIP BETWEEN THE TAX OFFICE AND THE TAXPAYER-

• The taxpayer is the “centrepiece” and is to be treated well;

- The tax administrator is treated well,
- Government invests adequately in its revenue system;
- Government spends taxpayers' money well;
- Tax Laws, to be clear and unambiguous in language.
- Letters should be direct and concise
- Queries should not be too verbose. Simple direct queries that will generate additional revenue should be encouraged.
- Be polite on the phone, Tax education is very key and maintain Help desk.

9.0 CONCLUSION

A good tax system must have the support of its taxpayers and the tax Advisors who assist them. Without this support, widespread voluntary compliance is hard to achieve. To get this support, a balance is needed between Taxpayer Rights and Taxpayer Responsibilities as observed by Michael Cadesky, Ian Hayes and David Russel[19] in their joint project on Taxpayers' rights.,

On this note, I recommend a blend of the Singapore and the OECD Model for the Nigerian Tax Authorities to emulate.

[19] Michael Cadesky, Ian Hayes, David Russel. "Towards Greater Fairness in Taxation: A Model Taxpayer Charter"

ECONOMIC IMPLICATIONS OF THE PROPOSED INCREMENT IN VALUE ADDED TAX IN RELATION TO THE NEW MINIMUM WAGE

BELLO AMUDATOLUWATOSIN&ATOKI AYOMIDE ISRAEL

1.0 INTRODUCTION

Taxation is one of the most vital sources of revenue to the government of any country. Taxation is a method of fund raising employed by the government to increase revenue and meet fiscal obligations. Tax is not just an obligation the citizenry can choose to perform or not, it is compulsory on all taxable persons and organisations and there are strict mechanisms to ensure compliance.[*] [1]

Tax is imposed by government authority on people and organizations within a particular territory and is seen as a compulsory payment imposed by various tiers of government on individuals and corporate organizations. Although it is important that the government accounts for how taxes are spent and on what specific projects they are dissipated on, there is no guarantee of absolute disclosure between taxpayers and the government. That is, even though the government is duty-bound to give an account of how tax payment is spent, the governments need not explain to a payer how his/her

* Bello Amudatoluwatosin, An associate at Yusuf O. Ali & Co, a firm well known for its prowess in litigation. A graduate of the University of Lagos and the Nigerian law school in 2017 and 2018 respectively with interest in corporate law, taxation, intellectual property and ADR. PHONE NO: 07030867304 EMAIL: bello.amudalatoluwatosyn1@gmail.com

Atoki Ayomide Israel, an associate at Yusuf O. Ali & co, a firm well known for its prowess in litigation. A graduate of the University of Ibadan and the Nigerian law school in 2016 and 2018 respectively, with a proclivity for business law and taxation. PHONE NO: 08166643760 EMAIL: atokiavomiderael@vahoo.com

[1] Tax is a compulsory payment as Section 24(f) of the Constitution of the Federal Republic of Nigerian 1999 (as amended) provides that 'it shall be the duty of every citizen to declare his income honestly to the appropriate and lawful agencies and pay his tax promptly".

own particular payment will be utilized. Adam Smith in his book the 'Wealth of Nations' propounded four canons of taxation and they are: (i) subject of every state are to contribute towards the support of the government in accordance with the proportion of their ability; (ii) tax must be certain and devoid of arbitrariness; (iii) tax levied should be convenient for the payer to pay; and (iv) tax administration must be efficient. This initial canon was extended into sixteen modern principles of taxation by Lambert (1992).[2]

Taxation is extremely important as it helps the government finance its activities and keeps the country in motion. However, it is sad that in Nigeria today, many taxable persons and organisations evade and avoid taxes. This debt file of the nation is also on an all-time increase, and this has been having detrimental effects on the economy and in turn, the citizenry.

In another breath, Minimum wage is the basic amount a worker is entitled to as payment for work done per month. The standard of living of a country is usually measured by the minimum wage. It is no news in Nigeria today that the proposed increment in the minimum wage from #18,000 to #30,000 has been assented to by the President although it has not come into effect due to certain mechanisms being put in place to ensure its kick-off. There have been calls from different quarters of the country toeffect the new minimum wage. However, the Minister for Labour and Employment has assured Nigerians that arrears would be paid after the new minimum wage comes into operation bearing in mind the day the President assented to it.

Some factions of the society mainly composed of elites and economic analysts have expressed concerns about the funding of the new minimum wage considering the inability of the current tax system to shoulder this responsibility and as well the huge

[2]UmeoraChinweobo Emmanuel, ***The Effects of Value Added Tax (VA.T) on the Economic Growth of Nigeria,*** Journal of Economics and Sustainable Development, ISSN 2222-1700 (Paper) ISSN 222-2855 (Online) Vol.4, No.6, 2013, page 7.

debt profile of the country. Fears are being expressed that the government might increase Value Added Tax to fund this new minimum wage.

2. VALUE ADDED TAX

Value Added Tax (VAT), also known as Consumption tax is a type of indirect tax in Nigeria which is levied on all provisions of goods and services at each stage of manufacture or distribution except those exempted. This tax is borne by the end-user/consumers of the goods and services. VAT was introduced and adopted in Nigeria in the year 1993 and is currently at a flat rate of 5%.

Value Added Tax is a tax on the supply of goods and services which is eventually borne by the final consumer but collected at each stage of production and distribution chain. As earlier stated VAT is an indirect tax, which makes it not prone to evasion as is common to other types of tax in Nigeria. It is the end-user of a product/good or service that bear the cost of tax. However, the producers/manufacturers are the ones taxable under the VAT legal regime. The manufacturers of products pay VAT through the amount garnered from the sale of their commodities. The producer charges VAT as part of the price for the commodity and in turn, remits it to the government.

It must be pointed out that if the purchaser is not the end-user of the goods and service, but such goods and services are costs to its business, the tax paid will be deducted by the seller from the tax it charges its consumers. VAT is paid on the gross margin of each transaction, by each participant in the sales chain. The cost of collection of VAT is borne by business organisations or individuals but never the State as is the case with other types of tax. Thus, VAT is assessed and collected on the value of goods or services that have been provided every time there is a sale/purchase.

VAT was introduced into Nigeria by Decree 102 of 1993 and became operative in the year 1994. The Act was consolidated in Value Added Tax Act and after the consolidation exercise in 2004, the VAT Act was amended by the Value Added Tax (Amendments) Act 2007. The adoption of VAT as a form of tax in Nigeria has

contributed significantly to the economic growth of the country despite the argument that the incidence of VAT like other indirect taxes is regressive. The reason for the assertion is due to the fact that poor people spend a large portion of their income on purchases (on which VAT is levied). Regardless of these criticisms, VAT has continued to contribute largely to the total revenue of the country. In Nigeria today, VAT is placed at 5% of the value of all taxable goods and services. The attempt by the Federal Government to increase VAT rate in 2010 was unachievable due to the social, economic and political environment of the country bearing in mind also the rate at which inflation in the country has been an albatross to the economy.

The taxable persons also are known as 'registered persons' are the business organizations and individuals in the chain of production. These registered persons are the ones who collect VAT, having been registered with the Federal Inland Revenue Service for VAT collection within 6 months of the commencement of business. Taxable persons are then obliged to remit the VAT collected to government authority, which is the Federal Inland Revenue Service and must keep a record of all transactions, operations, import and other activities relating to taxable goods and services. The registered person pays the 5% VAT on goods and services purchased (which is the input tax) but claims credit for the tax when same goods and services are sold (called the output tax). It must be noted that before a registered person can claim a credit for input VAT, he or she must hold a 'Tax Invoice' which is similar to the conventional sales and purchases invoice except that it has VAT registration number and VAT payment at the prescribed rate.

VAT is collected on all types of goods and services except those goods and services listed in the Schedule to the Act that have been exempted.[3] VAT although is a multiple-

[3] See section 3 and Part I and II to the Value Added Tax (Amendment) Act, 2007. The goods exempted in Part I of to the Act are: all medical and pharmaceutical products; basic food items; books and educational material; baby products; locally produced fertilizer, agricultural and veterinary, medicine, farming machinery and farming transportation equipment; all exported goods; plant and machinery imported for use in the Export Processing Zone; Plant machinery and equipment purchased for utilization of gas in downstream petroleum operations; tractors, ploughs,

stage tax, it only has a single effect and does not add more than the specified rate to the consumer price no matter the number of stages at which the tax is paid.[4] The general economic inference that can be drawn from our discourse on VAT is the fact that it is paid by consumers of goods and services and not the producers of those goods and services.

Over the years, there have been attempts to increase the rate of Value Added Tax. The first attempt was to raise it to 10%, however, this was met with stiff resistance from the Nigerian Labour Congress (NLC) and members of the public and the second attempt was in form of a proposal to increase the rate after the passage of the new #30,000 minimum wage into law. This proposal too has been met with a lot of mixed reactions from the general public as the utilitarian purpose of the increase in minimum wage would be defeated if the common man is still made to bear the eventual burden by increment in prices of goods and services.

The outcry for the approved #30,000 new National minimum wage started in 2017 from the agitations and advocacy of the Nigeria Labour Congress and trade unions for a raise in the minimum wage of workers which at that time stood at eighteen thousand naira. The advocacy was due to many reasons but particularly the over-due review (which was supposed to be carried out once in every five years and the last wage review was done in 2011). The 2011 increment was bedevilled by inflation to the inconvenience of the people.

The National Minimum Wage Bill was approved by the Senate on 19th March 2019 after nearly 8 years of no-increase and assented to by President Muhammadu Buhari

agricultural equipment and implements purchased for agricultural purposes. While the services exempted in Part II are: medical services, services rendered by community banks, People's Bank and Mortgage Institutions; Plays and performance conducted by educational institution as part of learning; and all exported services.

[4]Ashabi Vincent "What You Need to Know about Value Added Tax (VAT) in Nigeria" available at https://nairametrics.com/2014/09/11/what-vou-need-to-know-about-value-added-tax-vat-in-nigeria/ (assessed on 21 May 2019).

on 18th April 2019 to become an Act of the National Assembly, thereby repealing the old Act.

Thus, with the implementation of the new minimum wage comes the proposal by the Federal Government to increase Value Added Tax (VAT) by 50% that is from 5% flat rate to 7.5%. This proposed increment is a measure to fund and implement the new minimum wage per month which is apposite. In light of the current economic realities in Nigeria, there is actually nowhere the government can raise revenue to cater for the percentage of the increment in the new minimum wage considering the fact that the available revenue isn't even enough to cater for the annual budget, despite the debts acquired from foreign loans.

This proposed increase by the government has been met with mixed reactions from the public, as there are those who believe the increase in VAT will mount inflationary pressure on the country's economy and others with the view that the increase is the best way to fund the implementation of the new minimum wage. In light of the foregoing, this work mirror, the economic implications, the country will face if Value Added Tax is increased to cater for the percentage of increase in the minimum wage.

Practically speaking, it is very probable that VAT will be increased to fund and implement the new minimum wage. What utilitarian purpose then will the new minimum wage serve if prices of commodities increase in an attempt to fund the project, bearing in mind that it is those to be paid that will still purchase goods and services at inflated rates.

3. THE ECONOMIC IMPLICATIONS

Prior to the assent of the president on the new minimum wage, the Minister for Budget and National Planning, Udoma Udo Udoma and the Executive Chairman of the FIRS, Babatunde Fowler, both made the intention of the Federal Government to increase the VAT rate by 50%, that is from the current 5% flat rate to 7.5% by the end of 2019 so as to enable the government fund and implement the new minimum wage of #30,000

per month known to the general public. The FIRS subsequently clarified that the intention is to increase the compliance rate and not the tax rate.[5] However, there are still guesses and premonitions that VAT will be increased.

It is therefore logical the increase in the minimum wage this year, will also require the government to expand its already strained finances to be able to fund the new wage. This was the case in 2011 when the minimum wage was increased from #7,500 to #18,000 and the federal government's personal cost also rose by 18.5% to N1.85 trillion. It is therefore logical the increase in the minimum wage this year too will also require the government to expand its already strained finances to be able to fund the new wage. Borrowing to settle its personnel costs may leave the country in higher debt profiles and as such, borrowing is not an option.

Thus, even though an increase in the minimum wage is plausible and long overdue, the government will be required to increase the revenue available to fund the new minimum wage. The increasing VAT will defeat the aim of the new minimum wage which is to increase the standard of living of the common man and expose the masses to better financial capability. Speaking from a social and humanitarian viewpoint, it would be morally unjust to tax the unemployed indigents who form a larger percentage of the population and get funds from menial and uneasy tasks to fund the employed. This is not to say the employer does not purchase goods and services too. An increase in VAT is gradually becoming inevitable if at all the increased minimum wage will see the light of day. The economic implications the increase in VAT will have on the country, are as follows:

[5]Taiwo Oyedele, "The Implications of FGN's Increase of VAT Rate to Pay For Minimum Wage", available at <https://www.proshareng.com/news/Taxes%20&%20Tariffs/Implications-Of-FGN%E2%80%99s-Increase-Of-VAT-Rate-To-Pay-For-The-New-Minimum-Wage/44498(assessed on 21 May 2019).

1. INFLATIONARY PRESSURE

Inflation is the rate at which the general level of prices for goods and services is rising and, consequently, the purchasing power of currency is falling.

In practice, businesses are forced to raise prices when there is an increase in the minimum wage in an attempt to maximize profit margin and revenue. This ultimately puts cost-push inflationary pressures on the economy. An increase in VAT would translate to an increase in prices of goods and services which will obviously be to the disadvantage of the common man. Ideal businesses practice this theory. A strategic attempt to absorb an increase in VAT costs will cause producers to transfer the cost of wage increase to product prices, which are eventually borne by consumers in form of higher prices. It will eventually mean the increase in the minimum wage would be used to purchase goods and services at higher prices and this drags us down to the current situation we currently are. The percentage increase in Minimum wage would have served no significant purpose.

In 2003, when the government reviewed a wage increase, prices of goods and services rose, and inflation rate rose from about 10.5% to as high as 24%.[6] A similar wage-increase in 2011 saw the inflation rate remain at double-digit for two years thereafter, according to data from the CBN.

The net effect of inflation is that it serves to transfer money from savers and investors to debtors. It punishes those who postponed their enjoyment and invested in building roads, schools, factories, and businesses and gives their reward to those who are in debt. Some would argue it is a moral injustice, mostly caused by governments printing money to cover expenses that cannot be paid out of the general treasury revenue.

Inflation in prices of commodities will lead to a decrease in the purchasing power of currency due to a rise in prices across the economy.[7]

[6] http://statistics.cbn.gov.ng/cbn-onlinestats/queryresultwizard.aspx (assessed on 21 May 2019).

[7] http://www.investopedia.com/terms/p/purchasingpower.asp

If implemented, the 2019 wage increase may cause inflation rate to extensively exceed the CBN's 12% projection.[8] This will progressively erode purchasing power and render void the value of the new minimum wage in the long term. By then, agitations for another wage raise may come into effect, yet again simply because the amount being earned cannot cater for the needs of consumers since prices of commodities would have hiked.

2. JOB LOSSES

Another adverse effect the increase in minimum wage might have on the economy is the loss of jobs. Since employers of Labour now have to pay an increased salary, some workers might be laid off in an attempt to reduce the salary scale.

According to the World Bank, empirical evidence suggests that employment effects of a rise in the minimum wage are often significant and negative, particularly in a largely informal Labour market like Nigeria. By reorganizing internal human resource structure, businesses that lack the capacity to keep up with an increase in overhead costs may take drastic measures such as retrenching workers and downsizing Labour time in an attempt to save cost.

The resultant effect of a drastic loss in jobs and lay-offs is an unprecedented increase in the rate of unemployment and underemployment. A survey by the NBS showed that between 2011 when there was a rise in minimum wage and 2012, about 1.43 million people who were fully employed or underemployed lost their jobs. Although there was an increase in the Labour force population, the total number of unemployed persons rose by 82.5% to 7.3 million. It is very likely that the implementation of the 2019 approved minimum wage may project a similar trend given past occurrences and considering the fact that no employer of Labour would want to spend all financial resources paying salaries.

[8]Channels Television "CBN Projects 12% Rise In Inflation" http://www.channelstv.com/2019/03/22/cbn-proiects-12-rise-in-inflation/ (assessed on 21 May 2019).

The increase in minimum wage would definitely lead to a lot of people being unemployed or underemployed and this would be a bad one for the economy since the unemployed lot might still be affected by an increase in prices of goods and commodities if VAT is increased.

3. HOARDING OF GOODS

It is common in the Nigerian market that when there is a threatened increase in the prices of goods and services, sellers would hurriedly acquire those goods in large quantities, hoard them and eventually sell at prevailing market prices when the price increase becomes an eventuality. An increase in VAT to cater for the percentage increase in minimum wage will obviously lead to a hike in prices of goods and services which will be borne by end consumers. Sellers of these commodities, having this premonition will purchase goods now that prices are low in order to sell at higher costs later. This will work extreme hardship on consumers as sellers will rake gross profits.

4. CURRENCY WEAKNESS

Increase in prices of goods and services is the eventuality of the increase in VAT and this will invariably lead to the devaluation of the currency as huge amounts of money would not even be enough to purchase basic market commodities. A weaker currency will stimulate exports and make imports more expensive, thereby decreasing the nation's trade deficit over time. Depreciation in domestic currency is one of the reasons why export business has remained competitive in international markets. Currency fluctuation affects the economy in diverse ways which include instability in market prices. Although a currency's level should be determined by the underlying economy, the tables are often turned as huge movements in currency can dictate the overall economy's fortunes.

4.0 THE WAY FORWARD

The Herculean task is to strike a balance between raising funds for the payment of the percentage increase in the minimum wage and preserving the essence for which the increase is made. The essential purpose of this increase is to improve the standard of

living of the common man and improve the viability of the struggling Nigerian economy. However, if the common man is burdened to pay for the increase in minimum wage, then the utilitarian purpose would not have been served. The big question now is "how will the government raise funds for this percentage increase, bearing in mind also that borrowing is out of the picture?"

An increase in VAT is not the best approach as having been seen in this work. A more re-constructive attempt should be made to generate revenue, especially from taxable income earners and corporate organisations playing on the inadequacies of the law to avoid and evade taxation.

The Nigerian taxation system amongst other sources of revenue generation needs a complete overhaul and a stronger mechanism for compliance needs to be put in place.

Although revenue from taxation has grown over the years, the efforts of the government and revenue-generating agencies to improve tax revenue have yielded limited progress and this ordinarily should have been a veritable source from which the percentage increase in the minimum wage should be funded. Alongside the improvement of collection processes, other areas for improvement exist, like an extension on the limited tax coverage that mitigates the collection efforts.

Widening Nigeria’s tax net is absolutely necessary to ensure that efforts yield positive results in funding the long over-due minimum wage precisely on Company Income Tax and Personal Income Tax. Lagos state sets a remarkable example for other states to follow through its model tax administrative machinery.

Improvement of foreign investments in the country would also help raise funds for this project. Foreign investments can be encouraged by creating an enabling atmosphere for foreign businesses to thrive which includes the creation of workable and encouraging incentives.

Attempts can be made by the government to strengthen locally produced goods which will ultimately lead to a drastic reduction in the amount spent on import of basic

commodities that can otherwise be produced locally. All participants at all levels of our commercial value chain should also be encouraged through grants, loans and financial schemes.

Individuals and businesses are not left out in ensuring that the new minimum wage policy works for the improvement of the economy. To do this, critical emphasis on an employee/worker productivity must be encouraged, particularly when the alternative retrench mechanism is not an option. For individuals, collecting a higher wage is needful to encourage their improved commitment and performance. For businesses, it is trite productivity is an important determinant of economic growth, spurring productivity could inform higher national output. More periodic assessments and demanding increased realistic targets from each employee are imperative measures that could be used to ensure improved productivity among workers and employees.

Nigeria as a country must look inward to ensure that the essential aim of this increase in minimum wage is undefeated and other ways of raising revenue must be embraced, increase in VAT not been a good option.

THE NIGERIAN TAX APPEAL SYSTEM AND THE RECONSTITUTION OF THE TAX APPEAL TRIBUNAL: RETRACING OUR STEPS TOWARDS TAX JUSTICE IN NIGERIA

BOLAJI OGALU*

ABSTRACT

Disputes arising from taxation are inevitable. This is mainly because taxation is a "touchy-issue" on both sides of the divide; the tax-payer and the tax authorities. The tax authorities have to ensure the maximization of a tax based revenue and the taxpayer in trying to reduce his tax liability must ensure its acts and omission do not infringe on any existing tax law as there may be criminal liability. When these disputes arise, their speedy determination is a veritable yardstick in determining the efficiency or otherwise of any tax administration. Experience has shown that leaving the settlement of tax disputes primarily with the courts have been a bulwark to many countries economic prosperity, particularly in Nigeria where the wheels of justice turn slowest. This has occasioned the need for the constitution of tax tribunals to speedily settle disputes arising from taxation. This paper examines the Nigerian tax tribunal, the factors that led to its dissolution, the recent reconstitution of the Tax Appeal Tribunal and the prospects and possibilities and why its reconstitution is necessary for rebuilding taxpayers' trust and confidence in the fairness of the Nigerian tax administration.

1.0 INTRODUCTION

A "tax dispute" may be any argument, disagreement or controversy between two or among more people regarding the payment and/or discharge of tax liabilities owed

* Bolaji Ogalu LL.B University of Lagos, **contact:** ogalub@gmail.com

government or the collection of same from taxpayers by tax authorities.[9] There are different types of tax litigation, including challenges to collection actions or requests for information, constitutional challenges, and miscellaneous challenges to the exercise of administrative power through judicial review. "Tax justice" is about ensuring that all individuals and companies pay the right amount of tax to ensure a sustainable and functioning democracy.

Currently, under Nigerian law, the starting point for tax dispute resolution is an administrative appeal. Taxpayers are therefore entitled to explore the Tax Appeal process if and when they are dissatisfied with the decisions of any tax authority relating to the taxpayers status. They may also explore the same option with regard to the interpretation/application of tax laws and other matters which may affect the rights and status of the taxpayer.[10] The taxpayer still has the constitutional right to appeal decisions made by tax appeal system to the superior courts, once a taxpayer has exhausted all possibilities of administrative appeal and a final decision has been made.

2.0 A BRIEF HISTORY OF THE TAX APPEAL SYSTEM IN NIGERIA

The tax appeal system is not new in Nigeria. There existed the former Body of Appeal Commissioners (BAC) and Value Added Tax Tribunals. (VAT-T).

2.1 Body of Appeal Commissioners (BAC)

The BAC was the pioneer body that handled tax appeals in Nigeria. The BAC was established as an indoor mechanism to resolve and settle tax disputes between the tax authority and the taxpayer. The BAC was established at both Federal[11] and State

[9] J. J. Odinkonigbo & G. E. Ezeuko, *Does Nigeria Follow the Contemporary Global Trend in Tax Dispute Resolution Strategy?* (2014) 12 Nig. J. R.

[10] A Comprehensive Tax History of Nigeria, Instruments of Tax Policy available at http://www.firs.gov.ng/aboutus/Tax%20History%20Documentspdf/prelim.pdf pg. 326 (accessed 13 August)

[11] At the Federal level it had jurisdiction and powers to determine issues and matters arising from Companies Income Tax, Petroleum Profit Tax, Personal Income Tax (with respect to members of the Armed Forces, Foreign Affairs, residents of Abuja, the Police and Non Residents) Education Tax and Capital Gains Tax(with respect to Non Individuals).

level.[12] For any taxpayer to appeal to the BAC, an application to the tax authority must be made by filing a Notice of Objection in writing, to review and revise the assessment, stating the precise grounds of objection to the assessment. This should be made within 30days from the date of service of the Notice of the Assessment[13]. While subsection (4) of Section 57 also provides for the tax authority to appeal to the BAC also giving 30 days' notice to the taxpayer. The Appeal Commissioners may confirm, reduce, increase or annul the assessment or make such order as they see fit.[14] Therefore, an Appeal against the decision of the BAC, as seen in Section 64 of the Act provides that appeal may be made to the High Court of the State for taxpayers within the State tax net, while those within the federal tax net such as individuals within Section 2(b) (i) to (iv) of the Act and Corporate taxpayers are to appeal before the Federal High Court.[15]There were many drawbacks from the BAC for instance appeals before BAC were held in camera.[16] Further, only taxpayers could appeal to the BAC, while the appeal must relate to the "assessment," and, throughout the duration of the BAC, no taxpayer challenged its jurisdiction. In addition, a taxpayer who was dissatisfied with the decision of the BAC has a right to "appeal" to the High Court, and the payment of tax was not due until the appeal was determined by the Court although the Court may order the taxpayer to deposit a portion of the disputed tax in some circumstances.

2.2 Value Added Tax Tribunal (VAT-T).

Later, in 1993, the VAT-T was introduced to handle tax appeals on VAT this was done pursuant to the Second Schedule to the Value Added Tax Act[17] which was created in

[12] Section 59 of the Personal Income Tax Act While the BAC at the State level, was to have jurisdiction over the Personal Income Tax, Capital Gains Tax, and Stamp Duties with respect to Individuals.
[13] 57(2) of the Act
[14] Section 62(11) of the Act
[15] Section 39 of the Act
[16] Dr. Olumide K. Obayemi, ACTI, An Assessment of the Nigerian Tax Appeal Tribunal and the Need for a Speedier and More Efficient System, ***Research Journal of Finance and Accounting,*** Vol.6,No.6, (2015) '
[17] Value Added Tax (Amendment) Act, 2007

each zone and called Zonal VAT Tribunal. One notable feature of the VAT-T against the BAC is that the Federal Board of Inland Revenue Service is also empowered by Paragraph 10 to lodge an appeal before the VAT-T against any defaulting taxpayer. One major problem of the VAT-T proceeding was that like the BAC it was held in camera.[18] This gave the impression that there may not be fairness since the deliberations were not in the open. On the issue of Appeal of its decision to the Court of Appeal, this placed the VAT-T as a tribunal on coordinate and concurrent jurisdiction with the Federal High Court as it decisions were not subject to judicial review by the court.

This was what was in contention in *Stabilini Visononi Ltd. v. FBIR*[19] where the court declared the VAT-T unconstitutional for usurping the exclusive constitutional powers of the Federal High Court. Similarly, in *Cadbury (Nig.) Plc v. FBIR*,[20] the FBIR had directed Cadbury to render VAT returns based on Cadbury's payments to its Parent Company (Schweppes) in Britain. Upon Cadbury's refusal, FBIR instituted tax recovery proceedings before the VAT Tribunal. With FBIR's success, at the VAT Tribunal, Cadbury appealed to the Court of Appeal, which sustained Cadbury's objection, holding that the VAT Tribunal had no jurisdiction to entertain VAT issues since such tax issues touched exclusive jurisdiction on federal revenue, conferred solely upon the Federal High Court.

The combined reading of both cases and the establishment of the TAT Order (2009) issued by the Minister of Finance, Federal Republic of Nigeria[21] led to the invalidation of the VAT-T

[18] Paragraph 22
[19] (2009) 13 NWLR (Pt.117) p.9.
[20] (2010) 2 NWLR (Pt 1179) 561.
[21] As published in the Federal Government Official Gazette No 296, Vol. 96 of 2nd December, 2009.

3. THE TAX APPEAL TRIBUNAL

The Tax Appeal Tribunal ("TAT" or "The Tribunal") is an administrative body established by the Federal Inland Revenue Service (Establishment) Act, 2007 to hear and resolve tax disputes arising from all federal tax legislation. These include, the Companies Income Tax Act,[22] Personal Income Tax Act,[23] Petroleum Profits Tax Act[24], Value Added Tax Act,[25] Capital Gains Tax Act,[26] Stamp Duties Act,[27] Tax and Levies (Approved List for Collection) Act,[28] all regulations or rules issued in terms of these legislation and any other laws subsequently passed by the National Assembly. The Tribunal is the first forum for aggrieved persons (taxpayers or tax authorities) to litigate before approaching the Court as it is trite that where a statute prescribes a legal line of action for determination of an issue be that issue an administrative matter, chieftaincy matter or a matter of taxation, the aggrieved party must exhaust all the remedies in that law before going to Court

Under Paragraph 1(2) of the 5th Schedule to the Federal Inland Revenue Service (Establishment) Act (FIRS Act) 2007, the Minister of Finance is saddled with the vires to set up the Tribunal by specifying the number of zones, the matters and places to which the Tribunal may exercise jurisdiction. The jurisdiction of the TAT under the FIRS Act is as stipulated in Section 59 of the Act.[29]

By Section 8 (1) (a) and (b) of the FIRS Act 2007, it is the FIRS that has the exclusive reserve of assessing, collecting, accounting and enforcing payment of taxes due to the Government of Nigeria or any of its agencies from persons, including companies and

[22] Companies Income Tax Act, Cap C21, Laws of the Federation of Nigeria (2004) ("CITA")
[23] Personal Income Tax Act, Cap P8 Laws of the Federation of Nigeria 2004 and 2011 Amendment thereto ("PITA").
[24] Petroleum Profits Tax Act, Cap P13, Laws of the Federation of Nigeria (2004) ("PPTA").
[25] The Value Added Tax Act, Cap V1 Laws of the Federation of Nigeria 2004 ("VAT Act").
[26] The Capital Gains Tax Act, Cap C1 Laws of the Federation of Nigeria 2004.
[27] The Stamp Duties Act, Cap S9 Laws of the Federation of Nigeria 2004.
[28] The Taxes and Levies (Approved List for Collection) Act, Cap T2 Laws of the Federation of Nigeria 2004.
[29] Paragraph 1(1) of the 5 th Schedule to the FIRS (Establishment) Act 2007.

enterprises chargeable with tax. By Paragraph 13(1) of the 5th Schedule to the FIRS Act 2007:

> "A person aggrieved by an assessment or demand notice made upon him by the Service (i.e. FIRS) or aggrieved by any action or decision of the Service under the provisions of the tax laws referred to in Paragraph II, may appeal against such decision or assessment or demand notice within the period stipulated under this Schedule to the Tribunal."

Paragraph 17(1) of the 5 th Schedule to the FIRS Act 2007:

> "Any person dissatisfied with a decision of the Tribunal constituted under this Schedule may appeal against such decision on a point of law to the Federal High Court upon giving notice in writing to the Secretary to the Tribunal within 30 days after the date on which the said decision was given."

Paragraph 23 provides that: "An appeal against the decision of the Federal High Court at the instance of either party shall lie to the Court of Appeal." The cumulative effect of these provisions is that the Tax Appeal Tribunal is a mere administrative tax appeal tribunal which is not on concurrent jurisdiction with the Federal High Court nor can it in a way be capable of usurping the jurisdiction of the Federal High Court. It serves as an administrative procedure or condition precedent to instituting tax-related actions before the Federal High Court. From the above provision, it is clear that the draftsman made a conscious move to avoid the circumstances that led to the invalidation of the VAT-T by making the decisions of the Tribunal subject to the judicial review of the Federal High Court.

In June 2016, the tenure of the last set of Commissioners expired. During this period no cases were heard at the Tribunal. However, the registries remained operational for taxpayers to file appeals pending the reconstitution of the Tribunal. Due to various calls

for the reconstitution of the Tribunal, The Minister of Finance, Kemi Adeosun reconstituted the Tribunal by appointing new Commissioners to Chair the Tribunal in various geo-political zones.[30]

4. POSSIBLE JURISDICTIONAL CONFLICTS BETWEEN THE TAX APPEAL TRIBUNAL AND OTHER COURTS

Since the constitution of the TAT, its legality, constitutionality and jurisdiction has been a subject of debate, quite thankfully this matter has not just been lip service but it has been tested in our superior court. Thus in *FIRS v General Telecom Plc & Esso Exploration and Production Nigeria*[31]; and *Esso Exploration and Production Nigeria (Deep Water) Ltd & Anor v FIRS & Anor*[32] ...taxpayers had raised preliminary objections that the TAT had no jurisdiction to hear and determine their cases on the basis that section 59 of the FIRSEA was inconsistent with the provisions of Section 251(a)&(b) of the 1999 Constitution. Yet, the TAT held in those cases that it had jurisdiction to determine them and that its jurisdiction was not inconsistent with that of the Federal High Court principally on the basis that it was not a court. Basically, the position of TAT was that there is no inconsistency between section 59 of the FIRS Act and section 251(a) and (b) of the 1999 Constitution, the TAT not being part of the judiciary but an administrative tribunal established by the Minister of Finance.

It should be noted that there have been conflicting decisions by the Federal High Court on the status of the TAT, this was aptly captured by Professor Abiola Sanni when he stated that:

Being dissatisfied with the rulings of the TAT, aggrieved parties appealed to the Federal High Court. Two of such appeals which had [30] [31] [32]

[30] 'Finance Minister, Adeosun, reconstitutes tax appeal tribunals' available at https://www.premiumtimesng.com/business/business-news/275975-finance-minister-adeosun-reconstitutes-tax-appeal-tribunals.html (accessed 13 August 2018)

[31] (2012) 7 T.L.R.N 108

[32] (2012) 8 T.L.R.N 45

been determined so far formed the focus of this position paper. As indicated in the introduction, while Justice Ademola of the Federal High Court, Federal Capital Territory Division, Abuja held in *TSKJ Construction International Sociadade Unipessonal Lda v Federal Inland Revenue* Service,[33] [34]that the TAT is unconstitutional, Justice Buba of the Federal High Court, Lagos Judicial Division held in the case of *NNPC v Tax Appeal Tribunal (TAT) & Ors,*[34] that the TAT is NOT unconstitutional.[35] [36] [37]

It is now pertinent to examine the ruling of the above decisions by the court in *TSKJ Construction International Sociadade Unipessonal Lda v Federal Inland Revenue Service*[36] the court, struck down the composition of the TAT, on the ground that the FIRSEA and the Tax Appeal Tribunals (Establishment) Order of November 25th, 2009 (TAT Order) under which the TAT was established conflicted with the exclusive jurisdiction of the Federal High Court (FHC) conferred by section 251 of the Constitution

While in *NNPC v Tax Appeal Tribunal (TAT) & Ors,*[37]*the* court in considering the constitutionality of the TAT in line with the jurisdiction of the Federal High Court held that there was no jurisdictional conflict, it upheld the constitutionality of the Tribunal. It should be noted that both cases are pending appeal[38]

The conflicting views of the Federal High Court seems to have been put to rest in the recent Court of Appeal decision of *Shell Nigeria Exploration and Production & 3 Ors*

[33] (2014) 13 TLRN 1.
[34] (2014) 13 TLRN 39.
[35] Abiola Sanni, CITN Position on the Conflicting Decisions on the Federal High Counts on the Constitutionality or Otherwise of the Tax Appeal Tribunal, Prepared by the Indirect Tax Faculty, 23rd April 2014, at Page 2 ("Sanni CITN").
[36] Supra note 29.
[37] Supra note 30.
[38] Dr. Olumide K. Obayemi, ACTI, Tax Litigation in Nigeria and A Review of Recent Nigerian Court Decisions on Taxation, (2014) ***Research Journal of Finance and Accounting,*** Vol.5, No.24, 48

V. FIRS & Anot[29] this Court per Yahaya JCA, after considering the provisions of Section 3 (g) of the Petroleum Profits Tax Act, which is the Act governing the Production Sharing Contract (PSC), opined thus, at page 38 of the Judgment:

> The procedure for resolving claims and objections such as in the instant matter is spelt out. When an assessment is made and a party is not satisfied, it can serve a Notice of Objection with the FIRS. It can also file a Notice of Refusal to amend the assessment as desired where it disagrees with the FIRS. The party may also then appeal against the assessment to the Tax Appeal Tribunal. If the party is still dissatisfied with the decision of the Tax Appeal Tribunal, then it can approach the Federal High Court, the Court of Appeal and the Supreme Court.

Applying the above cases *mutatis mutandis,* it is obvious that the Tax Appeal Tribunal is an administrative tribunal, as prescribed by the enabling statute, and serves as a condition precedent to instituting an action before the Federal High Court. As a corollary to the above, I answer the question posed in this issue in the affirmative and hold that the Tax Appeal tribunal had the jurisdiction to entertain the subject matter of this appeal. The jurisdiction of the TAT is not a usurpation of the jurisdiction of the Federal High Court. The Tax Appeal Tribunal is a condition precedent to the jurisdiction of the Federal High Court to entertain the subject matter of this appeal.[39] [40]

5. IS THE TAX APPEAL TRIBUNAL A PROBABLE CONSEQUENCE OF A GOOD TAX ADMINISTRATION?

The answer to the question posed in all righteousness is a qualified yes. This is because while a tax appeal tribunal in itself would aid the seamless determination of disputes, an effective tax administration should primarily aim to employ preventive measures so as to reduce tax disputes and possibly eliminate them, as it is often said that prevention

[39] (Unreported CA/A/208/2012 Delivered on the 31st of August, 2016)
[40] Supra note 34 , Per Aboki J.C.A. (Pp. 47-51, Paras. C-A)

is better than cure. Thus, this would entail such tax authority looking into the major causes of this tax dispute and how best to avoid them.

The IMF[41] has provided some insights into ways by which tax disputes may be avoided some include (i.) Efficacious Auditing (ii) Simplification of tax laws

5.1 Efficacious Auditing

The audit and investigation aspect of tax administration seeks to verify the tax status of the taxpayers and to ascertain the completeness and accuracy of tax returns filed by taxpayers. In order to get a proper perspective on the taxpayer's status, it is imperative that audits are carried out regularly and within a reasonable period.[42]If there is a culture of aggressive tax avoidance, then many taxpayers will still avoid tax even if they understand their obligations. Changing taxpayer avoidance culture is an important way to reduce disputes, but tends to require a longer-term effort involving a more effective tax audit process and a credible threat of penalty upon discovery.

5.2 Simplification of Tax Laws

The specific ways to avoid disputes before a tax return is filed relate directly to the problem of interpretation of tax laws. If taxpayers have a clear understanding of their obligation, a greater number of them will be inclined to comply appropriately, thereby reducing the potential for a dispute with the tax administration.[43] Undue complexity of tax laws and an excessive rate of amendment can lead to disputes. It is important that tax laws be technically well-drafted, with care for precise language and policy that avoids legal distinctions that lead to problems of application. Complexity and changeability of tax laws cannot be totally avoided, but should be minimized.[44]

[41] How Can an Excessive Volume of Tax Disputes Be Dealt With? Available at https://www.imf.org/external/np/leg/tlaw/2013/eng/tdisputes.pdf (accessed 13 August 2018)
[42] Supra note 2
[43] How Can an Excessive Volume of Tax Disputes Be Dealt With? available at https://www.imf.org/external/np/leg/tlaw/2013/eng/tdisputes.pdf (2013) (accessed 13 August 2018)
[44] Ibid

Though as stated earlier in this paper as man exists dispute exists, thus even when the above means has been employed by the tax authorities, when litigants insist on adjudication, states must provide an effective dispute resolution mechanism to allay the grievances of the taxpayers. This policy is further in line with Action 14 of the Action Plan on Base Erosion and Profit Shifting (BEPS Action Plan, OECD, 2013)[45] which mandates Dispute Resolution Mechanisms for taxpayers to be more effective. Under this plan for action countries agreed that the introduction of the measures developed to address base erosion and profit shifting pursuant to the BEPS Action Plan, OECD, 2013 should not lead to unnecessary uncertainty for compliant taxpayers and to unintended double taxation. Improving dispute resolution mechanisms is, therefore, an integral component of the work on BEPS issues.

However, even Article 25 of the OECD Model Tax Convention[46] (OECD, 2014) provides for the mutual agreement procedure (MAP) - a mechanism, independent from the ordinary legal remedies available under domestic law, through which the competent authorities of the Contracting States may resolve differences or difficulties regarding the interpretation or application of the Convention on a mutually-agreed basis. This ensures that taxpayers entitled to the benefits of the treaty are not subject to taxation by either of the Contracting States. The measures developed under Action 14 of the BEPS Action Plan aim to strengthen the effectiveness and efficiency of the MAP process. They aim to minimise the risks of uncertainty and unintended double taxation by ensuring the consistent and proper implementation of tax treaties, including the effective and timely resolution of disputes regarding their interpretation or application through the mutual agreement procedure. Through the adoption of this Report, countries agreed to important changes in their approach to dispute resolution, in particular by having developed a minimum standard.

[45] OECD (2013), Action Plan on Base Erosion and Profit Shifting, OECD Publishing. http://dx.doi.org/10.1787/9789264202719-en (accessed 15 August 2018)

[46] OECD Model Tax Convention available at http://www.oecd.org/ctp/treaties/2017-update-model-tax-convention.pdf (accessed 15 August 2018)

Nigeria's response to this call for action still lies deeply with the legal means of dispute resolution with the TAT a means to achieving such, the laudability of this initiative is that it is a quasi-judicial body thus the court is not the first point of call to remedy the grievance of taxpayers, also the expertise of the individuals sitting on the tribunal is handy as these experts can easily understand the peculiarities of the situation and reach a more informed decision than judges on the normal courts who may lack the required expertise to handle such complex issues.

6. CONCLUSION

The goal of the present Nigerian appeal system is to meet the expectation of all tax stakeholders that the establishment of the TAT would reduce the incidence of tax evasion, ensure fairness and transparency of the tax system, minimize the delays and bottlenecks in adjudication of tax matters traditional court system, improve the taxpayers' confidence in the Nigerian tax system, provide opportunity for expertise in tax dispute resolution, provide avenue for effective involvement of parties, focus on facts rather than legal technicalities and promote early and speedy determination of matters without compromising the principle of fairness and equity.[47] To prevent a situation where the Tribunal would be in abeyance for a protracted period of time, the process of appointing and renewing the tenure of the commissioners should be made seamless as there should be a definite period for the Minister to appoint new Commissioners before or soon after the expiration of a tenure.[48]

Even though the TAT is relevant in ensuring justice is served to parties, it is also important that less formal means is adopted so as to reduce the workload of cases through making tax laws clearer, adopting an alternative dispute resolution mechanism and efficacious auditing.

[47] Executive Brief of the Nigerian Tax Appeal Tribunal available at: http://tat.gov.ng/node/6. (accessed 13 August, 2018).

[48] PWC, Federal Government of Nigeria reconstitutes Tax Appeal Tribunal available at http://pwcnigeria.typepad.com/files/pwc-tax-alert_fgn-reconstitutes-tat_july2018.pdf, (2018) (accessed 13 August, 2018)

HUMANE TAXATION: PROMOTING MICRO, SMALL AND MEDIUM SCALE ENTERPRISES – A FUNDAMENTAL OBJECTIVE.

OSHIOMAH ASEKHAMHE[49]

ABSTRACT

Micro, Small and Medium Scale Enterprises since before independence have been the major means of livelihood for the average Nigerian citizen. MSMEs since then have helped in shaping the Nigerian economy and improving the lives and standard of living in the country. It has proven to be a real catalyst for economic growth and national development. It is, therefore, the duty of the government to protect this sub-sector and put in place all instruments necessary for the improvement of MSMEs across the country. This paper thus examines MSMEs in Nigeria and the government's objective to promote an efficient and self-reliant economy, secure the maximum welfare and opportunity for every citizen of Nigeria and the introduction of humane taxation as an effective means of achieving this objective.

1.0. INTRODUCTION

Micro, Small and Medium Scale Enterprises in all nations of the world are popular and indispensable because of their unwavering contribution to the society and economy by alleviating poverty through job and wealth creation. Micro, Small and Medium Enterprises (MSMEs) play vital roles in the economic development of Nigeria and are known to be the main engine of economic growth and a key factor in promoting private sector development and partnership. MSMEs are generally responsible for the

[49] Oshiomah Asekhamhe is a 200 level student of the Faculty of Law, University of Lagos, Akoka, Lagos.

availability of goods and services, credits, motivating entrepreneurial spirit and repairs of second-hand products. They create employment and a high standard of living, provide competition and fill the needs of society and other firms[50]. Because of the economic variation of nations, there is no clear cut definition of small or medium scale enterprises in the world. However, definitions vary from country to country relative to the overall size and structure of the economy based on the following criteria which include: employment, turnover, and assets, paid-up capital, size, sector, location, organization, staff strength and technology. Even within Nigeria, different agencies have given different definition based upon the aforementioned criteria. However, The National Policy on MSMEs adopts a classification based on dual criteria: employment and assets (excluding land and buildings), and defines micro enterprises as an enterprise with an asset base of less than 10 million naira (excluding land and buildings) and employs less than 10 people; small enterprises as an enterprise with an asset base of between 10 million to less than 100 million naira (excluding land and buildings) and employs 10 - 49 people; medium scale enterprises are defined as enterprises with asset base of between 100 million to less than 1000 million naira (excluding land and buildings) and employs 50 - 199 people[51]. Even if there are controversies on what basis to define MSMEs, employment; assets; output or annual turnovers, what is not contestable is the contribution MSMEs are making to the Nigerian economy. A national survey put the estimated number of micro-enterprises alone at 36.99 million with a minimum total employment of 57.84 million.[52]

It is evident that the influence MSMEs have in Nigeria is great and more than sufficient for them to be covered by as many legislative authorities as possible to increase growth and productivity. The most important legal authority in Nigeria, the Constitution, has

[50] E.T. Ebitu (PhD), G. Basil and J.A Ufot, An Appraisal of Nigeria's Micro, Small and Medium Enterprises (MSMES): Growth, Challenges and Prospects, (2016) 4 ***International Journal of Small Business and Entrepreneurship Research,*** 4, p. 3.
[51] Federal Republic of Nigeria Draft on National Policy on Micro, Small and Medium Enterprises (NPMSMES), 2013
[52] The 2013 National MSMEs Collaborative Survey

provided for economic objectives for the State to fulfil in *Section 16 of the 1999 Constitution of the Federal Republic of Nigeria* (hereinafter referred to as The Constitution). This section provides that the State shall harness resources of the nation to promote an efficient, dynamic and self-reliant economy; secure maximum welfare, freedom and happiness for every citizen on the basis of social justice and equality; participate in areas of the economy other than the major sector and protect the rights of every citizen to engage in any economic activity outside the major sectors of the economy. The following section provides that government actions shall be humane and exploitation of human or natural resources in any form whatsoever for reasons, other than the good of the community shall be prevented and the state shall direct its policy towards ensuring that all citizens have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment[53]. The constitutional duty and directives of the government have been expressly spelt out for the sake of its policy-making powers on this matter which includes the manner in which money is to be collected from citizens who make their livelihood in the country.

It is against this background that it is pertinent to discuss the role of taxation as one of the major problems of MSMEs in recent years in the nation's bid to alleviate poverty, generate employment and boost the economy of the country. This paper also discusses the effect and implication of the above constitutional provisions on tax collection for MSMEs, the effect and implications of taxation on Micro, Small and Medium Scale Enterprises and an ideal tax method for MSMEs in Nigeria.

2.0. SIGNIFICANCE OF MSMEs IN NIGERIA

Micro, Small and Medium Enterprises (MSMEs) occupy a place of pride in virtually every country or State. Because of their significant roles in the development and growth of various economies, they have aptly been referred to as the engine of growth and catalysts for socio-economic transformation of any country. MSMEs represent a veritable vehicle for the achievement of national economic objectives of employment

[53] Section 17 of the 1999 Constitution of the Federal Republic of Nigeria.

generation and poverty reduction at low investment cost as well as the development of entrepreneurial capabilities including indigenous technology[54]. Apart from MSMEs potential for self-reliant industrialisation using local raw materials, they are in a better position to boost employment, guarantee even distribution of industrial development and facilitate the growth of non-oil exports. It is observed that small firms are a major source of employment opportunities for a wide cross-section of the workforce in developing economies: the young, old part-time workers and the cyclically unemployed. [55] The same has been the case for Nigeria. Over the years, MSMEs have helped reduce the flow of people from rural to urban areas and can easily be established with minimal skill. They also contribute substantially to the country's gross domestic product, export earnings and development of employment opportunities. They play an important role in Nigerian's economic growth. According to the General Statistics Office, they constitute 97.2% of the companies in Nigeria.[56]

2.1. MSMEs as a Catalyst for Economic Development in Nigeria

MSMEs have played and continue to play significant roles in the growth, development and industrialisation of Nigeria because of their efficiency and contribution to the country's industrial output. MSMEs are able to produce effectively because of the availability of local supplies as a first choice go-to as a source of manufacturing and production. There is no need to be involved in the struggle for industrialisation for most of these MSMEs. Through the utilisation of local resources, MSMEs promote industrial and economic development and are responsible for the production of intermediate goods and the transformation of rural technology. Thus, Nigerian MSMEs not only provide employment and income for the majority of its citizens but are also recognised as the breeding ground for domestic entrepreneurial capabilities, technical

[54]B.A.N. Onugu, Small and Medium Entrepreneurs (SMEs) In Nigeria: Problems and Prospects, (St. Clements University, 2005)
[55] Dr. M.A. Agwu and Dr. C.I. Emeti, Issues, Challenges and Prospects of Small and Medium Scale Enterprises (SMEs) in Port-Harcourt City, Nigeria, (2014) ***European Journal of Sustainable Development***
[56] General Statistics Office, Small and Medium Enterprises in Nigeria (2007)

skills, technological innovativeness and managerial competencies for private sector development[57]. It has, in years, been able to carry out the government objective of providing a livelihood for citizens, providing basic social amenities, improving the standard of living in the country and enhancing economic development. On a larger scale, MSMEs have, over the years, significantly boosted the Gross Domestic Product (GDP) of Nigeria contributing 46.54% in 2010[58]. MSMEs have enhanced the growth of the economy in the private sector in more ways than can be noted across the country. It is, therefore, a cause for concern when the government of Nigeria imposes heavy levies and multiple taxes on the MSMEs to pay to state and local governments.

2.2. MSMEs and the Nigerian Business Environment

MSMEs in Nigeria have a chequered history. Since Nigeria's independence in 1960, much emphasis has been laid on the growth of small and medium scale industries as a means of reducing the incidence of poverty and unemployment in the country. Since the adoption of the Economic Reform Program in 1986, there has been a decisive shift from grandiose, capital intensive and large scale industrial projects based on import substitution to small scale industries with immense potentials for developing domestic linkages for sustainable industrial development[59]. According to Umebali (2010), [60] small scale business started gaining prominence in Nigeria in the early 1970s when many personal enterprises started springing up. Before this time, agricultural production was dominating the economy. There were lots of agricultural smallholdings before and during the emergence of the oil boom. Over 75% of agricultural holdings were managed by small farmers and comprised mainly family businesses. Government agricultural holdings were not more than 10%. Presently, the economy is being affected by the global economic meltdown which is sweeping so many economies of the world.

[57] O.C. Aina, *The role of SME's in poverty alleviation in Nigeria.* Vol. 3 (2007)
[58] The 2010 National MSMEs Collaborative Survey
[59] Supra note 6
[60] I.G. Umebali, Problems and Prospects of Small and Medium Enterprises in Nigeria, A Case Study of Enugu East senatorial zone, Department of Economics, Faculty of Management and Social Sciences, Caritas University, Amorji Nike, Enugu State (2010)

Depreciation of the naira against the dollar, overdependence of the country on oil and inconsistency in government policies are what has characterised the Nigerian business environment.[61] It has, therefore, become imperative for Nigerians to return to and develop the MSMEs. Business dealers and entrepreneurs who currently deal within the scope of micro and small scale enterprises attest to the difficulty in procuring a safe haven for their businesses to thrive financially. This is due to the fact that MSMEs begin as capital intensive investments, and it becomes unfair in more ways than one to lose most of the proceeds or profit made to tax authorities who despite regulations extort money from business owners for the sake of taxes and levies. It is from this fast-growing sub-sector of the economy that the government seeks to raise funds rather than continue to develop.

3.0. TAXING MSMEs

There is no moral compulsion to pay tax unless there is a legal liability to pay tax. Every tax paid has a legal backing and it is clear that MSMEs do not pay taxes because they want to but because they have to. Taxes and levies MSMEs and their owners pay invariably include Personal Income Tax; Capital Gains Tax; market taxes and levies; sales tax; shops and kiosk rates; Tenement rates; amongst others across the three levels of government. [62] All these taxes ultimately hinder the growth of these enterprises and businesses which the government has set as an objective to protect and promote. The multiplicity of taxes has become a major problem especially given the role of tax consultants and agents hired by local governments. They are often crude in their operation, excessive in their assessment and destructive in their relationship with the production process. They tax everything in their bid to generate revenue without considering the net effect on household incomes and employment. [63] The multiplicity

[61] Y. Alabi, O.J. Awe and L.Y. Musa, Managing Small and Medium Scale Enterprises In Nigeria: Challenges and Prospects, (2015) 3 ***Review of Public Administration and Management,*** 7
[62] Taxes and Levies (approved List for Collection) Decree No. 21 of 1998 now Cap. T1, Laws of the Federation of Nigeria, 2004
[63] Supra note 6

of taxes has refused to die and continues to wreak havoc on stakeholders, average citizens, businesses and even households in Nigeria. [64]

3.1. Promoting MSMEs: A Fundamental Objective

In a developing countries like Nigeria, there are several socio-economic conditions disturbing the development of MSMEs despite many interventions and policy strategies. However, Micro, Small and Medium Enterprises, when fully developed, have been identified as being beneficial in alleviating poverty through wealth and job creation and can benefit any government that develops it to the extent that it has the capacity to grow a country's GDP, generate taxes and other revenue, as well as assist in bringing stability to the polity of a country. In spite of all the efforts and supports of governments and multilateral institutions such as the World Bank and the International Monetary Fund, MSMEs have not been able to make the desired impact on the Nigerian economy. This underscores the fact that there exist fundamental issues confronting small scale enterprises that have not been adequately addressed. Governments are often seen making frantic efforts in developing Micro, Small and Medium Scale Enterprises (MSMEs). These enormous efforts are as a result of the activities of these enterprises having significant contribution to the employment generation, manpower development and gross domestic product of the country. The problem of finance is a major one particular to the establishment and survival of MSMEs. Most SMEs in Nigeria die within their first five years of existence, a smaller percentage goes into extinction between the sixth and tenth year while only about five to ten percent survive, thrive and grow to maturity. [65] One of the main causes of the inability of MSMEs to be self-sustaining is the problem of taxation of these enterprises that barely have substantial savings funds for turnover. Having this in mind, continuous taxation of these MSMEs leads to a direct violation of the provisions of *Section 16 of the Constitution.* As we

[64] A. Sanni, Multiplicity of a Taxes in Nigeria: Issues, Problems and Solutions (2012) 3 *International Journal of Business and Social Science,* 17

[65] M.A. Aremu, and S.A. Adeyemi, Small and Medium Scale Enterprises as A Survival Strategy for Employment Generation in Nigeria .Journal of Sustainable Development, (2011) 4 ***Canadian Center of Science and Education***, P. 205

have seen earlier, all Micro, Small and Medium Scale Enterprises pass the scoreboard of *Section 16(1)(a) of The Constitution* in harnessing the resources of the nation and promoting national prosperity and a self-reliant economy, and where taxes hinder even one citizen from participating and involving himself in building Micro, Small and Medium Scale Enterprises, the government of the country has failed in its economic objective. The same applies in a case in which the owners of such enterprises are forced to fold up their businesses due to heavy tax and levy rates in the country. Then, the government has equally failed in her objective to ensure the maximum happiness of citizens participating in this sector as *Section 16(1)(b) of The Constitution* suggests. This right of citizens to participate in a sector outside the major sector of the economy is rarely spoken of and grossly violated by the government on almost a daily basis across the country because of these high tax and levy rates that are obtainable nationwide. *Section 16(2)(d) of The Constitution* is the crux and centre of the rights of the citizens to participate in a sector outside the major sector of the economy. Where the government is unable to provide for its citizens, suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled, the government should not be allowed to be let off the hook for depriving citizens of getting these basic amenities for themselves.

Unfortunately, the constitution has provided a safe haven for the Government under *Section 6(6)(c) of The Constitution* in stating that issues regarding socio-economic rights under which the right to participate in the activities of the economy cannot be enforced in the courts. Citizens, civil actors, influential persons in the society and Non-Governmental Organizations must continue to push for the mandate of setting the policies of the government at ensuring that exploitation of human and natural resources in any form other than the good of the community shall be prevented. Actions must be taken to reiterate *Section 17(2)(d) of The Constitution* in entirety that all governmental laws, policies, executive and administrative actions shall be humane hence, the need to review the tax methods of the MSMEs in Nigeria.

3.2. The Tax Method for MSMEs

As a resolution for the government, reviews of all laws necessary should be done to ensure that first and foremost, there exists a stimulant for popular inclusion in the MSME sub-sector. There must also be incentives to allow people engage in a free and comfortable environment for the MSMEs to grow and thrive within the country so as to increase the standard of living in the country and to allow the citizens to develop self-sustaining methods of economic growth and development.

The Government should consider a 0% tax rate for all micro and small enterprises and a 5% tax rate for medium-sized enterprises in the country respectively which would be based on their returns for the first two years of establishment. Although the money gotten from tax may be cut short during the period, the State would go through a stage of economic boost during the same said period. Taxes from the third to fifth years would be on a 3% tax rate for micro and small enterprises and 8% for the medium scale enterprises also based on their returns after which tax would be based in subsequent years, on returns in a manner to ensure sustainability of MSMEs.

4.0. CONCLUSION

It is pertinent that the tax regime should be harmonised to suit the productivity levels of the MSMEs. Governments at both federal and states levels should make it a priority to foster good relationships with the owners of the MSMEs to ensure that tax collection does not seem to be a form of exploitation but a duty to pay for the growth of the society. Ultimately, the administration of these taxes should be transparent to ensure voluntary compliance over a long period of time.

TAXING THE DIGITAL ECONOMY IN NIGERIA:

CEEALLENGES AND PROSPECTS

DANIEL OLIKAAND BUSAYO OlADAPO

1.0. BACKGROUND

The digital economy is characterized by a high level of innovation and disruption of the status quo. With this state of affairs comes the difficulty of taxing the key players and individuals in the digital economy. This challenge is replicated across various sectors (from transportation to housing, to media, etc.) of the economy that was once characterized by the brick and mortar companies. Some of these companies operating in the digital economy are; Uber, Airbnb, Google, Facebook, Amazon, Alibaba, etc. The Digital Economy is defined by Pascal Saint-Amans, Director of the OECD Centre for Tax Policy and Administration as:

A transformative process, brought about by advances in information and communications technology (ICT), which has made technology cheaper and more powerful, changing business processes and bolstering innovation across all sectors of the economy, including traditional industries.

In simpler terms, the Digital Economy is the economy that results from innovation and technological advancement. It is not sector-specific as this relates to every sector that is being affected by the new wave of innovation.

The challenges in taxing the digital economy are precipitated principally by the fact that the tax laws in place were built for the traditional systems and did not envisage the challenges that would come with the taxation of the digital economy. The challenge is [*]

* Daniel Olika and Busayo Oladapo are Associates at Kenna Partners

not made any better by the desire of these businesses to pay little corporate taxes or none at all. Tax authorities, the world over, are therefore working tirelessly to ensure that the existing tax regimes meet up with the challenges and demands posed by the digital economy. These attempts and efforts are happening both at the national as well as regional/global level, as can be seen in the efforts of; national governments, the Organisation for Economic Co-operation and Development (OECD), European Union, African Tax Administration Forum, etc.

2.0. CHALLENGES INVOLVED IN THE TAXING OF THE DIGITAL ECONOMY

Companies operating in the digital economy are able to avoid taxes by exploiting many of the loopholes in the traditional tax system to ensure that they pay little taxes or no tax at all. They are able to do this through the following avenues, including the exploitation of the weak transfer pricing regimes in place, hybrid mismatch arrangements, double tax treaty benefits, exploitation of the lack of a permanent establishment in jurisdictions where they operate, etc. However, the major challenge associated with taxing the digital economy for the revenue authorities is the lack or absence of a permanent establishment status. These companies are able to do this through the lack of a physical presence or office in jurisdictions where they carry out business activity. This strategy is made stronger with the adoption of business models which makes it impossible for them to have no real assets which can be amenable to any form of taxation in the jurisdictions in which they operate. Thus, it will be difficult to tax these companies when they do not have any offices within the jurisdiction. This dilemma is best represented by the statement of Tom Goodwin;

“Uber, the world’s largest taxi company, owns no vehicles. Facebook, the world’s most popular media owner, creates no content. Alibaba, the most valuable retailer, has no inventory. And Airbnb, the world’s largest accommodation provider, owns no real estate. Something interesting is happening.”

3.0. TAX REGIME FOR TAXING THE DIGITAL ECONOMY IN NIGERIA

The legal framework for taxing the digital economy in Nigeria is provided for under, the Companies Income Tax Act (CITA).[1] These laws capture the tax liability of the typical company operating in the digital economy in Nigeria. The CITA addresses the tax liability of companies for profits emanating from their business operations. The rate of the tax deduction for companies in 30% in Nigeria and the tax returns are to be filed within six months after the financial year-end of the Company.

3.1. Taxes Applicable to Companies Operating in the Digital Economy

There are a number of taxes that Companies operating within the digital economy are required to pay. While some of them are sector-specific, the following taxes have general applicability across sectors:

(a) Companies Income Tax:

The Companies Income Tax is regulated by the Companies Income Tax Act and as stated above, the applicable tax rate is 30% of business profits. The tax is to be filed within six months of the financial year-end of the company and it is payable to the Federal Inland Revenue Service.

(b) Withholding Tax:

Although Withholding Tax is a medium of collection of taxes at source by the revenue authorities on certain transaction, it is also considered to be a form of tax levied on Companies by the FIRS, with its own pre-approved rates, under specific transactions. The withholding tax will be paid at the applicable rate on certain specific transactions such as; payment of dividends to shareholders, professional fees, contractual/agency arrangements, royalties, etc. It is regulated by the Companies Income Tax Act,[2] Personal Income Tax Act[3] and Withholding Tax Regulations. Where the tax is

[1] Cap 60, LFN, 1990; Companies Income Tax Act, Cap C21, LFN, 2004 (as amended by the CIT (Amendment) Act, 2007)
[2] Cap 60, LFN, 1990; Companies Income Tax Act, Cap C21, LFN, 2004 (as amended by the CIT (Amendment) Act, 2007)
[3] Personal Income Tax Act 1993 was adopted by the Laws of the Federation of Nigeria 2004 Cap 02 and amended by Personal Income Tax (Amended) Act 2011.

deducted from companies, the remittance to the FIRS is usually done within 21 days after the duty to deduct arises.

(c) Value Added Tax:

The Value Added Tax (VAT) is paid at the rate of 5% of the value placed on goods and services purchased by the companies. There are a number of businesses exempted from the payment of VAT by the Value Added Tax Act. The due date for filing the VAT is the 21st day of the month following the month in which the transaction occurred. s

(d) Tertiary Education Tax:

The Tertiary Education Tax is payable at the rate of 2% and it is charged only on resident companies pursuant to the Tertiary Education Trust Fund (Establishment) Act of 2011. Companies usually pay this tax within six months at the end of the financial year. The Act, however, requires that the tax be paid within 60 days of the service of the notice of assessment by the FIRS.

(e) Technology Tax:

Technology Tax is payable at the rate of 1% of Companies' profit before tax. This tax is applicable to the profits of specific companies mentioned in the National Information Technology Development Tax Act of 2007. Some of these companies are; Telecommunication companies and GSM service providers, Internet Companies and Internet Service Providers, Banks, etc. The due date of filing of the technology tax is within 60 days of service of the notice of service of assessment on the companies. Although, Companies self-assess this tax when they file the returns for the Companies Income Tax.

4.0. CHALLENGES FOR THE TAX AUTHORITIES IN NIGERIA

The tax authority for collecting companies' income tax in Nigeria is the Federal Inland Revenue Service (FIRS). As with all other tax authorities across the globe, the Nigerian Federal Inland Revenue Service is also faced with the challenge of collecting taxes

from Companies operating in Nigeria and deriving business profits from Nigeria, but without a physical presence in Nigeria. This is especially due to the fact that *Section 13 of the Companies Income Tax Act* provides that, business profits shall be deemed to be derived from Nigeria, thus making them amenable to companies' income tax under Nigeria, where the Company in question has a "fixed base" in Nigeria. The section provides for variations of what can be defined as a "fixed base" and provides certain exceptions as well. It should be noted, however, that businesses operating in the digital economy tend to structure their businesses in a way that enables them to avoid being caught by the definition of "fixed base" under Nigerian law. The resultant effect of this is that the tax authorities are unable to collect any form of taxes from these companies.

5.0. GLOBAL EFFORTS TO ENSURE EFFECTIVE TAXATION OF THE DIGITAL ECONOMY

The most notable effort on the global scene which is targeted at ensuring effective taxation of the digital economy is that of the OECD under its *Action Plan 1 of the Base Erosion and Profit-Shifting (BEPS) Project.* The Action Plan 1 seeks to address the vagueness in the definition of "permanent establishment" (known as Fixed Base in Nigeria), which makes it easy for companies to exploit the loopholes in the bid to pay little or no corporate taxes. To this end, the OECD BEPS Action Plan 1 introduced a rule known as the *Significant Economic Presence (SEP).* The concept of SEP seeks to achieve permanent establishments of businesses in countries without having a fixed base.

There have also been national efforts across jurisdictions to ensure that digital revenues generated by non-resident companies in the digital economy are subjected to national corporate taxes. These efforts can be seen in countries like; India, New Zealand, Australia, etc. In India for instance, a non-resident company will be deemed to be liable to tax if the said company receives revenue from India which exceeds a prescribed amount for transactions carried out by the non-resident country within India, or if the non-resident company systematically or continuously solicits business in India through digital means. Also, India has introduced an equalisation levy on online

advertising revenue earned by non-resident companies. In Australia and New Zealand, businesses selling to customers online must now register for Goods and Services Tax (GST). In the European Union, there is a proposal for the short term to levy 3% tax on gross revenue generated by companies having met specific thresholds through online placement of advertisement, sales of collected user data and other digital services and digital platforms that facilitate interactions between users. Italy has announced a web tax while Spain has proposed a 'digital services tax'.

In other jurisdictions, the tax authorities and legislative bodies have established revenue thresholds to ensure that non-resident Companies who generate revenues above the threshold are made to pay their fair share of taxes.

5.1 Reliefs/Incentives Available to Corporations Operating in the Digital Economy

There are a number of tax incentives that the Federal Government of Nigeria makes available to businesses operating within Nigeria. Some of these reliefs are sector-specific and are generally aimed at ensuring socio-economic growth and make doing business easier for companies. A number of the general tax incentives/reliefs, as identified below, are amenable to businesses operating within the digital economy and they are;

(a) Bonus for Filing Tax Returns on Time:

Where a Company carries out self-assessment for its tax liability and it does so within the time specified, the Company is entitled to a bonus one percent of the tax payable.

(b) Tax Relief on Double Tax Treaties:

Where a Company is able to show that it has paid its tax or has a tax liability for the same profit in a country in which Nigeria is in a double tax agreement with; the Company will be entitled to a tax relief with respect to the particular amount.

(c) Investment Tax Credit:

Where a Company operating in the digital economy engages in research and development activities for large scale commercialization, by the provisions of CITA it will be entitled to 20% investment tax credit on its expenditure.

6.0. TAXING THE DIGITAL ECONOMY IN NIGERIA (TAXPAYERS' PERSPECTIVE)

The major problem with tax administration generally, in Nigeria, is that taxpayers are subject to multiple taxes across various levels of Government in the sectors in which they operate. The digital economy is not immune to this problem. This is a major problem of tax administration in Nigeria. This situation causes the taxpayers, especially the multinational enterprises, to structure their businesses in such a way which causes them to pay little in corporate taxes.

Another problem from the taxpayers' perspective is the lack of development in the country. Taxpayers often feel that their taxes contribute to the enrichment of politicians and not the development of the economy - which the taxes should ordinarily be used for.

7.0. CONCLUSION

The reality of the challenges in taxing the digital economy is that it is a global problem. With the harsh economic realities that countries are facing globally, companies are forced to avoid taxes by exploiting the loopholes that the digital economy avails them. Another interesting problem with this situation is that the companies feel they will pay taxes if the economy gets better but then this is more likely to happen, or would probably only happen if tax revenues get better - a catch-22 situation of some sort.

The entirety of the situation makes it obvious that we need a global solution to this global problem and countries across the world, Nigeria inclusive, will need to balance the interests of the taxpayer (businesses) and the tax authorities to achieve a solution that is effective and lasting.

TAXATION OF TECHNOLOGY COMPANIES IN NIGERIA

KADIRI AYODELE ASHIATA [4]

ABSTRACT

Technology has driven remarkable growth across various sectors in Nigeria in the past decade. E-commerce has become fully established in Nigeria - Jumia just completed its initial public offering and Jiji is on the verge of completing its acquisition of Olx. The telecommunications industry has also not been left out - MTN recently completed its listing by introduction on the Nigerian Stock Exchange (NSE) and Airtel Africa is currently working towards listing simultaneously on the NSE and the London Stock Exchange. The financial services sector has arguably accommodated the largest number of "disrupters" in a subsector tagged "Fintech". We have witnessed the entrance of payment solution service providers like Flutterwave andPaystack. We have also seen the establishment of investment services providers like Piggyvest and Cowryrise. We have also seen the "Agritech" players like Farmcrowdy and ThriveAgric. The transportation sector has not escaped these "disruptions " too which have come in the form of various ride-hailing apps - Uber, Bolt, Gokada, Max Okada, and lately Oride. These developments, and indeed the prospects of the technology sector in Nigeria, undoubtedly, have implications on the revenue drive of the Nigerian government.

*In this article, the author will examine the tax treatment of a technology company (a "**tech company** ") in Nigeria with the aim of determining the tax liabilities that such tech company may have been exposed to.*

[4]Kadiri, Ayodele Ashiata is an Associate at G. Elias & Co. where she is a member of the Disputes, Tax and Technology, Media and Telecommunications Practice Groups.

1.0 INTRODUCTION

One of the most commonly used words in the technology space is the word, "start-up"[5]. There are, however, varying vehicles[6] by which a tech start-up may organize its operations. Where a tech start-up utilizes the company (limited or unlimited, public or private) as a preferred vehicle, it is a company for all intents and purposes under Nigerian law (and a tech company for the purposes of this article) and will be subject to the applicable tax regime.

The primary tax statute for a tech company, being first a company, is the Companies Income Tax Act, 1978 Cap. C21, Laws of the Federation (LFN), 2004 as amended by the Companies Income Tax (Amendment) Act, 2011 (the "CITA"). The Company will also be required to comply with the provisions of the Personal Income Tax Act 1993 Cap. P8, LFN, 2004 as amended by the Personal Income Tax (Amendment) Act, 2011 (the "PITA"). Depending on the extent of its operations, it would be required to comply with the provisions of the Stamp Duties Act 1939, Cap. S8, LFN, 2004 (the "SDA"), the Value Added Tax Act 1993, Cap. V1, LFN, 2004 as amended by Value Added Tax (Amendment) Act, 2007 (the "VATA") and the Capital Gains Tax Act 1967, Cap. C1, LFN, 2004 (the "CGT Act"). There are also other tax statutes that impose specified taxes on the income of companies in Nigeria like the Tertiary Education Trust Fund (Establishment Etc,) Act, 2011 ("TETFUND Act") and the National Information Technology Development Agency Act, 2007 ("NITDA Act").

Some of the aforementioned statutes also provide for certain incentives and exemptions which are useful for minimizing the eventual tax exposure of a tech company. In subsequent paragraphs, this paper will examine the implications of the aforementioned

[5] One of the most popular definitions of the term has been credited to Steve Blank. Steve Blank defined a startup to mean "a temporary organisation, seeking a repeatable, scalable and profitable business model". Steve Blank is an entrepreneur and one of the initiator of the "Customer Development" Model that is at the core of the Lean Startup movement. You can read more on him and his work at www.steveblank.com.

[6] There are roughly about nine vehicles available for carrying out business in Nigeria under the Companies and Allied Matters Act, 1990, CAP C20, LFN 2004. Each has its advantages and disadvantages. They are the: Sole Proprietor, Partnership (and its variants under the laws of the various states); Incorporated Trustees, Public Company limited by Shares, Private Company Limited by Shares, Public Unlimited Company, Private Unlimited Company, Public Company limited by Guarantee, and the Private Company Limited by Guarantee.

tax statutes on a wide range of the activities of the tech companies from making donations to the disposal of assets. This paper will also examine the incentives or exemptions that a tech company may take advantage of.

2.0 SCOPE

The focus of this article is the tax regime that applies to tech companies[7] incorporated in and operating in Nigeria. This article will, therefore, not be making references to the taxation of entities like eBay, Facebook, Whatsapp and Apple who have no known Nigerian entities and are not operating out of Nigeria[8]. This problem is better explained with this illustration - *"[h]ow do you identify value creation for a company whose headquarters are in Germany, whose salespeople sit in Singapore, whose users are global, and who earns revenue by selling ads to other multinational enterprises*?"[9]

This article will not address the problems arising from the taxation of the digital economy. For the purposes of this article, a tech company is duly incorporated and licensed, where required, under Nigerian law. This article will, thus, be discussing the taxation of the profits derived from the activities of such companies to the extent provided for under applicable Nigerian tax laws. Furthermore, a tech company in this article is also not limited to a tech start-up. A tech company may be a large corporation or a business looking for an opportunity to scale.

3.0 TAXATION OF INCOME

[7] Alex Payne, "What Is and What Is Not a Technology Company" available at https://al3x.net/posts/2012/05/08/what-is-and-is-not-a-technology-company.html (accessed July 13, 2019).

[8] This is a very topical issue globally today. Companies like Facebook, Amazon and Apple make a lot of revenues from countries which they visibly do not operate from due to the ubiquity of the Internet. For most countries, the problem is how to tax incomes that have been derived from their country by a company that is no t operating there. This is also a problem even for regulators. For example, Nigerians visit website run by online lottery operators subject to regulators outside Nigeria and have their revenues collected by that other country.

[9] Kevin Dancey, "Three Imperatives for Taxing the Digital Economy" available at https://www.ifac.org/global-knowledge-gateway/business-reporting/discussion/three-imperatives-taxing-digital-economy (accessed July 9, 2019). See also Ogochukwu Isiandinso and Emmanuel Omoju, "Nigeria: Taxation Of Nigeria's Digital Economy: Challenges And Prospects" available at http://www.mondaq.com/Nigeria/x/810276/tax+authorities/Taxation+Of+Nigerias+Digital+Economy+Challenges+And+Prospects> (accessed July 9, 2019).

The profits of a tech company for the purposes of taxation under the CITA are (i) profits from any trade or business (for whatever period it may have been carried on); (ii) rent[10] or any premium arising from a right granted to any other person for the use or occupation of property; (iii) dividends, interests, royalties, discounts, charges or annuities; (iv) any source of annual profits or gains not falling within the preceding categories; (v) any amount deemed to be income or profit under a provision of this Act or with respect to any benefit arising from a pension or provident fund of the PITA; (f) fees, due and allowances (wherever paid) for services rendered; and (g) any amount of profits or gains arising from acquisition of short term money instruments like Federal Government securities, treasury bills, treasury or savings certificates, debenture certificates or treasury bills, treasury or savings certificates, debenture certificates or treasury bonds[11]. All these profits must have accrued in, derived from, brought into or received in Nigeria - that is, there must be some sort of connection between the Nigerian tech company and the profits.

These profits will usually be taxed at 30%[12]. However, a company may pay as little as 0.5% of its gross profits or 0.5% of its net assets or 0.25% of its paid-up capital or 0.25% of its turnover. This is called the "minimum tax"[13] and is usually payable when the ascertainment of total assessable profits from all sources of a tech company results in a loss, or where a tech company's ascertained total profits results in no tax payable or tax payable which is less than the minimum tax. These provisions will not apply to a tech company (a) carrying on the agricultural trade or business or (b) with at least 25% imported equity capital or (c) in the first four calendar years of its commencement of business.

[10] It is important to note that the payment of rent for a long period and in advance has tax and economic implications. See Y.Y. Dadem, "Property Law Practice in Nigeria" (Third Edition) (Jos University Press Limited: Jos, 2016) at 103.
[11] CITA, s. 9.
[12] CITA, s.40
[13] CITA, s. 33.

Interests and Dividends

Interests are derived from Nigeria to the extent that (A) the liability to make the requisite payment (in whatever form) is on a tech company or (B) the interest accrues to a foreign company or person from a tech company[14]. Dividends for the purposes of calculating a tech company's profits are dependent on whether the tech company is in liquidation or is a going concern. Dividends in respect of a going concern means profits distributed (whether of a capital nature or not) and includes payments equal to the nominal value of bonus shares, debentures or securities awarded to the shareholders. Dividends of a company in liquidation will include any profits which are not of a capital nature that are distributed whether in money or in money's worth during liquidation, but which were earned before or during the winding-up or liquidation. [15]

Dividends due to a tech company as a shareholder in another corporate entity are chargeable to tax at 10%. However, where dividend is paid by that other company to the tech company out of profits on which no tax is payable due to no total profits or total profits which are less than the amount of dividend which is paid, that other company will be charged to tax at the rate of 30%. [16]

Withholding Taxes[17]

Withholding taxes ("WHT") are not a type of taxes. Rather, they are a mechanism for deducting taxes at source. The mechanism requires the payer of such income to the taxpayer to deduct a certain percentage of the sum in question and remit same to the relevant tax authority on behalf of the taxpayer.

It goes both ways. Every tech company will remit WHT on behalf of some taxpayers, where applicable. Conversely, some payments made to a tech company will be made less WHT. In respect of what kind of payments should a tech company expect to remit

[14] CITA, s. 9(2).
is CITA, s.9(3)
[16] CITA, s.19.
[17] See generally ss.78 - 85 of CITA.

WHT?[18] Income taxes on interest, rents, dividends, royalties, building, construction and related activities (excluding survey, design and deliveries), all types of contracts and agency arrangement, other than sales in the ordinary cause of business, consultancy and professional services, technical services, commissions and director's fees will be collected using the withholding tax mechanism. WHT rates are either 5%, 10% or 2.5% depending on what type of payment WHT is being paid in respect of, and on whether it is being remitted by an individual or a corporate taxpayer.[19] WHT will be paid at a lesser rate where it is remitted on behalf of a resident of another country that is a party to any of the extant double tax treaties[20]. It is, however, important to look to the wordings of each treaty to determine which payments the reduced rate apply to and what the exact rate of reduction is. These taxes are collected at source and remitted to the tax authorities and will typically be applied in considering a tech company's eventual tax liability.

Tech companies are also subject to the Pay As You Earn (PAYE) Scheme ("PAYE").[21] Tech companies are expected to deduct income tax chargeable on their employee's emolument when making such payments to them. The tech company, as an employer, will also file returns for the preceding year with the relevant tax authority[22] no later than January 11 of the current year.

Technology Tax

The NITDA Act establishes a fund[23] - the National Information Technology Development Fund (the "NITD Fund"). Apart from grants, gifts and other voluntary [18] [19] [20] [21] [22] [23]

[18] Conversely, in respect of which sort of income should a tech company expect to receive payments less than its actual invoice?
[19] See the Companies Income Tax (Rates etc., of Tax Deducted at Source (Withholding Tax)) Regulations 1997; the Companies Income Tax (Rates etc., at Source (Withholding Tax)) Amendment Regulations, 2015; and the Explanatory Regulations and Public Notices issued by the FIRS in respect of these matters. See generally https://www.firs.gov.ng/TaxResources/TaxCircularsRegulationsandPublicNotices (accessed July 20, 2019).
[20] CITA, s. 45. The countries with active Double Tax Treaties are United Kingdom, Northern Ireland, Canada, France, Belgium, the Netherlands, Pakistan, China, South Africa, Philippines, Czech Republic, Slovakia, and Romania.
[21] PITA, s. 81.
[22] Personal Income Tax is collected and assessed by the internal revenue service or the board of internal revenue of the state in which the employee is employed.
[23] s. 12.

contributions, the NITDA Act provides that a levy of 1% of the profit before tax of certain companies[24] with an annual turnover of N100,000,000.00 be paid into the NITD Fund. These companies are GSM[25] service providers and all telecommunications companies, cyber companies and internet providers, pensions managers and pension-related companies, banks and other financial institutions and insurance companies.

On a literal interpretation, this means that a tech company will only be required to pay the technology tax where it is one of the particular businesses identified under the NITDA Act and has an annual turnover of N100,000,000. It is also noteworthy that this tax is imposed on the profits-before-tax.

Education Tax

The education tax is imposed at a rate of 2% on the assessable profits of a company[26]. There is not much to add except that this tax, unlike the technology tax, is imposed on all companies regardless of their sectors or industries.

The National Cyber Security Fund[27]

A tech company engaging in any of the following businesses - GSM service providers and all telecommunication companies; internet service providers; banks and other financial institutions[28]; insurance companies - will be required to pay to the National Cyber Security Fund "a levy of 0.005 of all electronic transactions".

[24] NITDA Act, Third Schedule.
[25] Global System for Mobile Communications.
[26] TETFUND Act, s.1.
[27] See generally s. 44 and the Second Schedule of the Cybercrime (Prohibition, Prevention etc.,) Act 2015 (the "**Cybercrime Act**"). See also Rotimi Akapo, "Nigeria: Multiple Taxes, Levies and Regulations in the Nigerian Communications Industry" available at http://www.mondaq.com/Nigeria/x/751100/withholding+tax/Multiple+Taxes+Levies+And+Regulations+In+ The+Nigerian+ Telecommunications+Industry (accessed August 1, 2019).
[28] *Quaere:* In light of the fact that the CBN has evinced an intention to regulate "fintech" companies, would they qualify as "other financial institutions" for the purposes of the Cybersecurity Fund and the Technology Tax payable under the Cybercrime Act and the NITDA Act respectively?

Interest of Foreign Loans: [29]

CITA exempts interests payable on foreign loans granted to tech companies on or after April 1, 1978, from being included in that tech company's profits. The scope of the exemption depends on the term of the loan. Where a tech company is also involved in a "home-based" creation of products and services, interest payable on loans granted by a bank for the provision of its working capital shall be exempt from taxation only if the moratorium provided is not less than eighteen months and the rate of interest on the loan is not more than the "weighted average of the cost of fund" to that bank as at the time the facility was provided.

Exempted Dividends:[30]

Where a tech company is a shareholder in another Nigerian company, dividend accruing to it in that company will be exempt from being included in its profits if: (A) the dividend was satisfied by the issuance of shares[31]; (B) that other Nigerian company is a beneficiary of the pioneer status incentive; and (C) that other Nigerian company is chargeable to tax under the Petroleum Profits Tax Act. This is not a full exemption, because a different tax regime applies under the PPTA.

Exempted Profits:[32]

Certain categories of the profits earned by a tech company will not be included in its total profits for the assessment of its taxes. They are: (i) dividends, interests, rent or royalty derived by a tech company from another country but brought into Nigeria through the CBN or an authorized dealer;[33](ii) interests on a foreign currency domiciliary account in Nigeria; (iii) dividends from small companies in the

[29] CITA, s, 11, and the Third Schedule.
[30] CITA, s. 18.
[31] Please note that this would not be so if that other company was in liquidation. See text to n. 12 above (on dividend)
[32] CITA, s. 23.
[33] The Revised Foreign Exchange Manual, 2018 defines an Authorized Dealer to mean, "any bank licensed under the Banks and Other Financial Institutions Act 1991 as amended and such other specialized banks issued with licence to deal in foreign exchange."

manufacturing sector in the first five years of their operations; and (iv) dividends from investments in wholly export-oriented businesses.

Permitted Deductions[34]:

After ascertaining the profits of a tech company (excluding exempt profit), the tech company is permitted to make certain deductions to the extent that the expenses in respect of which they are made are "wholly, exclusively, necessarily and reasonably incurred in the production of those profits". Some of the permitted deductions include: (a) interest payable on loans utilized as capital; (ii) rent for land or building occupied for the tech company's business; (iii) expenses in respect of salary, wages, benefits, allowances and other remuneration of senior staff and executives; (iv) expenses incurred for repair of premises, plants, machinery and features used for the business; (v) bad and doubtful debts; (vi) any contribution to a pension, provident or other retirement benefit funds; (vii) certain charitable donations out of the profits (and not the capital of the tech company) to funds, bodies and institutions listed in the Fifth Schedule of the CITA; (viii) donations (whether of a capital nature or not) to a university and other tertiary or research institution for research or any developmental purpose or as an endowment and (ix) reserve made out of the tech company's profits for research and development. Donations under para. (viii) must be equal to 15% of the ett tech company's total profits or 25% of the tax payable in the year of donation except there is an order in the Federal Gazette directing otherwise. While donations under para. (ix) should not exceed 10% of the tech company's total profits. Tech companies should be careful to also manage their exposure to non-permitted deductions[35] as well for tax planning purposes.

Losses

[34] CITA, ss. 24, 25, 25A, 26. Although, this is not in the strict sense some sort of incentive, a proper knowledge of the deductible expenses may enable a tech company properly structure its expenses to use these deductions to reduce its chargeable income.
[35] CITA, s. 27.

S. 31(2) of CITA allows tech companies to deduct their losses from their assessable profits for up to four years from the commencement of their business in accordance with the provisions of that section[36].

Investment Allowances

S. 32 of CITA permits a tech company that has incurred an expenditure on plant and equipment to set off 10% of the actual expenditure incurred on such plant or equipment in addition to the initial allowance provided in Schedule 2 of the CITA (to the extent that it qualifies for the same under the provisions of that Schedule).

S. 34 of CITA recognizes that a tech company may incur expenditure on the provisions of facilities like electricity, water or tarred road for the purpose of a trade or business which is located at least 20 kilometres away from such facilities provided by the government. The tech company may deduct a portion of the total of the costs of provision of such facilities depending on whether the extent of the facilities is provided.

A tech company will also enjoy a 15% investment tax credit where it has incurred expenditure for the replacement of an obsolete plant or machinery[37].

The Pioneer Status Incentive (PSI)[38]

The PSI is being administered in Nigeria pursuant to the Industrial Development (Income Tax Relief) Act 1970 ("IDITRA"), the Pioneer Status Incentive Regulations 2014 and the Application Guideline for Pioneer Status Incentive in 2017. The PSI is enjoyed by companies in industries identified in the various pioneer lists that have been gazetted from 1958 to 2017. There are some conditions that have to be met before a tech company can enjoy this incentive, among which is being a stakeholder in a

[36] If the tech company is also engaged in agricultural trade or business, the loss allowance is not limited in time. See CITA s. 31(3)).
[37] CITA, s. 41.
[38] See generally Ayodele Ashiata Kadiri and Adaeze Akuegbu, "The Pioneer Status" *Journal of the Tax Club University of Lagos* Volume 3 - August 2018 138.

qualifying industry (such as e-commerce services and software development and publishing) and having non-current tangible assets worth N100,000,000.00[39].

Once a tech company is deemed eligible to enjoy the PSI, it will get a tax holiday of up to five years. Its dividends are also exempted from tax under the PITA and the CITA. Apart from the tax holiday, (a) assets acquired during the tax holiday and used after the tax holiday will enjoy qualifying capital expenditure[40] and (b) losses incurred during the tax holiday may be set off against taxable profits post-PSI[41].

4.0 TAXATION OF DISPOSAL OF ASSETS

The CGT Act taxes the gain or profit obtained from the disposal of certain assets at a rate of 10%.[42] Assets for this purpose means all forms of property including options, debts and incorporeal property, any currency[43] other than Nigerian currency and any other form of property created by the person disposing it[44]. Disposal also means the sale, lease[45], transfer, assignment, compulsory acquisition and other dispositions whether or not assets are acquired by the person paying for the said assets[46].

Thus, where a tech company assigns any of its assets - patents, trademarks, copyrights and any other assets - it will be subject to CGT on the profits from such disposal.

5.0 INDIRECT TAXES

The two indirect taxes that will be talked about here are the stamp duties and the value-added tax ("VAT").

Stamp duties are imposed on every written document. Stamp duties are chargeable on every instrument listed in the schedule to the SDA according to the rates set out in the

[39] This is incredulous and clearly was not arrived with tech companies in mind, especially in light of the fact that some of the biggest tech companies today started in garages or a one-room office.
[40] IDITRA, s. 14(2).
[41] IDITRA, s. 14(3).
[42] CGT Act, s. 2(1).
[43] *Quaere:* What is the implication of this for tech companies involved in mining cryptocurrency?
[44] Ibid. s.3.
[45] Rents from leases are also subject to the WHT under the CITA or PITA as the case maybe.
[46] Ibid. s. 6(1).

schedule to the SDA. These rates, which may be flat or *ad valorem* charges, vary depending on the type of the instruments or the nature of the transaction.

VAT, charged at five *percent,* is payable on the supply of all goods and services, except for[47]: all medical and pharmaceutical products; basic food items, book and educational materials; baby products; fertilizer, locally produced agricultural and veterinary medicine, farming machinery and farming transportation equipment; all exports, plants, machinery and goods imported for use in the export processing zone or free trade zone[48]; plant, machinery and equipment purchased for utilization of gas in down-stream petroleum operations; tractors, ploughs and agricultural equipment and implements purchased for agricultural purposes; medical services; services rendered by community banks, People's bank and mortgage institutions, play and performances conducted by educational institutions as part of learning; and all exported services. The VAT Act, with the amendment in 2007, introduced "zero-rated goods and services" - non-oil-exports, goods and services purchased by diplomats and goods purchased for use in humanitarian donor-funded projects.

VAT is imposed on the final consumer, but a taxable person for the purposes of the VAT Act refers to the person supplying the goods and services on the distribution chain for the final consumer. It is perhaps important to make a further clarification - a tech company will only pay VAT to the extent that it is the final consumer of that taxable good or service (e.g. professional services). Where, the tech company is, however, just one more level on the production chain, the tech company is expected to collect the taxes and remit the difference between its input tax[49] and output tax[50], where applicable[51].

[47] VAT Act, ss. 2 and 3; see generally the Schedule to the VAT Act.
[48] However, 100% production of such company should be for export.
[49] VAT Act, s.12.
[50] VAT Act, s. 14.
[51] VAT Act, s. 16.

5.1 Other Taxes

Nigeria's federal system has an impact on its taxation system as a whole - each tier of government is constitutionally empowered to impose and collect certain kinds of taxes[52]. These taxes have been specifically enumerated and compiled in the Taxes and Levies (Approved List for Collection) Act 1998 as amended by the Schedule to the Taxes and Levies (Approved List for Collection) (Act Amendment) Order 2015 (together with the "Taxes and Levies Act"). The validity of the Taxes and Levies Act have been pronounced upon severally[53]. Further to the Taxes and Levies Act, the various state governments have begun to impose taxes like the development levy, economic development levy and the social services contribution levy. In a case where the imposition and collection of these levies were challenged at the Federal High Court, the state government raised a preliminary objection challenging the jurisdiction of the Federal High Court on Appeal, and the Court of Appeal held that the appropriate forum was the State High Court [54] The Court of Appeal was, thus, unable to make any pronouncements on the merits of the case, due to the jurisdictional issues.

The local governments, on the other hand, are empowered to administer the taxes in the Fourth Schedule of the Constitution.[55] The current position of the law seems to be that a local government can only collect and administer taxes listed in the Taxes and

[52] The Constitution of the Federal Republic of Nigeria 1999 (as Amended) (the "Constitution"; s. 4, Second Schedule Part 1 (Exclusive Legislative List - items 58 and 59), Part 2 (Concurrent Legislative List - items 7, 8 and 9), Fourth Schedule (Items 1(b) and (j)) for the Federal Government, State Government and Local Government respectively.

[53] See *Eti-Osa Local Government* v. *Jegede* [2007)]10 NWLR (Pt.1043) 537; *AG Cross River State et al.* v. *Ojua* [2010] LPELR-9014(CA); *Peace Mass Transit Ltd.* v. *FCT et al.* [2014] LPELR-23740(CA); *Government of Akwa Ibom State v. Barrister Livinus Udofia* [2010] LPELR-4214(CA). Although, it must be noted that some authors have written extensively, questioning the continued validity of the Taxes and Levies Act. See N. Ikeyi & S. Orji, "How Much Force is Still Left in the Taxes and Levies (Approved List for Collection) Act?" (2011-2012) *10 The Nigerian Juridical Review* 73; Adaeze Akuegbu, "A Critical Appraisal of the "Taxes and levies Approved List (for Collection) Act to Determine the Taxes and the Non-Taxes Listed Therein Collectible by the Various Arms of Government" *Journal of the Tax Club University of Lagos* Volume 3 - August 2018 29

[54] *AG Cross River State et al. v. Ojua supra.*

[55] n. 49.

Levies Act further to the extent that the local government is empowered by a statute of the relevant House of Assembly[56].

What is clear from the foregoing paragraphs is that the average tech company in Nigeria is subject to multiple taxes - from the Federal Government, the governments of the various states (to the extent that they are operating in more than one state), and in the local governments they operate in those states. What cannot be overemphasized is the need for better co-ordination across the tiers of government for seamless collections and perhaps, a memorandum of understanding (modelled after the double taxation treaty) between the local governments and state governments to ease the tax burdens on the tech companies.

6.0 CONCLUSIONS

The taxation of the profits of tech companies may take a different turn than envisaged in this article in the next five years. It is clear that the current tax laws did not contemplate the existence of tech companies. Some of the incentives may well be beyond the reach of the regular tech company, like the PSI with its requirement for current tangible assets of N100,000,000.00. Some of the tax laws may also be revised to capture all tech companies (not just telecommunications companies and internet service providers), like the technology tax and the cybersecurity fund levy.

Unfortunately, these are desperate times in Nigeria. All the tiers of the Nigerian government exploring various means to generate revenue and technology seems to be the new oil. Or how else can one explain the recent N25,000,000.00 license being proposed by the Lagos State Government for bike-hailing companies?[57] It is a sneaky move - no state government can impose taxes on the profits of a tech company (or any tech company), this is within the legislative competence of the federal government.

[56] See the Constitution; Second Schedule Part 2 (Concurrent Legislative List – items 9). See also *Eti-Osa Local Government v. Jegede (supra.)* and *Abuja Electricity Distribution Company Plc v. Abuja Municipal Area Council* (Suit No. FCT/HC/CV/2028/2017) (unreported).

[57] See Techcabal, https://techcabal.com/2019/07/22/lagos-state-is-considering-a-n25-million-license-for-bike-hailing-startups/ (accessed August 8, 2019).

They can, however, regulate trade and commerce within the state by providing licenses to the companies at a fee.

A better approach may be to have a separate taxation regime for tech companies[58] - one that recognizes that most tech companies begin as start-ups (with a corresponding applicable minimum tax regime) and a graduated tax regime that can be applied once they have begun to scale. The existing incentives should also be revised to consider the peculiarities of the technology industry.

Nevertheless, with the right kind of financial, legal and tax advisers, a tech company can take advantage of the current incentives in the Nigerian tax system to minimize its tax exposures and promptly discharge its tax liabilities.

[58] See Olaniwun Ajayi LP's Newsletter, National Lottery (Amendment) Act 2017- Special Tax Regime for Lottery Companies available at http://www.olaniwunajayi.net/blog/national-lottery-amendment-act-2017-special-tax-regime-for-lottery-companies/ (accessed August 1, 2019).

MULTIPLICITY OF TAXES IN NIGERIA: ADDRESSING ITS IMPACT ON BUSINESSES AND INVESTMENT; ISSUES, DYNAMICS AND SOLUTIONS

Oloyede Agbolarin [59]

Taxation is central to the current economic development agenda. It provides a stable flow of revenue to finance development priorities, with which the government may provide necessary public services, and is interwoven with numerous other policy areas, from good governance and formalizing the economy, to spurring growth[60]. Taxation is a term for when a taxing authority, usually a government, levies or imposes a tax. The term "taxation" applies to all types of involuntary levies, from income to capital gains to estate taxes[61]. What the relevant bodies need to keep in mind, however, is that the tax policy and administration system under which taxation is to be administered fundamentally affects tax burden which will determine, majorly, whether or not there will be tax compliance, ultimately affecting the very purpose for which the taxation is to address.

It is fairly accurate to posit that the Nigerian tax administration system is fraught with several inadequacies; however, none is more underhanded, ubiquitous and domineering than the phenomenon of multiplicity of taxes. The issue of multiple-taxation has been described as a cankerworm threatening the continued existence of small, medium-sized and major corporate organizations in Nigeria[62]. The effects of multiplicity of taxes transcend more than just impact on domestic institutions; they also tend to shape and influence, negatively, decisions with regard to investments, especially from foreign entities. It certainly is not contended that taxation is a core

[59] By OLOYEDE AGBOLARIN. 400 Level Student. Faculty of Law, University of Lagos.
[60] Mike Pfister. “Taxation for Investment and Development: An overview of policy challenges in Africa”.
[61] Investopedia - Tax Multiplicity
[62] Akinwunmi Abiodun Jelil, Olotu Ayooluwa Eunice, Adegbie Folajimi Festus . “Multiplicity of Taxes and Foreign Direct Investment: A Relational Analysis of Nigerian Tax Environment”

pillar, necessary to leverage enough revenue to enhance public service delivery, ultimately to promote growth and development in any economy, but equally necessary, is the need to create a tax regime that is business and investment-friendly. The challenges which subsist as a result of trying to strike a balance between the two are majorly centred on multiplicity of taxes.

The concept of the multiplicity of taxes is not an established term in the field of taxation as such. Thus, the term seems to be peculiar to Nigerian fiscal lexicography[63] connotes paying similar taxes on the same or substantially similar tax base[64]. Examples of such multiple taxes for which this definition would be suitable for include: Companies Income Tax, Education Tax, Information Technology Tax (NITDA levy), Nigerian Content Development Levy, which are all based on income or profits; and Value Added Tax (VAT), Sales Tax and Hotel consumption Tax, all of which are based on sales. Multiple-taxation may also refer to a situation in which the same earnings are taxed more than twice. Thus, for instance, multiple-taxation may occur when a publicly-traded company pays corporate taxes on its earnings. It then passes on some of those earnings to shareholders as dividends, on which they must pay a capital gains tax at the federal level and then again at the state level[65]. Given the unique nature of the Nigerian Federation which practices fiscal federalism in which the fiscal responsibility of government is based on a three-tiered tax structure comprising the Federal government, Thirty-six (36) State governments and the Federal Capital Territory, and Seven Hundred and Seventy Four (774) local governments, the exact number of taxes levied on businesses may vary significantly between various states and local governments and businesses may be subject to as many as 100 different taxes, charges, fees and levies, and in some instances taxed for the same event or asset that are levied by the three tiers of government[66]. The major reason given to the inadequacy and dissatisfaction with the

[63] Yomi Olugbenro. “Multiplicity of Taxes In Nigeria - Addressing The Impediments”. Deloitte (2014).
[64] Oyedele, T. (2015). Insights on taxation and fiscal policy. West Sussex: Bloomsbury Professional Ltd.
[65] Farlex Financial Dictionary - Multiple Taxation
[66] Financial Investment Advisory Service, (2008)

concept of multiplicity of taxes lies not centrally in its existence, but fundamentally in its arbitrary imposition. Multiple taxations infringe the cardinal principles of taxation. Justifiable as it may seem that the government requires revenue to discharge its responsibilities to the citizens, this cannot be done in a haphazard, arbitrary and capricious manner[67].

The dynamics go to show just how severe the situation is. The 2014 World Bank report on doing business in Nigeria listed up to 47 tax payments made by companies every year, with a whopping 956 hours spent on complying, preparing, filing, and paying these taxes. This is far beyond an average Organization for Economic Cooperation and Development (OECD) country where the statistics of tax payments and compliance duration are 12 and 175 hours, respectively[68]. The situation only worsened in 2016 when Nigeria was ranked 182 out of 190 economies on the Ease of Paying Taxes Survey[69] on the basis that there were 59 tax payments with an average tax rate of 34.3 percent which require about 908 hours to comply. By contrast, Qatar, which came first, had only 4 tax payments, an average tax rate of 11.3 percent requiring an average of 41 hours to comply[70].

These indications result in overbearing impacts on businesses, especially Small and Medium Enterprises (SMEs). The overall magnitude of the burden is just too great. Estimates have outlined that all tiers of tax cost firms on average about 40 percent of production costs[71]. An average effective tax rate of business in Nigeria was approximately 33 percent and a marginal effective tax of approximately 40 percent. The study highlights that associated administrative costs amplify the tax burden substantially, accounting for as much as 42 percent of pre-tax profits of traders and businesses in Nigeria. These costs, which seem to be even higher for smaller and more remote enterprises, place firms at a distinct disadvantage. High taxation levels and

[67] Dr. Abiola Sanni, PhD. (2012). Multiplicity of Taxes in Nigeria: Issues, Problems and Solutions.
[68] Supra, ***note 5***
[69] World Bank/PWC Ease of Paying Taxes Survey 2017
[70] Ibid.
[71] Center for International Private Enterprise (CIPE) (2010)

compliance costs have significant implications for Nigerian businesses, reducing incentives to expand production, leading to higher prices, and distorting factor incomes[72]. As firms make investment decisions based on long-run returns to capital, the costs of multiple taxations reduce the size of the capital stock and aggregate output in the economy and discourage investment in productivity enhancing measures. This ultimately leads to lower returns to human capital and lower job creation[73]. The Divisional Head, Large Enterprises, Bank of Industry, Mr Joseph Babatunde, has said that more than 17 million small businesses in Nigeria are in the informal sector and not registered with the Corporate Affairs Commission. He added that the number constitutes 99.87 per cent of all SMEs in the country[74]. According to estimates from the Manufacturers Association of Nigeria, about 1,000 manufacturing firms that set out to do business in the country annually end up shutting down due to the unfriendly business environment[75] - aside the problem of infrastructure like unstable electricity, the yoke of multiple taxes on manufacturers ranked second among the factors stunting the growth of the real sector. It is a heavy yoke that frustrates existing investors and scares away prospective ones. Therefore high taxation levels, high tax burdens, and compliance costs have significant implications for Nigerian businesses, reducing incentives to expand production, leading to higher prices, and distorting factor incomes. As firms make investment decisions based on long-run returns to capital, the costs of multiple taxations reduce the size of the capital stock and aggregate output in the economy and discourage investment in productivity enhancing measures[76]. This ultimately leads to lower returns to human capital and lower job creation. Addressing the issue of multiple taxations

The multiplicity of taxes makes investment climate tempestuous as investors are not sure the extent to which their incomes would be taxed[77]. It occurs occasionally that

[72] Nihal Pitigala and Mombert Hoppe. Impact of MultipleTaxation on Competitiveness in Nigeria. (2011)
[73] Ibid.
[74] Bank of Industry. “17 Million SMEs Not Registered with Corporate Affairs Commission”. 2015
[75] Manufacturers Association of Nigeria, (2010).
[77] Supra, ***note 9***

large companies and investors may move their operations out of some States or from Nigeria to neighbouring countries referred to as Tax havens - low-tax jurisdictions that provide prospects for tax avoidance, on account of multiplicity of taxes and the rising cost of doing business in Nigeria. This is generally the case with Foreign Direct Investment (FDI). FDI essentially refers to foreign investments in which the investor owns more than 10% of the stock that is invested in. This generally refers to investments by multinationals in foreign-controlled corporations such as affiliates or subsidiaries. It is suggested that high taxes have a significantly negative effect on the likelihood of a country to attract FDI. The situation is made particularly worse in relation to multiple taxations, and raising the overall tax burden can reduce growth. Generally, a sound tax policy improves the environment in which business is carried out; it also encourages international trade and investment and promotes economic growth[78]. Nigeria also applies import duties similar to those of other West African countries with which it is negotiating a Common External Tariff (CET). However, its highest tariff exceeds that of other countries in the region substantially at 35% and Nigeria argues that its neighbours should also adopt this high tariff band as part of the CET[79] Nigeria levies a number of product-specific levies (including excise levies on alcohol)

Addressing the issue of multiple taxations would increase expected returns to entrepreneurs and would encourage capital accumulation, investment, and job creation. It is thus suggested that in order to curb the phenomenon of tax multiplicity, there should be an approach towards the elimination of "nuisance taxes" and a conscious coordinated approach towards the alignment of tax bases. To reduce the multiplicity problem, and ultimately, the administrative costs they create, the federal government should enter into a dialogue with the other tiers of government to reduce the overall number of taxes - without necessarily reducing the amount of tax revenue collected. Taxes could be regrouped at the municipal level and levied consistently. This would also increase transparency, provide greater legitimacy to taxes that businesses have to pay and prevent opportunities for collecting additional —taxes by illegal tax collectors. Ideally, the government should undertake a top-down reform from the Federal level

[78] OECD Policy Framework for Investment (PFI) Toolkit, p. 29, —Draft user guidance for the PFI tax policy questions

[79] The Impact of Multiple Taxation Competitiveness in Nigeria.pdf

that reduces and clarifies responsibilities of tax authorities at lower levels of government, while addressing the issue of revenue distribution among the three tiers of government. The aim would be to eliminate the incidence of multiplicity of taxation by clarifying relevant legal texts and strict assignment of tax bases, or harmonization of key tax policies across levels of government to guard against over-taxation and to lower the administrative and compliance costs associated with the implementation of multiple taxes. Moreover, a well-understood tax system eliminates the chances of corruption and harassment by tax officials and consequently of non-compliance by taxpayers. A critical step would be to publicize the taxpayer rights and responsibilities. Specifically, there is a need to provide adequate awareness to taxpayers on the list of approved taxes at the federal, state, and municipal level to check arbitrariness in assessment by properly defining the tax base, tax rate and other aspects of tax administration - and to establish an independent yet powerful complaint body that taxpayers could turn to when treated in violation of their rights, particularly the small- and medium-sized companies. Additional efforts could be undertaken to reduce trade-related compliance costs by simplifying and making payments more transparent. Given the delays in obtaining duty and VAT refunds, the introduction of alternative systems by the Federal government, such as suspension schemes, could bring down companies' capital costs of funds that are currently tied up in federal accounts.

Similar reforms have been undertaken in several countries where tax revenues actually increased as a result of these simplifications. For instance, The Russian Federation, in the 1990s operated a tax system characterized by a complexity that resulted in levies and charges at different levels of government. This amounted to approximately 100 different taxes. This propagated the need for reforms initiated to deal with tax avoidance which began with a reduction of the corporate tax rate from 35 percent to 24 percent and a flat-rate small business tax. Other tax reforms included replacing separate taxes for pensions, medical insurance, social insurance, and unemployment with a unified, lower social insurance tax rate; and eliminating most small nuisance taxes and tax privileges. Between 2001 and 2003, income tax revenues under the flat tax system increased by 28 percent in the first year after reform and by more than 80 percent within three years after reform as compliance increased and economic growth expanded the tax base. The laws on both direct and indirect taxes were substantially altered—with the result that Russia today has a modern and internationally competitive tax system which may even serve as a model for tax reform in the industrialised countries of the West[80]. In the Hashemite Kingdom of Jordan, the tax regime comprised a complex array of taxes and fees on commercial activities, including hundreds of nuisance taxes, many disguised as fees that were promulgated through dozens of laws and different

[80] Alexander PogorletskiyFritz Sollner The Russian tax reform. (2002)

government agencies. Aimed at mitigating the burden on the private sector and in a bid to reduce the administrative costs, the Government of Jordan, in 2009, embarked on an ambitious fiscal reform program to eliminate such nuisance taxes and unify them through a flat corporate income tax regime. A temporary tax law entered into force in January 2010 unifying several categories of taxes making Jordan more attractive for foreign investment[81]. Similarly, Tanzania, in 2013, initiated a tax reform which included the abolition of nuisance taxes, the flat rate development levy and of business license fees for enterprises below a certain size, and capping the latter for larger enterprises. Tanzanian businesses recorded a 14 percent decrease in the tax burden overall. Within this, medium businesses recorded 11 percent less tax and small businesses 36 percent less tax[82]. The reforms were particularly beneficial in remote regions where many firms have seen a reduction of 28 percent in total taxes paid. All councils were enterprising in replacing income lost from the development levy and market dues by intensifying collection of taxes that remained on the permitted schedule.

Eliminating double taxation of specific tax bases, reducing the total number of taxes paid, increasing transparency as to how and what to pay, and facilitating procedures for filing taxes, will be essential to reducing the high compliance costs in terms of man-hours that were identified by our study. Streamlining and simplifying the tax system would reduce the regressive nature of the current tax system that puts additional burden especially on SMEs, and companies in remote areas of Nigeria. It would directly benefit those companies that are the potential engine of growth and are likely to create the largest number of jobs[83].

In conclusion, the multiplicity of taxes in the Nigerian regime subsists majorly due to arbitrary imposition and is inimical to developing businesses and institutions, as well as already established businesses. It also influences the decision of investment and may encourage prospective and already existing investors to seek more suitable environments, known as tax havens, in which to carry on operations. It is thus recommended that a more accommodating environment be created at home through the elimination of multiple taxation.

[81] Supra, ***note 14***
[82] Poverty and Social Impact Analysis of the World Bank (2006)
[83]Supra, ***note 14***

CHALLENGING OVERREACH IN THE EXERCISE OF TAXING POWERS IN THE NIGERIAN TAX SYSTEM*

ENIOLAAKINOSO

1.0 INTRODUCTION

"You can have a Lord and you can have a King,

but the man to fear is the Tax Collector".

This 'necessary evil' sentiment of taxation borne by the Iraqi from almost four millennia ago is still shared by taxpayers of present. This is notwithstanding that Taxation is universally acknowledged as the sinews of the State and a mechanism *inter alia* for social engineering, controlling the economy, revenue generation and resource redistribution. It is also reflected in the definition of Tax as a compulsory levy made by public authorities for which nothing is received directly in return'.

This is because the exercise of taxing powers by tax authorities in Nigeria is fraught with intermittent deviation from the dictates of enabling framework such as the 1999 Constitution of the Federal Republic of Nigeria (as amended), national tax policies, taxing statutes, international action plans laid down by the OECD and the Canons of Taxation: Equity, Certainty, Convenience and Administrative Efficiency, all of which underscore the motives of ease, simplicity, transparency and accountability that are crucial for an efficient and dynamic tax system.

One of the snags of our federal system of taxation which arises from our federal system of government is its convenient utilization by the tax authorities to overreach their legislative boundaries. This results in multiple taxations which overburden taxpayers and results in direct and indirect tax evasion. Direct tax evasion occurs where taxpayers already in the tax net claim fictitious expenses and manipulate records while indirect tax evasion entails those not in the tax net going out of their way to arrange their affairs

so that they never get into it. Actions like these from multitudes of taxpayers culminate into immense loss of government revenue and deflation of the tax to GDP ratio.

Nigeria loses over 15 trillion naira (NGN 15,000,000,000,000) yearly, to tax evasion while the tax to GDP ratio remains at an abysmal 7%. The 2019 gross tax revenue of 5.3 trillion naira (NGN 5,300,000,000, 000) is in the records as the highest amount ever generated by the FIRS during a one-year period since it was established. Juxtaposing the amount generated with the amount lost from evasion which is at least three times higher, it behoves this writer why the tax authorities forgo more revenue to make less revenue in allegiance to a revenue generation spree.

Uprisings have arisen in due course in the form of challenges by aggrieved taxpayers against the exercise of taxing powers by tax authorities at different levels of government. The current state of the tax system is largely inequitable with taxing emphasis placed on few who alone bear the burden of the majority that remains outside the tax net, especially those in the informal sector. This paper shall address the pillars upholding an effective tax system, the sources of taxing powers of the tax authorities in Nigeria, the source of conflicts in the exercise of taxing powers and the challenge by taxpayers of the overreach of taxing powers in Nigeria.

2.0. THE TAX TRIPOD: PILLARS UPHOLDING AN EFFICIENT TAX SYSTEM

The Tax tripod consists of elements that are necessary for the smooth running of policies, tax laws and tax administration. The three pillars that make up the tax tripod must be in sync as the absence or deficiency of any, posits a fundamental problem for the tax system in focus.

2.1. Tax Policies

Tax Policies are the first pillar of the tax tripod. They are the basic principles underlying the regular development of the remaining pillars - Tax laws and Tax administration.

The canons of Taxation are exemplary factors to put into consideration when drafting tax policies. It is crucial to note that if the policies are inadequate, the entire tax system will be defective.

Tax Policies are thus the foundation from which the other pillars of the tripod derive their effectiveness. Nigeria's National Tax Policy (NTP) was formulated by the NTP Review Committee, set up by the Minister of Finance to review the pioneer NTP of 2012. The extant NTP was approved by the Federal Executive Council (FEC) in 2017. The NTP is to be contemplated during the formation of any tax law in Nigeria as it emphasizes sustainable patterns of revenue generation.

2.2. Tax laws

Tax Legislation is created with the Tax policies in consideration, to provide guidance for Tax administrators in performing their duties. Tax laws must be flexible to adapt to social and economic circumstances. Examples of Tax Laws are Capital Gains Tax Act (CGTA), Companies Income Tax Act (CITA), Stamp Duties Act, Value Added Tax Act (VATA), Personal Income Tax Act (PITA), Petroleum Profits Tax Act (PPTA), etc.

2.3. Tax Administration

Tax Administration is made up of bodies of people implementing the Tax Laws to achieve their objectives which are in tandem with Tax Policies. Notwithstanding impeccable policies and laws, the tax system cannot function effectively if the administration goes awry. Bad administration is detrimental. The three tiers of government are responsible for Tax administration and must have an efficient system to collect taxes. The following bodies are responsible for the administration of Taxes in Nigeria:

2.3.1. Federal Inland Revenue Service (FIRS)

The FIRS is established by the Federal Inland Revenue Service (Establishment) Act of 2007 for controlling and administering different taxes and laws of the Federation. Only the FIRS assesses, collects, accounts for and administers all taxes for the Federal

Government. It drives tax compliance, enforces sanctions for non-compliance, also develops and deploys e-solutions to allow ease of tax payment. Its current chairman is Babatunde Fowler.

2.3.2. State Internal Revenue Service (SBIR)

SBIR is established for each state by the PITA. State Internal Revenue Service is the operational part of each SBIR e.g. Lagos Internal Revenue Service, Bayelsa State Board of Internal Revenue, Delta State Board of Internal Revenue. They ensure effective and optimum tax collection in the state and they enforce penalties that accrue.

2.3.3. Joint Tax Board (JTB)

The JTB is established by the PITA and it advises all tiers of government on tax matters for the ultimate objective of promoting an efficient tax administration system. It resolves areas of conflict on tax jurisdiction among states and most importantly, enhances uniformity in the application of tax laws and harmonizes the administration of personal income tax in Nigeria. The JTB consists of representatives from the Federal Government and each of the thirty-six (36) states and acts as a meeting point for the tax authorities to resolve issues on procedure and interpretation. The current JTB chairman is Babatunde Fowler.

2.3.4. Joint State Revenue Committee (JSRC)

The JSRC is established for each state of the federation by the PITA. It implements decisions of the JTB, advice the JTB, State and Local governments on revenue matters and harmonises tax administration in the state. It comprises representatives of the State Internal Revenue Services, the Local Government Revenue Committees and the National Revenue Mobilisation, Allocation and Fiscal Committee.

2.3.5. Local Government Revenue Committee (LGRC)

The LGRC is established for each Local Government Council in the State. It assesses and collects all taxes, fines and rates under the jurisdiction of the local government.

3.0. SOURCES OF TAXING POWERS IN NIGERIA

The authority to make taxes policies, to enact tax legislation and to administer taxes is bestowed in accordance with the system of government of a nation i.e. whether it is federal or unitary. Ours is a Federal system of government adopted since the 1951 Constitution which has been preserved in subsequent constitutions. It goes without saying that there is the need for the proper demarcation of powers to avoid conflicts/overlap amongst the various levels of government and to avoid on the part of the taxpayer, the incidence of multiple taxations and tax evasion. The following sources determine the extent to which taxing powers can be exercised, a surpassing of which renders such exercise ultra vires.

3.1. The Constitution of the Federal Republic of Nigeria

The Constitution is the grundnorm, the supreme law from which other laws derive their existence and validity. Our Constitution divides the taxing powers among the three levels of government by allocating legislative powers on tax subject matters. Section 2(2) sets the ball rolling by pronouncing Nigeria a "Federation consisting of States and a Federal Capital Territory", effectively excluding the local government for the purpose of constituting the Federal Republic of Nigeria.

Section 4 goes further in Subsection 3 to bestow on the National Assembly, the exclusive power to make laws for the peace, orders and good governance of the Federation with respect to any matter in the Exclusive Legislative List. Items (taxes) which the National Assembly has exclusive power to make laws on are:

i. Customs and Excise Duties;
ii. Export Duties;
iii. Stamp Duties;
iv. Taxation of Incomes, Profits and Capital Gains;

In exercise of these powers, the National Assembly has enacted the following tax laws:

i. Personal Income Tax Act
ii. Companies Income Tax Act
iii. Stamp Duties Act

iv. Capital Gains Tax Act

v. Customs Duties

vi. Excise Duties

vii. Value Added Tax Act

viii. Petroleum Profit Tax Act

Section 4(7) gives the State the power to make laws for the Peace, order and good governance of the State or any part thereof with respect to any matter included in the Concurrent Legislative List.

Section 4(5) then provides that "If any Law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other Law shall, to the extent of the inconsistency, be void."

This sets a limit on the powers of the State while Section 1(3) which provides that "If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void", checks both powers of the National Assembly and the State.

The Concurrent Legislative List also provides that the National Assembly may in the exercise of its powers to impose any tax or duty on:

i. Capital gains, incomes or profits of persons other than companies.

ii. Documents or transaction by way of Stamp Duties,

Provide that the collection of any such tax or duty or the administration of the law imposing it shall be carried out by the Government of a State or other authority of a State.

This connotes that the only taxes imposed by law by the National Assembly, which falls under the jurisdiction of States to administer are: (x) Capital gains Tax of Individuals alone; (y) Personal Income Tax; and (z) Stamp Duties of Individuals alone.

It can be gleaned from the following that the power to impose a tax through legislation does not equate to the power to collect or administer the same.

The Constitution does not grant the local government the powers to enact tax legislation. It is recognized as the third tier of government in the Constitution, but it does not form part of the Nigerian Federation. Section 7 of the 1999 Constitution guarantees the system of local government by democratically elected local government councils then goes further to subject their existence to a Law of the Government of every State which is to provide for the establishment, structure, composition, finance and functions of such councils. The Local Government thus possesses no powers of its own, except that given it by an enabling law of the State. As such, if no enabling law is enacted, the local government cannot even perform nor make laws on its own functions as listed in the Constitution.

3.2. Taxes and Levies (Approved List for Collection) Act

By Decree No. 21 of 1998, the Federal Military Government of Nigeria enacted the Taxes and Levies (Approved List for Collection) Decree (the "Decree"). The Decree was a response to the complaints of multiple taxation by taxpayers, especially businesses. The complaints ranged from the number, types, and rates of taxes and levies imposed by states and local government councils, to the manner of collection of these taxes. At the time, the objective of the Decree was to restrain the excesses of state governments and local government councils in the exercise of their taxing powers. The Decree then specifically allocated the power to collect specified taxes among the federal government, the state governments and the local government councils; and, in some cases, went further to fix the amount of tax to be collected.

The Decree survived the coming into effect of the 1999 Constitution as existing law and now the Taxes and Levies (Approved List for Collection) Act, provides a list of taxes and levies that the various levels of governments in Nigeria can collect. In 2015 and pursuant to the provisions of the Act, the Minister of Finance issued the Schedule to the Taxes and Levies (Approved List for Collection) Act (Amendment) Order 2015 which increased the list of taxes collectible from 39 items to 61.

Below is a detailed list of the taxes, levies, fees and rates collected by different tiers of government in Nigeria.

3.2.1. Federal Government

1. Companies Income Tax
2. Education Tax
3. Petrol eum Profits Tax
4. Nigeria Information Technology Development Levy
5. Nigeria Social Insurance Trust Fund Levy
6. Industrial Training Fund Levy
7. Personal Income Tax Act- (FCT resident, armed forces, Police enc...
8. Value Added Tax
9. Withholding Tax (Income due to Companies, FCT residence, Non-resident persons)
10. Stamp duties (Instrument executed involving a company as a party, FCT residence)
11. Capital Gains Tax (with respect to gains by companies/FCT residence on disposal of chargeable assets)
12. Customs and excise duties
13. Nigeria content development levy
14. Pioneer status incentives application service charge
15. Mining Royalty
16. Gas flaring fee
17. Contributions by banks to banking sector resolution cost fund

3.2.2. State Government

1. Personal Income Tax
2. Capital Gains Tax (where an individual makes gains on the disposal of chargeable assets)
3. Stamp duties (executed between individuals)
4. Pool, lotteries, gaming and casino taxes
5. Road tax
6. Business premises levies
7. The naming of streets in the state capital
8. Development levies
9. Right of occupancy fees on land owned by the state government
10. Hotel, restaurant and event centre consumption tax
11. Market taxes and levies where state finance is involved
12. Entertainment tax
13. Environmental Ecological fees or levies

14. Mining, milling and quarry fees
15. Animal trade tax
16. Produces sales tax
17. Slaughter or abattoir fees where state finance is involved
18. Infrastructure maintenance charge
19. Fire service charge
20. Economic development levy
21. Social services contribution levy
22. Signage and mobile advertisement (jointly with the state)
23. Property charge
24. Land use charge
25. Effluent Discharge and Turbidity Levy
26. Food Sales Permit
27. Hoteliers license and fees
28. Learner Permit
29. The urban and regional planning fee
30. Contributions to the national housing fund
31. Contributions to pension
32. Premium paid under the group life insurance scheme
33. Contributions to employees' compensation fund
34. Contributions to the industrial training fund
35. Contributions to the national housing fund
36. Premium paid under the National Health Insurance Scheme
37. Land perfection related fees (including application fee, charting fee, endorsement fee, administrative fee, registration fee, endorsement fee, consent fee etc.)
38. Sanitation Fee

3.2.3. Local Government

1. Shop and kiosk rate
2. Tenement rate
3. On and off liquor license fees
4. Slaughter slab fees
5. Marriage, birth and death registration fees
6. The naming of street registration fees, except streets in the state capital
7. Right of occupancy fees on land in the rural area except those collectable by federal and states
8. Market and taxes levies except for market where state finance is involved
9. Motor park levies

10. Domestic animal license fees
11. Bicycle, truck, canoe, wheelbarrow and cart fees other than a mechanically propelled truck
12. Cattle tax payable by cattle farmers only
13. Merriment and road closure levy
14. Radio, television license other than radio and television transmitter
15. Vehicle radio license (to be collected by the state in which the vehicle is registered
16. Wrong parking charges
17. Public convenience sewage and refuse disposal fees
18. Customary burial ground permit
19. Religious places establishment permit
20. Signboard and advertisement permit fees
21. Wharf landing charge
22. Local Government Support Levy
23. Regulated Food Premises Fee
24. Okada toll
25. Open Market Levy

The Act aims to delineate the subject matters upon which the various levels of government can impose or collect taxes subject to their constitutional and legislative competencies and in doing so, to curb the menace of multiplicity of Taxes.

3.3. National Tax Policy

Our National Tax Policy is the handbook that guides the thinking, formulation and execution of strategies relevant to taking tax administration at all levels (assessment, collection etc.) and the tax system at large to optimum heights.

The National Tax Policy (NTP) was first published in 2012. Due to problems plaguing the Nigerian tax system:

i. lack of a robust framework for the taxation of the informal sector and high network individuals, thus limiting the revenue base and creating inequity;
ii. fragmented database of taxpayers and weak structure for the exchange of information by and with tax authorities, resulting in revenue leakage;

iii. inordinate drive by all tiers of government to grow internally generated revenue which has led to the arbitrary exercise of regulatory powers for revenue purpose;
iv. lack of clarity on taxation powers of each level of government and encroachment on the powers of one level of government by another;
v. insufficient information available to taxpayers on tax compliance requirements thus creating uncertainty and non-compliance;
vi. poor accountability for tax revenue;
vii. insufficient capacity which has led to the delegation of powers of revenue officials to third parties, thereby creating complications in the tax system;
viii. use of aggressive and unorthodox methods for tax collection;
ix. failure by tax authorities to honour refund obligations to taxpayers;
x. the non-regular review of tax legislation, which has led to obsolete laws, that do not reflect current economic realities; and
xi. lack of strict adherence to tax policy direction and procedural guidelines for the operation of the various tax authorities,

The new National Tax Policy 2017 was formed as part of the efforts to entrench a robust and efficient tax system in Nigeria.

It has the objectives of guiding the operation, clarity, review of and accountability to the tax system, providing the basis for future tax legislation and administration and serving as a point of reference for all stakeholders on taxation.

The National Tax Policy, as a guiding document for the formation of tax laws and the betterment of tax administration:

i. outlines the Guiding principles of the Nigerian Tax System e.g., Equity and Fairness, Simplicity, Certainty and clarity, Convenience, Low Compliance Cost, Low Cost of Administration, Flexibility and Sustainability;
ii. enjoins focus on indirect taxation, tax incentives, the convergence of tax rates, the importance of having a wide network of beneficial treaties;
iii. outlines the responsibilities of stakeholders i.e. the Government, the Federal and State Ministries of Finance, the Taxpayer, Revenue Agencies, Professional Bodies, Tax Practitioners, Consultants and Agents, Media Advocacy Groups;

iv. Establishes clear guidelines on crucial tax administration issues e.g. registration of taxable persons, tax compliance, the efficiency of administration, technology and tax intelligence, dispute resolution.

v. Outlines implementation measures by all stakeholders and arms of government.

4.0. CHALLENGING OVERREACH OF TAXING POWERS BY DIFFERENT LEVELS OF GOVERNMENT

A rigorous perusal of the powers accorded to each of Federal, State and Local Government by the 1999 Constitution (as amended), manifests a careful delineation specifically to prevent overlap and fail-safe provisions to counter any overlap in the event of the same happening. These fail-safe provisions exist in the form of Section 1(3) which voids any law inconsistent with the provision of the Constitution to the extent of its inconsistency and Section 4(5) which provides that where any Law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other Law shall, to the extent of the inconsistency, be void."

The taxes, rates and levies listed in the Taxes and Levies (Approved List for Collection) Act are also delineated and the responsibility for collection of the taxes is clearly divided among the tiers of government. The National Tax Policy does not also allocate any taxing powers but sets broad parameters for effective taxation and ancillary matters connected with taxation in Nigeria. It is a clear statement on the principles governing tax administration and revenue collection; it provides a set of guidelines, rules and modus operandi for the regulation of taxation in Nigeria which all stakeholders in the tax system can subscribe to.

The plethora of case law evidence the fact that the framework bequeathing taxing powers is not the cause of overlap, rather, overlap arises during the exercise of taxing powers by the tax authorities. This unconstitutional overreach of powers only causes conflicts in the tax system, serves to confuse, overburden and agitate taxpayers, eventually making deviants of them and does nothing to diminish the vast problems plaguing the tax system. The counterproductive actions of the tax authorities

punctuated by stupefying and draconian demands and penalties perpetually engender floodgates of challenge by aggrieved taxpayers. The Tax Appeal Tribunal, being the first resort of the aggrieved taxpayer and the courts of law, however, aid taxpayers aggrieved by an overlap in the exercise of taxing powers by continuously churning out decisions curbing the excess of the tax authorities. We examine below multiple instances where taxpayer challenge of the overreach of the exercise of taxing powers by tax authorities in respect of different subject matters, has proved successful.

5.0. DECIDED CASES ON DIFFERENT SUBJECT MATTERS

5.1. Power of Tax Authority to Distrain

A combined reading of CITA, PITA, PPTA, and FIRS Act, reveals that the tax authority may distrain the goods or chattels, bond or other securities, land, premises or place which the taxpayer owns for the purposes of recovering the tax. For distrain to be valid, the tax authority must:

i. first, assess a taxpayer;
ii. serve notice of assessment on the taxpayer;
iii. allow the assessment to become final and conclusive;
iv. issue a demand notice in accordance with the provisions of the law; and
v. distrain the property if tax isn't paid within the time stipulated by the demand note.

In GTB V Ekiti State Board of Internal Revenue ('ESBIR'), the issue at the Court of Appeal was whether or not the court below was right to grant the ex-parte application for distrain and whether ESBIR complied with Section 55 and 104 of PITA as regards applying for the distrain. The facts of the case are summarized as follows:

ESBIR sent letters to GTB requesting for bank and client documents. Upon failure by GTB to furnish ESBIR with the requested documents, ESBIR filed an ex-parte application at the Ekiti State High Court seeking among others, an order to distrain the GTB's premises and property. The High Court granted the Order to Distrain. GTB appealed. The Court of Appeal set aside the ex-parte Order on the grounds that the pre-conditions for distrain had not been complied with as an ex-parte application for an order to distrain can only be validly issued against a taxpayer where the taxpayer fails

to comply with a final and conclusive assessment in accordance with Section 55 of PITA.

The Court also held that the remedy where a taxpayer refuses to furnish the tax authority with requested documents is not an ex-parte Order for distrain but an application for an order compelling the taxpayer to produce the relevant documents and disclose relevant information.

5.2. Income Tax on Turnover Basis

Section 30 of the CITA provides that a Non-Resident Company (NRC) that has a fixed base of business in Nigeria, shall be subject to income tax on such fair and reasonable percentage of their turnover that is attributable to the fixed base. The FIRS also requires NRCs to file their tax returns on an actual profit basis in accordance with Section 55 of CITA.

In Theodak Nigeria Limited v FIRS the issue at the Federal High Court (FHC) was whether or not FIRS acted within the provisions of Section 30(1)(a) of CITA as regards assessing Theodak's liability. The facts of the case are summarized as follows:

FIRS valued Theodak's property (Theodak Plaza), ascribed deemed profit on the property and assessed Theodak to income tax in the sum of Ninety-Four Million, Six Hundred and Eighty-One Thousand, Eight Hundred Naira (NGN 94,681,800) based on the value of the Plaza which is deemed as Theodak's turnover.

Theodak filed an action contesting this assessment and the power of FIRS to make the turnover assessment on the property instead of Theodak's business. The FHC held that FIRS can only assess and charge Theodak on such fair and reasonable percentage of the turnover of the trade or business where Theodak does not assess itself or the profit ascertained is not certain, that if the position adopted by FIRS was allowed, Theodak's property would be assessed based on the value of the property every year where Theodak failed to assess itself and make returns.

The Court held that the value of Theodak Plaza as assessed by FIRS cannot be its turnover, that the position would have been different if Theodak was in the business of selling properties as FIRS would then have been able to tax it on the value of the property. A perpetual injunction was then made restraining FIRS from entering, sealing and/or enforcing or commencing any action against Theodak for the recovery of the assessed tax.

The writer shares the sentiment of the majority that assessing Theodak's property to determine its turnover is an utter deviation from the clear provisions of the law. However, the writer was privileged to be at a gathering where a director of the FIRS explained the reason behind such action. He stated that Theodak turned out to be the owner of so many assets worth hundreds of millions of naira and that its returns were not reflecting it, that those assets did not arise out of nothing and since the actual profit returns were abysmally lower than the value of their property, the FIRS deemed it fit to assess Theodak's turnover based on the value of its property. This only lends more credence to the position that the tax authorities would overlook the provisions of the law and would act within the realm of the preposterous and the unlawful, to soothe the revenue generation mania.

5.3. Power of Local Government Councils to Create/ Impose Tax

The extent to which local government can exercise their powers is as defined by an enabling law made by the State. Any contrary action is unconstitutional, null and void to the extent of its inconsistency.

In Abuja Electricity Distribution Company PLC (AEDC) v, Abuja Municipal Area Council (AMAC), the issue before the High Court of the Federal Capital Territory was whether AMAC had the legislative power and competence to create the Loading/Off-Loading, Parking and Control of Traffic Bye-Law No. 8 of 2012 which provides for corporate parking permit and prescribes annual fee payable. The facts of the case are summarized as follows:

AEDC was served a demand notice from AMAC for the sum of Seventeen Million, Five Hundred Thousand Naira (NGN 17,500,000) as corporate parking permit levy/fee for 2016 and 2017, and the penalty for non-payment of the 2016 bill. AEDC challenged the constitutionality of the demand notice and the legislative competence of AMAC to enact Loading/Off-Loading, Parking and Control of Traffic Bye-Law No. 8 of 2012. One of the functions of the Local government council under Section 1(e) of the 4th Schedule to 1999 Constitution (as amended) includes the establishment, maintenance and regulation of motor parks. Motor park levies and wrong parking charges are items 9 and 16 respectively in the list of taxes/levies collectable by Local Government Councils as contained in Part III of the Taxes and Levies (Approved List for Collection) Act.

The Court held that the 4th Schedule merely sets out the main functions of Local Government Councils in Nigeria without more, that powers and functions are different legal concepts and because Local Government Councils do not have legislative powers of their own, the power to impose taxes/levies by means of bye-laws or regulations must be traceable to a specific Law of the House of Assembly of a State or an Act of the National Assembly in the case of the FCT.

The Court further held that AMAC and other Local Government Councils in Nigeria have no power to create or impose any tax or levy outside the ambit of the Taxes and Levies [Approved List for Collection) Act Cap. T2, LFN, 2004 and/or the Taxes and Levies (Approved List for Collection) Act (Amendment) Order, 2015. It held that Corporate Parking Permit Fee/Per Annum contained in Paragraph 3 of the Schedule to the Loading/Off-Loading, Parking and Control of Traffic Bye-Law No. 8 of 2012 enacted by AMAC is inconsistent with Part III of the Schedule to the Taxes and Levies [Approved List for Collection) Act, Cap. T2, LFN, 2004 and consequently ultra vires the Defendant, null and void and of no legal effect whatsoever.

Also, in Planned Shelter Limited v Abuja Municipal Area Council & 4 Ors. The issue before the High Court of FCT, Abuja was whether AMAC and the 4 other Area

Councils have the Power and Capacity to assess, determine, demand and legislate on tenement rate without strict compliance with and in accordance with the provisions of Section 1 (j) of the 4th Schedule of the 1999 CFRN (as amended). The facts of the case are summarized as follows:

Planned Shelter Limited instituted a class action against AMAC and all the other area councils of the FCT through an originating summons relating to questions on the issue above. The court held that local government councils have the power to earn revenue from tenements as permitted by law but that the local government councils have no power under the constitution to make bye-laws fixing tenement rates.

Various bye-laws enacted by the Area Councils at various times for the collection of tenement rates from owners or occupiers of property within the respective territorial jurisdictions of the Area Councils comprised in the FCT were declared unconstitutional, null and void. The Court held that no tenement rate in the FCT ought to be levied unless and until the National Assembly makes a law e.g. an amendment to the extant Local Government Act, fixing tenement rates to be collected on rateable property within the territory.

5.4. Power of State Government to Create/ Impose Tax

Section 4(7) of the 1999 Constitution (as amended), provides that the House of Assembly of a State shall have the power to make laws for the peace, order and good government of the State with respect to any matter not included in the Exclusive Legislative List which is within the ambit of the National Assembly. The Taxes and Levies (Approved list for Collections) Act clearly delineates the bounds of each tier of government on the list of taxes chargeable and recoverable by each tier. The legislative competence to enact laws imposing taxes, levies, fees by the state must be within the scope of the Taxes and Levies (Approved list for Collections) Act in relation to matters listed under the State Government.

In IHS Nigeria Limited v AG Fed and 4 ors, the issue before the Federal High Court was whether mobile communication mast/ station site qualifies as Business Premises

within the context of the Registration of Business Premises (Amendment No 1) Law of Abia State. The facts of the case are summarized as follows:

MTN, Etisalat and other telecommunication companies transferred their towers and cellular Mast to IHS Nigeria Limited following Nigerian Communication Commission (NCC) directives. The Abia State House of Assembly enacted and passed into law the Abia State Basic Environment Law 2004 and the Abia State Basic Environment (Amendment No.1) Law 2013, which imposed fees/levies on the telecommunication companies. Pursuant to the laws, Abia State Environmental Protection Agency (ASEPA) an agent of AG Abia and Abia State House of Assembly, issued Demand notices on IHS Nigeria Limited to pay "Environmental support fees" for their telecommunication masts in Abia.

The AG Abia, Abia State House of Assembly and Abia State Government, pursuant to Section 24 (1) of the Registration of Business Premises (Amendment No. 1) Law of Abia State 2013, also served on the Plaintiff about 253 demand notices numbering for all the Telecommunication mast/base stations belonging to the Plaintiff at the rate of hundred thousand naira each (NGN 100,000) each. IHS instituted the action challenging all the demanded fees.

The FHC held that the Taxes and Levies (Approved list for Collections) Act clearly delineated the bounds of each tier of government on the list of taxes chargeable and recoverable by each tier, that whilst business premises is listed as Item 7 of part ll for the State Government; Companies Income tax falls under item I for Federal Government in the schedules. Taxes on Mobile Communication/ Mast sites thus fall within the domain of the National Assembly.

It further held that the Abia State House of Assembly having powers to legislate on Environmental Matters like prior approvals for building and erection of Masts, business premises Fees is one thing, amending the laws to incorporate Communication Mast sites as business premises and mandated payment for Environmental tax is legislative competence found lacking and that charging

Telephone Mast Station as a business premises is akin to charging every power infrastructure commonly called or referred to as transformer in the neighbourhood as a business premises. These infrastructures are supporting the companies that mount them with a distinct chargeable office in each state.

The AG of Abia state, Abia State House of Assembly and Abia State Government were held to lack the legislative competence to enact laws imposing taxes, levies, fees on Telecommunication critical infrastructure outside the purview of physical planning approval and outside the scope of the Taxes and Levies (Approved list for collections) Act. The Item No. 16 under 14th schedule, Section 24 (1) of the Registration and Business Premises Law, Abia State was held to be unconstitutional and ultra vires as a telecommunication Mast site by no logical interpretation nor reasoning can be called a business premises. The demand notices on the telephone mast sites were then set aside for being ultra vires, null and void and of no effect.

6.0. CONCLUSION

A shift from extreme over-dependence on oil revenue to non-oil revenue and the move to increase the tax to GDP ratio has set the Nigerian taxing authorities on a revenue generation spree the likes of which has never been seen. It has also, as can be inferred from the decided cases above, propelled the tax authorities to pull against their leashes in acts of intentional encroachment on powers reserved for a different tier of government to the detriment of taxpayers who are the most important class of stakeholders in the tax system. The tax authorities are not only guilty of the overreach of their powers but also in some cases act completely in isolation of the law as seen in Theodak v FIRS.

It is apparent that the courts of law would without hesitation uphold the law and the supremacy of the Constitution, providing a trail of healthy precedent for taxpayer challenge. However, the following issues still exist:

I. taxpayers need to be unburdened
II. more revenue needs to be generated

III. the overreach in the exercise of taxing powers must be prevented *ab initio.*

Widening of the tax base will unburden taxpayers and a direct effect of the widening of the tax base is an increase in revenue generation. It is the writer's opinion that the implementation of the National Tax Policy 2017 would solve the three issues listed above.

The NTP underscores the challenges confronting the Nigeria tax system and provides key policy principles to address them. It recognises the roles played by key stakeholders in the development of an effective tax system, and clearly states their rights and duties. It also highlights the need for effective tax administration through the development of mandates which relevant Tax Authorities should strive to adhere to in their pursuit of an effective and efficient tax system.

All other problems plaguing the Nigerian tax system: operation of the informal sector outside the tax net, lack of collaboration between tax authorities, multiplicity of taxes leading to tax evasion, lack of adequate education and clarity in relation to taxes, ambiguities in tax laws, overreach of taxing powers, among others, upon diplomatic implementation of the NTP, will not persist.

\

TAXATION AND COMPETITION LAW: THE NEXUS AND POTENTIAL TO THE NIGERIAN ECONOMY

OTITOOLA OLUFOLAFIMI ADURALERE

1.0 INTRODUCTION

No relationship between two parties, with the possible exception of that between client and psychiatrist, is more fraught with love and hate than that of citizen and elected government.[84] Despite this, one thing remains true, this is the fact that modern governments need lots of money to function.[85] How they get this money and whom they take it from are the two most difficult political issues faced in any modern political economy.[86] Major economies and developed countries of the world are built and supported by a sustainable system of revenue generation. One major sustainable system of revenue generation globally is taxation. Taxation can be said to be the most important because compared to other sources of revenue, tax revenues can be relatively predictable and governments are able to plan with a greater amount of certainty than when relying on the volatile alternative of natural resources. However, it is not an easy task to introduce an optimal tax structure in an underdeveloped or a developing country.[87]

[84] Gillespie, W. I., *Tax, Borrow and Spend: Financing Federal Spending in Canada, 1867-1990,* (Ottawa: Carleton University Press, 1991).

[85] This is supported by the fact that according to Rampell, combating the effects of the global recession that hampered the economies of various nations has been endeavoured by many governments since 2008. See Rampell C., 'Great Recession: A Brief Etymology', New York Times, March 11, 2009.

[86] Sven Steinmo, *Taxation and Democracy: Swedish, British and American Approaches to Financing the Modern State* (Yale University Press: 1993), p. 302.

[87] Bhatia, O. F. (2004), "An Evaluation of the Contribution of Value Added Tax (VAT) to Resource Mobilisation in Nigeria", An M.Sc. Seminar Presented and Submitted to the Department of Economics, University of Port Harcourt, Nigeria.

Competition law is a legal framework put in place to promote or maintain market competition by regulating anti-competitive conduct by companies.[88] The existence of a comprehensive legal regime for the regulation of competition is extremely important to the growth of any advanced economy.[89] Competition law has two major instruments.[90] The first is a competition law which contains rules to restrict anti-competitive market conduct, such as monopolies and abuse of dominant position. The second major instrument is competition advocacy, and it is particularly important as it is the interface with other activities that promote a competitive economy outside competition law itself.

We live in a time of widespread dissatisfaction with the legislative outcomes generated by the political process.[91]Too often, the process seems to serve only the purely private interests of special interest groups at the expense of the broader public interests it was ostensibly designed to serve.[92]While the current distrust of government represents a major shift away from the dominant public perception of "government as helper",[93] * * the current attitude of distrust is not new by any means. This can, however, be changed with the gradual enactment of legislation for the economic benefit of the public which would show the government as indeed being the helper it was once thought to be.

[88] Martin Taylor, ***International Competition Law - A New Dimension for the WTO?*** (Cambridge University Press, 2006), p. 1.

[89] Yetunde Okojie & Ibidolapo Bolu, "A Review of the Federal Competition and Consumer Protection Bill, 2017" (SPA Ajibade& Co, 3 May 2018), http://www.spaajibade.com/resources/wp-content/uploads/2018/06/A-REVIEW-OF-THE-FEDERAL-COMPETITION-AND -CONSUMER-PROTECTION-BILL-2016-Okojie-Bolu.pdf, accessed 13 August 2018.

[90] 6th UN Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, "The Role of Competition Policy in Promoting Economic Development: The Appropriate Design and Effectiveness of Competition Law and Policy", United Nations Conference on Trade and Development (UNTAD), (2010).

[91] See Sunstein R., "Interest Groups in American Public Law" (1985) 38 ***StanfordLaw Review*** 29.

[92] Jonathan R. Macey, "Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model", (1986) 86 ***Columbia Law Review*** 223, 243-44; Jonathan R. Macey,"Cynicism and Trust in Politics and Constitutional Theory", 87 ***Cornell Law Review*** 280 (2002) Available at: http://scholarship.law.cornell.edu/clr/vol87/iss2/2;

[93] This conception of government is also known as the public interest theory of legislation. It is a theory more often assumed than articulated. See Posner, "Theories of Economic Regulation", (1974) 5 Bell J. Econ. & Mgmt. Sci. 335, 335.

For Nigeria, her competition laws have been grossly inadequate when viewed against the size and complexity of her economy.[94] Hitherto, the laws regulating competition in Nigeria have been embedded in various pieces of legislation relating to the regulation of different sectors of the economy.[95] These laws all contain provisions that deal with competition as it relates to the specific sector they regulate.[96]

The passing of the Federal Competition and Consumer Protection Bill 2017[97] by the National Assembly brings Nigeria closer to having a codified set of laws governing competition in the market place. The Competition Bill seeks to repeal the Consumer Protection Act;[98] and for market regulation and protection of small businesses, as it seeks to avoid monopolies and abuse of dominant market positions. Its objectives are in tandem with internationally accepted goals of competition regulation.[99]

With the Federal Competition and Consumer Protection Bill soon to be enacted as an Act, there is a need to change our laws and policies to ensure the smooth application of this necessary law to favour both the government (in terms of revenue generation) and the people (by driving competition to lower the cost of access to quality products and services).

With the background now stated, creating an intersection between taxation and competition law is important.[100] The interface between competition and tax laws can be seen from their respective objectives. Intensive studies on both fields provide a

[94] ***Supra*** note 7.
[95] A few prominent examples are the Investments and Securities Act 2007; the Nigerian Communications Act 2003; the Electric Power Sector Reform Act 2005 amongst other laws.
[96] ***Supra*** note 7.
[97] The Federal Competition and Consumer Protection Bill 2017 was passed by the National Assembly in December 2017 and has since been sent to the President for assent.
[98] CAP C25, LFN, 2004.
[99] Section 1(1) of the Bill contains the objectives, which are to: (1) promote and maintain competitive markets in the Nigerian economy; (2) promote economic efficiency; (3) protect and promote the interests and welfare of consumers by providing consumers with competitive prices and product choices; (4) prohibit restrictive business practices which prevents, restricts or distorts competition or constitutes an abuse of a dominant position of market power in Nigeria; and (5) contribute to the sustainable development of the Nigerian economy
[100] Jaeger Thomas, "Tax Incentives under State Aid Law: A Competition Law Perspective" (2016) 6, 39-57.

relationship that cannot be avoided in a country that wishes to advance its economic growth by utilising economic legislations.[101] The relationship between the tax and competition law has not been given the attention commensurate to its importance. The analysis of the objectives of both competition and tax law indicate that being economic legislations, they mutually provide a nexus that can be linked for effective enforcement of both legislations for economic development. Further, there is an element of deterrence objective that is also common to both fields for conduct that seems reprehensible. Since both have similar objectives, one field cannot be implemented without having an impact on the other. The aim of this research is to expose the possibility of aligning these two fields.

Hence, the goal similar to both competition law and tax laws is regulation and stabilisation of the economy. While the competition law works towards this goal by breaking monopoly and abuse of dominant position, tax laws through the setting of strategic rates, besides their function of raising revenue, can be used to encourage private investment, through tax incentives for competitive sectors and the abolition of monopoly privileges, which breaks monopoly thereby stimulating productivity. By working in harmony, the maximum effectiveness of competition laws and policies can be achieved through tax laws and policies.

The main conclusion drawn from this paper is that there is a great impact of the tax law as well policy on competitive economy. This paper thus, recommends a policy that promotes a change in approach through which the government can generate revenue and further fulfil the basic purposes of both laws. This change would assist the government in raising revenue more effectively, become transparent and accountable to the people, and achieve its economic growth path and, in turn, combat the global economic crisis that affected the economy.

[101]Economic legislation is legislation that serves the public interest by maximizing society's welfare from an economic perspective. See *supra* note 10.

2.0 RECOMMENDATIONS TO ENSURE THE ACHIEVEMENT OF COMPETITIVE ECONOMY THROUGH TAXATION LAWS AND POLICY

The tax system in Nigeria is made up of the tax laws, tax policy, and tax administration. According to the report of the Presidential Committee on National Tax Policy (2008), "the National tax policy provides a set of rules, modus operandi and guidance to which all stakeholders in the tax system must subscribe". [102]All of these are structured to work together in order to achieve the economic goal of the nation. This article considers some innovative ideas for the tripod areas of taxation for the purpose of a complete turnaround of fair competition through the instrumentality of taxation.

2.1 Tax Law Reform: Tax Rates Inversely Proportional to the Number of Competitors in the Sector

According to Adam Smith, a good tax system must be in consonance with cannons of taxation, which are equitability, neutrality, efficiency, flexibility and simplicity.[103]There is extensive empirical evidence that industries facing greater competition experience faster growth because competition allows more efficient firms to gain market share at the expense of less efficient ones. For example, prior to when the Nigerian telecommunication sector was deregulated, Nigeria had about 700,000 lines, which could not meet the demand for telecommunications services by Nigerians. The entry of new operators also deepened the competition in the sector with the subscribers being the better for it. According to the National Bureau of Statistics, the sector boosted the nation's Gross Domestic Product (GDP) by N1.58 trillion in the second quarter of 2016 representing 9.8% of the GDP. The exponential growth of the Nigerian telecoms market is clear and compelling evidence of the huge untapped

[102] Presidential Committee on National Tax Policy (2008) "Draft Document on the National Tax Policy". Available from: http://www.scribd.com/doc/10063735/National-Tax-Policv-Draft-Updated (accessed 11 August 2018).

[103] Nightingale K., ***Taxation Theory and Practices,*** 4th ed. (England Pearson Education, 2002).

potential of the Nigerian market with effective competition as the telecommunication sector has been described as Nigeria's highest revenue earner.[104]

The growth shown above can be contrasted with the downslide in the oil and gas and electricity sectors where emerging facts have shown that Nigeria is losing an estimated $1.5bn annually to a monopoly of the discharge of oil and gas-related cargos at a designated terminal belonging to a particular company.[105] Historically, the energy sector in Nigeria has been under a government monopoly that has seriously damaged the economy and international reputation of Nigeria. Policymakers tend to conclude that energy industries are natural monopolies for which competition is inappropriate due to large economies of scale, or decreasing marginal and average costs across a very large range of output.[106] However, the monopolies have never worked, it has instead restricted supply liquidity and increased inefficiency.

This recommendation proffers a change/amendment in tax laws to ensure the fulfilment of the Federal Competition and Consumer Protection Bill by establishing an inversely proportional tax system. An inversely proportional relationship is one between two variables in which the product is constant. When one variable increases, the other decreases so that the product is unchanged. In application to taxation, when competition increases, the tax percentage rate reduces; and when there are no competition, the tax percentage rate increases. Basically, it is a tax law/policy which increases/reduces tax based on the number of competitors in the sector.

Hence, the tax rate of every sector is inversely proportional to the number of investors or participants in that sector. This makes the investors or participants of the sector themselves want competition because they will have to share the burden of taxation if there is no competition. For example, where there are 2 investors, there is a 50% tax

[104] "Positioning communication sector as Nigeria's highest revenue earner" - Sulaimon Olanrewaju, Nigerian Tribune, 29 July, 2018 http://www.tribuneonlineng.com/40155/ (accessed 11 August 2018).

[105] https://www.naiia.ng/788530-shocker-nigeria-losing-1-5bn.html#788530 (accessed 11 August 2018). (reference properly)

[106] David B. Spence, "Can Law manage Competitive Energy Markets?" (2008) 94 ***Cornell Law Review*** 767.

rate; 3-5 investors, 30% investors and 5-10 investors, 25% tax rate. Basically, it is a tax law/policy which increases/reduces tax based on the number of competitors in the sector. It reduces excess profit, encourages existing investors to want competition, maintains and even increases governmental revenue from taxation. It is also a clear and straight forward tax rule which will ensure competition thus creating a level playing field.

Generally, it applies to situations where a company has control of so large a part of the market-supply or output of a given commodity as to stifle competition, restrict the freedom of commerce, and give the monopolist control over prices.[107] Where situations like this exist, the company in such a situation will be made to pay a high tax percentage rate that it only makes sense to involve competition. Therefore, where there is an artificial monopoly or abuse of dominant position, the law addresses this and still raises revenue for the government.

A possible concern is that there could be an uninfluenced monopoly without any taint of corruption. In fact, the Bill was created to protect the consumer and general public benefit or interest, and in certain circumstances monopolies,[108] mergers,[109] or conspiracy[110] which will be for public benefit. However, the response is that the aim remains to encourage competition hence these situations will not be exempted from the increased tax percentage rate. This is because even when the monopoly is not corrupted or where it is for public benefit, the said company or investor is singularly operating the market making all the profits, and also determining the prices thereby controlling the market. In the event that it is a pioneer sector, then exemption can be made under

[107] ***State v. Eastern Coal Co.,*** 20 R. I. 254, 70 Atl. 1, 132 Am. St. Rep. 817; ***Over v. Byrain Foundry Co.,*** 37 Ind. App. 452, 77 N. E. 302, 117 Am. St. Rep. 327; ***State v. Haworth,*** 122 Ind. 462, 23 N. E. 040, 7 L. R. A. 240; ***Davenport v. Kleinschmidt*** 6 Mont. 502, 13 Pac. 249; ***Ex parte Levy,*** 43 Ark. 42, 51 Am. Rep. 550.

[108] Section 85 & 87 of the Bill.

[109] Section 95(2) of the Bill.

[110] Section 109(2) of the Bill.

the Industrial Development (Income Tax Relief Act)[111]. Outside this, the importance of a competitive market can only be understated.

This recommendation will lead to the fulfilment of Nigeria's 2017 National Tax Policy[112] which provides that tax policies on investments should not promote monopoly such as entry barriers or otherwise prevent competition. Furthermore, the immediate beneficiary of this recommendation is the government itself as it shows them as the helper again, raises tax for the government and protect and benefits the public.[113] For the consumers' advantage, activities which result in consumer harm in the forms of higher prices, lower quality, limited choices and lack of innovation will be reduced to the barest minimum or stopped.

2.2 Tax Policy Approach: Same-Sector Reinvestment Scheme

The stabilization of the economy, the redistribution of income and the provision of services in the form of public goods are among other obligations the government owe her citizens. Taxation is required to finance public expenditure, as it serves as a means of financing public goods and providing public infrastructure.

However, paying taxes is not particularly willingly done anywhere in the world for anyone who has expended time, energy and other resources to earn the income. The major reason for this is that there is no direct benefit for tax payment. For investors, it is disheartening that how well you enjoy social services and public infrastructure is not a function of how much tax you pay.

The case is peculiar in Nigeria, as more than 60% of revenues earned by Nigeria go into debt servicing. The argument is always that these loans would be used to execute some important infrastructural projects that can accelerate growth. But in practice, the use of foreign loans in Nigeria is not encouraging. All the foreign loans taken in the

[111] Cap 17, LFN 2004.

[112] Federal Ministry of Finance, "National Tax Policy", February 2017, see at http://nwcnigeria.tvpepad.com/files/fec-approved-ntp—feb-1-2017.pdf (accessed 11 August 2018).

[113] ***Collins Dictionary of Economics, 4th ed.***. S. V. "Monopoly Tax", see at https://financial-dictionary.thefreedictionary.com/monopoly+tax (accessed 11 August 2018).

past have not significantly improved economic growth and development in Nigeria. This simply means one thing - Nigeria has a big problem of utilisation of revenue. Hence, people do not trust the government. They do not trust that if they pay taxes, the taxes would be used appropriately. So, because of this lack of confidence, people try to hide their earnings.

This recommendation suggests that instead of redistributing revenue raised from taxation across all sectors, it should be openly reinvested in the particular sector from which certain revenue is raised. Taxation should be used as a developmental tool, majorly for the sector from which it was earned. Hence, rather than being used to support public infrastructure investment or other government activities, a substantial amount of revenue from the 'tax' should flow back to the sector where it is generated from to enhance effectiveness and efficiency in quality of products and services.[114]

In spite of the potentials of the telecommunications sector as stated under the first recommendation, and the huge revenue that has accrued to the country therefrom, Nigeria is nowhere near maximizing the opportunities therein. Positioning Nigeria to benefit from the huge potentials of the sector will require the development of the country's capacity to meet the needs of the hungry telecom sector solution seekers. Recent research results by Pyramid Research Strategic Consulting Group warned that Nigeria may lose all telecom attractions if sustenance policies are not continually put in place.[115] Therefore, there is a need to take the right step as regards sectors like this. That is, reinvest in these sectors to ensure continuity of productivity in this sector. There is the possibility that if this policy is applied in the Oil and Gas sector (once there is competition and since it is Nigeria's biggest sector), the government may be able to afford to restore subsidy to the price of petroleum products.

[114] Anderson Robert and Frederic Jenny (2005). 'Competition Policy, Economic Development and the Possible Role of a Multilateral Framework on Competition Policy: Insights from the WTO Working Group on Trade and Competition Policy.' In Erlinda Medalla (ed.), Competition Policy in East Asia (Routledge) chapter 4.

[115] https://www.vanguardngr.com/2015/03/nigeria-may-lose-n400bn-telecom-contribution-to-gdp-by-2018-if/ (accessed 11 August 2018).

It must be stated that while this recommendation raises the concern of neglecting sectors without competition, this proposed scheme would not affect the growth and development of other sectors of the economy or inhibit revenue allocation as only a part of the tax raised from a particular sector must necessarily be reinvested in the same sector. This policy would not preclude the government from spending tax money generated from a particular sector in improving the other sectors of the economy. Consequently, the benefit of the scheme is more pronounced. Not only would the government be able to invest properly in sectors of the economy that generate substantial revenue e.g. Oil and Gas and Telecommunication Sector, the government still remains at liberty to direct and utilize money obtained from tax in developing other sectors of the economy. This also addresses the perceived lack of direction in the use of taxpayer's money by the government as it provides certainty to the people and guidance to the government in utilizing revenue generated from tax as reinvestment.

2.3 Tax Administration Reform: Good Governance (Transparency and Accountability)

The use of tax as an instrument of fiscal growth cannot be possible except effective and efficient government tax planning and administrative machinery is ensured in the country. This is transparency and accountability. The twin concepts of "transparency" and "accountability" are key pillars of good democratic governance in contemporary societies. They are vital to a democratic state as it is the responsibility of the government to continually reveal to its citizens how governmental activities are run. Hence, having made these recommendations, it is important to point out how they touch on good governance, i.e. transparency and accountability.

Past governments in Nigeria, instead of focusing on delivering essential public services, assumed control of major sources of national income. In the process, corruption thrived in public service and gained a strong foothold in society.[116] [117] Hence, because the public service was characterised by misuse of power, corruption and nepotism, *Privatization and Commercialization Act*[111] *was* enacted and the Nigerian government began to play a regulatory role, allowing private sector ownership and participation. Thus, in almost every sector in Nigeria, there is the requirement of a

[116] Nigeria: Poverty Reduction Strategy Paper - National Economic Empowerment and Development Strategy; IMF Country Report 05/433; December 1, 2005.
[117] Decree No. 25 of 1988.

permit or licence to be granted before businesses can operate legally. These sectors include banking,[118] telecommunications,[119] electricity,[120] petroleum,[121] aviation,[122] shipping,[123] education,[124] even the lottery.[125] This still did not stop the problems as, by 1999, corruption was practically institutionalized. As the grant of these licenses were largely discretionary, the government was widely regarded as a provider of large contracts, distributed by officers in power to people wealthy enough to buy their influence.

Corruption in the public sector simultaneously involves the private sector as well.[126]This is particularly so in the case of the oil industry. And this culture of impunity aided corruption in Nigeria's oil and gas sector and has hindered the provision of essential infrastructure to grow the industry. Also, the dominant monopoly in the country's oil and gas sector has existed for over 20 years, sabotaging the national economy, and conspiring and working against any potential competitor. The monopoly regime has been turned into a 'tollgate' which has forced the oil and gas industry and the nation into capitulation. They have driven away investments from Nigerian.

In some sectors, unqualified shell companies are regularly inserted into certain deals as a tool for distributing patronage. For years, Nigeria's national oil company, the Nigerian National Petroleum Corporation (NNPC), sold large portions of the country's crude oil production to unqualified companies, often referred to locally as "briefcase companies". These are small, little-known intermediary firms, typically connected to a political heavyweight, that lack the financial and operational wherewithal to sell oil. Instead, they re-sell, or "flip", the oil they receive to larger, more experienced commodities traders, and collect a margin on the sale.[127] A 2012 Nigerian government task force noted that many buyers of NNPC oil "did not demonstrate renowned expertise in the business of crude oil trading" and had "little or no commercial and

[118] Section 2 of the Banks and Other Financial Institutions Act, CAP. B 3 L.F.N. 2004.
[119] Section 31 of the Nigerian Communication Commission Act 2003, CAP. N97 L.F.N. 2004
[120] Section 62 of the Electric Power Sector Reform Act, 2005, NO. 6 2005.
[121] Section 2 and 3 of the Petroleum Act, CAP. P10 L.F.N. 2004.
[122] Section 35 of the Civil Aviation (Repeal and Re-Enactment) Act 2006, CAP. C13 L.F.N. 2004.
[123] Section 28 of the Nigerian Maritime Administration and Safety Agency Act, 2007, NO. 17 2007.
[124] Section 1 of the Educational Correspondence Colleges Accreditation Act.
[125] Section 17 of the National Lottery Act, 2005, NO. 7 2005.
[126]Gray C. & Kaufman M., "Corruption and Development" (1998) 2, ***Finance and Development*** 12-17; Khan M, "A Typology of Corruption Transaction in Developing Countries" (1996) 27(2) ***IDS Bulletin,*** 12-21; Klitgard R, "International Cooperation against Corruption" (1998) 38 ***Finance and Development*** 16-32.
[127] Aaron Sayne, Alexandra Gillies and Christina Katsouris, Inside NNPC Oil Sales: A Case for Reform in Nigeria (Natural Resource Governance Institute, 2015), 47-48.

financial capacity."[128] 2015 Natural Resource Governance Institute (NRGI) research found that some of these briefcase companies were used to channel payments to Nigerian, and sometimes foreign PEPs.[129] These funds - estimated in 2013 at the higher end of $0.25-$0.40 per barrel[130]—could potentially have been captured by the Nigerian state. The companies, therefore, served a corruption or patronage purpose, rather than adding any value to the commercial transaction.[131]

Theoretically, the implementation of these recommendations will imbue in the Nigerian Tax System the qualities of good governance, as it will prevent and reduce corruption to the barest minimum. Hence, where government officials without exercising good faith permit or licence a company or investor to operate in a sector without competition, the "beneficiaries" will end up placing on themselves heavy taxes as a consequence which would erode the intended profits of operating a monopoly. Since it is trite that most people do not want to pay taxes, no one will want to be overtaxed through a corrupt arrangement he was complicit.

The implication of this is that the "beneficiaries" themselves will end up wanting competition in their sector, as the more participants there are in the sector, the lesser their taxes will be.

3.0 CONCLUSION

Nigeria is a vastly blessed economy, both with natural resources[132] and manpower.[133]The benefits of the recommendations raised are almost endless. First, the government can utilise both aspects of the law to better achieve its principles and prove itself again to the people as the helper. It can also be used to solve both problems of revenue generation and the utilisation of taxes. It also positively affects the productivity growth, allocation efficiency and private and public sector efficiency. It discourages

[128] Federal Ministry of Petroleum Resources, Report of the Petroleum Revenue Special Task Force (2012), 76.
[129]Sayne, Gillies and Katsouris, Inside NNPC Oil Sales, 49-50.
[130]**Ibid**.
[131]There is also the Malabu case shows a newly minted firm with no apparent operations or experience receiving a license that could be highly prospective. In April 1998, Nigeria's petroleum minister granted to Malabu Oil and Gas the exclusive rights to explore oil prospecting license (OPL) 245, one of Nigeria's most valuable offshore oil blocks. Malabu had been set up just five days before the award and was unknown at the time.
[132] Apart from petroleum, Nigeria's other natural resources include natural gas, tin, iron ore, coal, limestone, niobium, lead, zinc and arable land.
[133] Nigeria is currently the most populous country in Africa and the seventh most populous in the world, and according to the UN Department of Economic and Social Affairs, 'World Population Prospects: The 2017 Revision' (2017), Nigeria is projected to be the world's third most populous country by the year 2050 and Nigeria's population size will increase from its current level by 120 million people to 400 million by 2050 and 700 million by 2100.

nepotism and red-tape between foreign and domestic, public and private, large and small, or incumbent and new entrants. It ensures competition and protection of the consumer and the public at large. It further creates an attractive investment climate. This attractive investment climate can be used in ensuring inclusive and sustainable development by channelling investment into particular sectors or activities.

According to John F. Kennedy, it is a paradoxical truth that tax rates are too high today and tax revenues are too low, and the soundest way to raise the revenues, in the long run, is to cut the tax rates. Most importantly, this essay posits a way through which the private sector itself can control how it is being taxed. There just has to be competition, as the government is elected to ensure public protection and benefit, not to further the interest of private sectors.

Prospects: The 2017 Revision' (2017), Nigeria is projected to be the world's third most populous country by the year 2050 and Nigeria's population size will increase from its current level by 120 million people to 400 million by 2050 and 700 million by 2100.

EXPLORING THE POSSIBILITY OF REGULATING CRYPTOCURRENCY IN NIGERIA: TAXATION AS THE INTRINSIC INCENTIVE

OLUYEMIADEBO [134]

ABSTRACT

In recent times, the world has come to familiarise itself with an ostensibly disruptive economic innovation with the potential of revolutionising contemporary economic structures as well as global finance. This disruptive phenomenon is cryptocurrency. The emerging rise of cryptocurrency into one global currency for cross border transactions is now in geometric proportions; thus necessitating the repeated calls for Nigeria to act fast and tap into the multi-billion dollar market currently taking the world by surprise, by regulating it. As always, however, technology moves rapidly and the law has to play catch up. Whilst we wait for our regulators to play catch up, the wave continues to move at an inconceivable speed. In fact, as it were, the focus appears to be shifting from cryptocurrency to other awe-inspiring prospects and developments of blockchain technology.

Concurrent to the above and in light of the prevailing economic realities, the possible uses of cryptocurrency are being researched and deliberated. On a deeper level, political and academic discussions on the regulation of cryptocurrency continue to be divided on what designation to be attributed to cryptocurrency. Some opine that cryptocurrency would thrive only as a virtual commodity while some believe that the further step of adopting cryptocurrency as a legal tender alongside other physical currencies is the future of the economic sector.

Whilst opinions vary as to its best usage in any given economy, it remains beyond ounce of doubt that, howsoever cryptocurrency is deployed or categorised, it is a means

[134] By Oluyemi Adebo Email: oluyemiadebo@yahoo.com ; oadebo@kennapartners.com)

by which governments may reap huge tax benefits. Accordingly, this paper examines the calls for the regulation of cryptocurrency in Nigeria as well as the need to tap into its fabled revenue potentials.

1.0 AN INTRODUCTION TO BLOCKCHAIN TECHNOLOGY AND CRYPTOCURRENCY

What we have here is perceived by a considerable lot of people to be a millennial conception nay an abstraction. Be that as it may, from the aggregate of the writer's research, it can be understood that cryptocurrency is one of the products of the mind-blowing blockchain technology. Simply put, blockchain is a decentralised ledger (i.e. the records it contains can be verified autonomously without the need to have a central entity). Practically, this ledger incapable of storing anything that can be put on record, including contracts, financial transactions, information on supply chain, physical assets, etc.

The information recorded on a blockchain can take on any form, whether it denotes a transfer of money, ownership, a transaction, someone's identity, an agreement between two parties, or even how much electricity a light bulb has used. However, to do so requires a confirmation from several devices, such as computers, on the network. Blockchain is an entirely new way of documenting data on the internet. The technology can be used to develop applications, such as social networks, messengers, games, exchanges, storage platforms, voting systems, prediction markets, online shops and much more. In this sense, it is similar to the internet, which is why some have dubbed it "The Internet 3.0". It is upon this system that cryptocurrency (the focal point of this paper) is hinged. Blockchain Technology is the beauty and brains behind virtual currencies.

Cryptocurrencies are digital or virtual currencies designed to work as a medium of exchange and are run on blockchain technology. They may be defined as a type of digital money, fashioned to be secure and (predominantly) anonymous. They are

known to employ cryptography,[135] the process of converting legible information into an almost enigmatic code, to track buying and transfers. Cryptography is used to secure and verify transactions as well as to control the creation of new units of a specific cryptocurrency. Essentially, cryptocurrencies are limited entries in a database that no one can change unless specific conditions are fulfilled[136]. Although distinctions are being made amongst cryptocurrency, cryptoasset and cryptocommodity based on their nature and functionality, cryptocurrency will be used generically in this paper.

By their very nature, cryptocurrencies defy the conventional notions of control, regulation, and by extension, a centralised system. These appear to be in utter consonance with what cryptocurrencies stand for. They are supposed to be totally devolved, and therefore not bound by many rules. This innate nature and inclination were however tenable when cryptocurrencies were not in the spotlight and not a major economic factor on the world stage. However, as their mainstream adoption has increased there has been an attendant increase in interest from governments and regulators around the world. For example, Australia has been very direct and positive in terms of cryptocurrency regulation and is already implementing some of its bigger plans, like exchange registration.[137]

The first cryptocurrency to emerge was Bitcoin (BTC); it is based on the SHA-256 algorithm which is a set of cryptographic hash functions designed by the United States National Security Agency (NSA). This digital commodity was conceptualised in a whitepaper written in 2009 by a pseudonymous writer who went by the name Satoshi Nakamoto.[138] Bitcoin is currently the most reliable and popular of all Cryptocurrencies, as it is the oldest, and has become the topic of mainstream media

[135] Cryptography was born out of the need for secure communication in the Second World War. It has evolved in the digital era with elements of mathematical theory and computer science to become a way to secure communications, information and money online. Within a cryptocurrency network, only crypto miners can confirm transactions by solving a cryptographic puzzle. They record transactions, and the network adds it to its database. Once a transaction is confirmed it becomes unforgettable and irreversible and a miner receives a reward, plus the transaction fees.

[136] https://cointelegraph.com/bitcoin-for-beginners/what-are-cryptocurrencies last assessed on July 30, 2018

[137] Supra

[138] http://empirica.io/blog/different-types-cryptocurrency/ last assessed on April 25, 2018

coverage because of rapid market changes and also an innovative technical concept. Bitcoin has been a trendsetter, ushering in a wave of cryptocurrencies built decentralised peer-to-peer network it has become the de facto standard for cryptocurrencies.[139] Other types of Cryptocurrency used all over the world include Litecoin, Ethereum, BitcoinCash and Ripple[140].

Without a doubt, cryptocurrencies are now taking centre stage. In times past, finding a merchant that accepts cryptocurrency was extremely difficult, if not impossible. Lately, however, lots of merchants accept cryptocurrency, especially Bitcoin[141] as a form of payment. They range from massive online retailers like Overstock and Newegg to small local shops, bars and restaurants. Bitcoins can be used to pay for hotels, flights, jewellery, apps, computer parts and even a college degree. Things are no doubt changing for the better, with Apple the giant Telecommunications Company having authorized at least 10 different cryptocurrencies as a viable form of payment on App Store.[142]

With digital currencies on the rise, there is bound to be a change in the way the world will trade and transact business in the coming years. It has therefore been clamoured that regulators world over need to key into the trend. In Nigeria (particularly), there is the Central Bank of Nigeria has been urged to take a firmer stance on the issue of cryptocurrency; rather than close its eyes to this economic reality.

2.0 LEGAL STATUS OF CRYPTOCURRENCY

As cryptocurrencies are becoming more and more mainstream, law enforcement agencies, tax authorities and legal regulators worldwide are trying to understand them and figure out where exactly they fit in, in existing regulations and legal frameworks. This has become necessary when you consider the billions of dollars that are traded daily on the cryptocurrency exchanges. A lot of concerns have been raised regarding

[139] By Prableen Bajpai, CFA (ICFAI) | December 7, 2017
[140] https://cryptocurrencyfacts.com/list-of-cryptocurrencies/ last assessed April 25, 2018
[141] Bitcoin is the most popular of the cryptocurrency, and has the highest market capitalizations. It would be used interchangeably with cryptocurrency throughout this proposal
[142] https://cointelegraph.com/bitcoin-for-beginners/what-are-cryptocurrencies last assessed on April 17, 2018

cryptocurrency's decentralised nature and their ability to be used almost completely anonymously. Regulatory authorities all over the world are particularly worried about cryptocurrency's appeal to traders of illegal goods and services; and their use in tax evasion schemes, money laundering and terrorist financing activities.[143] The risk associated with cryptocurrency has reached the front burner such that members of the G20 agreed to continue to monitor cryptocurrency in their respective states.[144] As of November 2017, Bitcoin and other digital currencies were outlawed in Bangladesh, Bolivia, Ecuador, Kyrgyzstan and Vietnam, with China and Russia being on the verge of banning them as well. Other jurisdictions, however, do not make the usage of cryptocurrencies illegal as of yet, but the laws and regulations vary drastically depending on the country.[145]

Despite the widespread dissemination and use of the Internet, cryptocurrencies are not legally secure and require detailed consideration by its users. The regulatory status of cryptocurrency varies from country to country. Although they are not generally accepted as legal tender, they are also not illegal. Some distinguishing characteristics of cryptocurrencies are: [146]

a. Exists in a virtual environment;
b. It has real purchasing power;
c. Lacks adequate security;
d. The official exchange rate in relation to the major world currencies;
e. Decentralisation - no single governing body in charge management and control;
f. The anonymity of the operations;
g. The absence of inflation, due to algorithmic limitations;
h. Determination of its value by supply and demand.
i. High volatility

last
[143] supra
[144] https://worldcore.eu/blog/g20-approves-monitoring-cryptocurrencies-remaining-uncertain-ban/ assessed on May 9, 2018
[145] supra
[146] *Natalia G. Vovchenko, Evgeniy N. Tishchenko, Tatiana V. Epifanova, Mark B. Gontmacher, Electronic Currency: The Potential Risks to National Security and Methods to Minimize Them, European Research Studies Volume XX, Issue 1, 2017pp. 36 - 48* https://www.ersj.eu/repec/ers/papers/17_1_p3.pdf. assessed on April 19. *2018*

Owing to the foregoing factors, (which has been noted above) regulators world are overly very careful as to their approach to cryptocurrencies. In Nigeria, the Central Bank of Nigeria (CBN) is the apex body responsible for regulating all monetary transactions. Via a circular dated February 28, 2018 (against the backdrop of Nigeria being among the top countries with the most cryptocurrency trade around the world and the existence of Nigerian initial coin offerings[147]) the apex bank reiterated that "cryptocurrencies such as Bitcoin, Ripples, Monero, Litecoin, Dogecoin, Onecoin, etc. and Exchanges such as NairaEx are not licensed or regulated by the CBN". By the said circular, the CBN's position is that Cryptocurrencies are not legal tender and Nigerians should deal with them at their own risk.

A similar position is set out by the European Union, via an issued warning regarding the risks associated with transactions in the virtual currency, pointing to the lack of legal regulation protecting consumers from the state, and creates a risk of losing money. In a recent study, it was estimated that cyber-attacks managed to steal close to $400million dollars from investors participating in Initial Coin Offerings (ICOs) since 2015.[148] The fears regulators have towards cryptocurrency are justified, after all, cryptocurrency is a market disruption that threatens to destroy the modern banking system as it currently is.

Despite the fears, it has however been strongly argued that it would be dangerous to conclude that cryptocurrency is a craze or that it ought to be ignored like a *Ponzi* scheme. It is widely believed that there are cogent benefits from studying, adopting and regulating cryptocurrency which governments can take advantage of. In this regard, the governments are required to provide protection mechanisms, including the regulatory, legal and organisational support of the development of economic processes that meet modern international realities and minimise the risks of illegal activities; to tap into the market.

[147] https://nairametrics.com/cbn-says-cryptocurrencies-are-illegal/
[148] https://www.zdnet.com/article/hackers-steal-almost-400-million-from-cryptocurrency-icos/

3.0 THE POTENTIAL TAX VIABILITY OF CRYPTOCURRENCY

Over the course of history, a number of exchange mediums have surfaced and the world has somehow inventively evolved. We have seamlessly journeyed through the use of barter, precious metals, fiat currency and are now exploring high tech electronic money. The year 2009 marked a remarkable turning point in the global concept of money and payment, with the emergence of Blockchain technology and cryptocurrencies.[149] The emergence of these game-changers has no doubt taken finance and economics to an entirely different height. In some climes, it is already envisaged that in the nearest future, fiat money will be nothing but curio pieces; relics of the inevitability human evolution and the limitless nature of the invention.

A recent study conducted from information collated from about 200 persons or companies dealing in cryptocurrency, covering about 40 countries, revealed an estimated 3-6 million active users of cryptocurrency wallets and about 12 million active wallets.[150] With the cryptocurrency market capitalisation for the year 2017 exceeding $200 billion,[151] there are no doubts that it is a lucrative venture that will take over finance globally. As of now, there are already tell-tale indications of a massive influx of investors as a result of the sector being perceived as a viable means of diversifying investment portfolios.

3.1 Cryptocurrency and Taxation

Generally speaking, the value or nomenclature (if any) which cryptocurrency bears in any given system will determine the sort of tax implications that may arise therefrom. Although virtual currencies have gained recognition worldwide as a concept and a virtual commodity for trading, the legal status of cryptocurrency varies substantially from jurisdiction to jurisdiction and is still undefined or changing in many of them.

[149] https://blackwoodstone.com/the-need-for-regulations-goveming-the-taxation-of-crvptocurrencv-in-nigeria-introduction/ last accessed on April 18, 2018

[150] Jonathan Vaux in Garrick Hileman and Micheal Rauhs, 'Global Cryptocurrency Benchmarking Study, Cambridge Centre for Alternative Finance, University of Cambridge Judge Business School, (2017), 4.

[151] N. Christian and Markus, 'CIO Insights Reflections: Cryptocurrency and Blockchains- their importance in the future' (December 2017) Deutsche Bank Wealth Management, 4.

Currently, only Japan has gone as far as to give virtual currency the designation of a legal tender in an apparent bid to become the global centre for virtual currency dealings.

Accordingly, where for instance cryptocurrencies are deemed to be legal tender (as in the case of Japan), one must consider the income tax implications; likewise, where it is viewed as a commodity, we must consider its capital gains implications as well as its income tax implications.

World over, it is a known fact that tax systems flourish even better when there are new avenues via which wealth is created. It is therefore only reasonably construable that an emerging and highly lucrative venture such as the cryptocurrency market be explored, for governments to optimise their revenue generation agenda. Furthermore, it is worthy of note that besides the use of taxation as a mechanism for revenue generation (which unarguably, is its universally accepted primary usage), the uses of taxation when deeply explored, transcend revenue generation.

Although the classical function of a tax system is to generate revenue for the government, in modern times, a lot of emphases have come to be laid on other germane functions such as redistribution of wealth and more crucially, the management of the economy.[152]

In other words, it is a fiscal instrument with an eclectic variety of indispensable utilities. And so, as a consequence of the wide acceptance and popularity of cryptocurrency across the globe, as well as the great exploits that may be achieved if tapped into, different jurisdictions have taken significant and proactive steps by exploring its tax potentials.

3.2 Taxation of Cryptocurrency in some Jurisdictions

In the United States of America (US) its paramount revenue agency, the Internal Revenue Service (IRS), addressed the taxation of virtual currency transactions in Notice 2014-21. According to the said Notice, virtual currency is treated as property

[152] Groves 1948, *Nat Jo.* Vol. 1 p.23

for federal tax purposes. This means that, depending on the taxpayer's circumstances, cryptocurrencies, such as Bitcoin, maybe business property, investment property, or personal property. Following this (and as has been noted in the preceding paragraphs), general tax principles applicable to property transactions must be applied to exchanges of cryptocurrencies in such jurisdictions as the US. Hence, Notice 2014-21 holds that taxpayers recognise gain or loss on the exchange of cryptocurrency for other property.

Consequently, every time that a cryptocurrency is used to purchase goods or services gain or loss is recognised. A taxpayer who receives cryptocurrency as payment for goods or services is obligated to include the fair market value of the crypto-currency in computing his/her gross income.

Notably, cryptocurrencies received from mining activities, income derived by individuals engaged in mining of cryptocurrencies as a trade or business, cryptocurrencies paid as remuneration for work done or services rendered are all brought into consideration in determining the income of a taxpayer. Hence, in the US, cryptocurrencies are by virtue of their status as assets or intangible properties subject to Capital Gains Tax. In addition, they are also subject to income tax, where they are employed as a means of payment for goods or services.

In Germany, cryptocurrencies have been declared private money and therefore also subject to private income taxation.[153] This definition invariably means that people have to pay an income tax on their realised cryptocurrency gains in Germany. These may range from sale of cryptocurrencies for fiat monies or exchanging them for goods and services. In summary, a person is subject to income taxation of cryptocurrency trading gains under the following circumstances: If more than 600 EUR worth of gain has been realised at any point in time, the person personally is subject to income taxation in Germany.

In the United Kingdom, the situation similar to what is applicable in Germany. Cryptocurrency is treated as private money/private property rather than a currency and

[153] https://www.grin.com/document/366924 last accessed on April 17, 2018

therefore it is subject to Value Added Tax, Corporate Tax, Income Tax and Capital Gains Tax.[154] In the context of Corporate and Income tax, cryptocurrencies are treated as a foreign currency. Concerning corporate tax, companies have to pay taxes on exchange gains whereas losses are deductible. Generally, it can be said, that gains or losses on any cryptocurrency are subject of the Capital Gains Tax.

3.3 Exploring the Tax Option in Nigeria

"*Governments need money. Modern governments need lots of money. How they get this money and whom they take it from are the two most difficult political issues faced in any modern political economy. ” - Sven Steinmo*

In terms of economic parameters, the last three years have arguably been Nigeria's worst in twenty-five years. The nation recorded its worst Gross Domestic Product (GDP) in the same time frame, with oil prices dropping drastically and monetary liquidity tightening. More than ever, the situation brought to the fore, the overbeaten emphasis on how inimical our sole dependence on oil revenue is. It also highlighted the need to optimally explore taxation (for its sustainability and stability) in the bid to exit our economic doldrums. However, optimisation of taxation in Nigeria transcends better tax compliance. An essential part of it is the taxation of new wealth or the presence of more taxable wealth.

Nigeria has witnessed a rise in the number of cryptocurrency exchanges operating in the country. However, since 2009 there is yet to be a regulatory framework on their taxation. Many reasons are responsible for this. Part of which is the disruptive effect of crypto-currencies on global trades and economies which has led to several theories and arguments in various countries across the globe. Nigeria's reluctance to regulate cryptocurrency continues to dissuade investors and juicy foreign direct investment. For

[154] Saunders, S. (2015, March 11). Tax treatment of bitcoin. Retrieved March 5, 2017, from https://www.taxation.co.uk/Articles/2015/03/10/332784/cryptic-currency last accessed on Aril 18, 2018

example, a FinTech company looking to set up a base in Africa for the purpose of exploring cryptocurrency will definitely not consider the country.

Notwithstanding the fears that Nigerian regulators have, as seen in the jurisdictional examination of the taxation of crypto-currency above, modern economies such as the US have keyed into the recognition of cryptocurrencies as commodities. The US Commodity Futures Trading Commission (CFTC) has since 2014, regarded cryptocurrencies as such as Bitcoin commodities. Consequently, they are regulated and subject to taxation.[155]

If this path is towed in Nigeria, cryptocurrency has the potential of generating immense revenue for the government. With its recognition as a commodity, it can be regulated and structured to fall under the purview of Capital Gains Tax, which is currently governed by the Capital Gains Tax Act Cap C001 LFN 2004 and is levied at a rate of 10%. Transactions involving cryptocurrency are also bound to generate streams of service delivery, thereby presenting an ample fulcrum for the payment of more Value Added Tax.

On a related note, the benefits of regulating cryptocurrency for tax purposes run deeper than what meets the eye. The absence of taxable wealth, ventures and/or businesses are functions of the prevailing business environment. For example, where an economy is blighted by issues such as lack of infrastructure or inadequate framework for ease doing business, no rocket science is required to conclude that such economy will have decreased Foreign Participation and investments. For more specificity, more foreign participation will give life and liquidity to the system. Accordingly, where Nigeria is able to convince ambitious investors that they have put in place a robust and progressive framework (legal, economic etc.) which will guarantee the interests of such investors will thrive and be protected;

[155] Available at http://fortune.com/2018/03/07/bitcoin-cftc-commodities-coin-drop-markets/. Accessed on April 17, 2018.

then the country will be sure to experience huge economic growth and influx of foreign investment.

Although it may be argued that the very elusive nature of cryptocurrency transactions defeats the arguments for taxing it, as it will be difficult to track gains, seamless liaison with successful jurisdictions such as the US as well as a better understanding of blockchain technology will help fill in the void. With a better understanding of blockchain technology, our authorities will be able to come up with effective guidelines for the regulation and taxation of cryptocurrency. Plugging the loss of revenue that should accrue to the government from cryptocurrency transactions in Nigeria is possible, but the right regulations must be put in place to make this happen.

4.0 PROPOSED AMENDMENTS TO OUR LAWS AND/OR THE NEED FOR REGULATIONS TO ACCOMMODATE DIGITAL CURRENCIES

Regulators all over the world have begun to address the challenges presented by digital currencies that mostly bypass regulated banks, financial firms, exchanges and central clearinghouses. Digital currencies, token sales and blockchain initiatives of all types have ignited a global phenomenon unlike anything before it, as the technology underpinning these developments disrupts products and services in nearly every industry, lawmakers, regulators and law enforcement are scrambling to keep up.

The unpredicted increase in the value of digital currencies has seen a significant rise in the number of mainstream investors putting considerable resources into acquiring them. i.e there is an erosion of physical cash and assets into global digital space. This trend is worrying because as highlighted above, regulators have indicated that the existing legal frameworks are not adequate to cover the many issues that the rise of digital currencies presents.

Amongst others, the US also has the United States virtual currency,[156] Law which is a financial regulation as applied to transactions in virtual currency in the U.S. The Commodity Futures Trading Commission has regulated and may continue to regulate virtual currencies as commodities[157]. The Securities and Exchange Commission (US) also requires registration of any virtual currency traded in the U.S. if it is classified as a security and of any trading platform that meets its definition of an exchange[158]. The regulatory structure also includes tax regulations and the Financial Crimes Enforcement Network (FinCEN) transparency regulations between financial exchanges and the individuals and corporations with whom they conduct business.

The IRS treats Virtual Currency (VC) as property and requires for gains or losses upon an exchange of VC to be calculated[159]. This means that every VC user must track the gains or losses of every one of their VC transactions to stay in compliance with IRS regulations[160]. This approach may allay the fears of a number of regulators as to the use of digital currencies to the commission of fraud.

In Canada, the Financial Consumer Agency does not consider cryptocurrencies to be "legal tender," excluding all but Canadian banknotes and coins from that definition. However, Canada is not all harsh on its cryptocurrency regulatory stances. In fact, it appears to be the most transparent country in this list when it comes to understanding the laws surrounding the digital currency industry.

[156] The Internal Revenue Service (IRS) describes Virtual Currencies (VCs) as "a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value [and] does not have legal tender status in any jurisdiction.

[157] Virtual currencies are commodities, US judge rules". CNBC. Reuters. March 7, 2018. https://www.cnbc.com/2018/03/07/cryptocurrencies-hke-bitcoin-are-commodities-us-judge-rules.html Accessed April 19, 2018. Accessed April 19, 2018.; Clinch, Matt (September 18, 2015). "Bitcoin now classed as a commodity in the US". CNBC. Reuters. https://www.cnbc.com/2015/09/18/bitcoin-now-classed-as-a-commodity-in-the-us.html Accessed April 19, 2018

[158] "Statement on Potentially Unlawful Online Platforms for Trading Digital Assets". *U.S. Securities and Exchange Commission.* https://www.sec.gov/news/public-statement/enforcement-tm-statement-potentially-unlawful-online-platforms-trading Accessed April 19, 2018.

[159] Internal Revenue Service, Notice 2014-21, IRS Virtual Currency Guidance: Virtual Currency Is Treated as Property for U.S. Federal Tax Purposes; General Rules for Property Transactions Apply https://www.irs.gov/newsroom/irs-virtual-currency-guidance Accessed April 19, 2018.

[160] Jose Pagliery, "New IRS rules make using Bitcoins a fiasco", CNN Money http://money.cnn.com/2014/03/31/technology/irs-bitcoin Accessed April 23, 2018.

After weeks of hearings, which included testimony from experts like Andreas Antonopoulos, the Canadian Parliament approved Bill C-31 on June 19, 2014, the world's first national law on digital currencies. The Canadian government has been communicative in its regulatory stances on cryptocurrency ever since: the Canadian Securities Administrators (CSA) sent out a regulatory notice on August 24, 2017, confirming "the *potential applicability of Canadian securities laws to cryptocurrencies and related trading and marketplace operations and to provide market participants with guidance on analysing these requirements.*

Although there is no uniformity in the global approach to regulating digital currencies, the golden thread throughout the globe is that countries have begun trying to understand the phenomenon and how best to approach and deal with it. The approaches of the United States, Canada and even Switzerland can be said to represent stands taken by different countries on digital currencies.

If Nigeria is to benefit from the unavoidable rise of digital currency into one global currency for cross border transactions, then the regulation of cryptocurrencies is a discussion it must have and act on. This discussion would eventually tie into a decision as to whether there is a need for a global legal framework in addition to laws enacted by individual nations.

The role of the Central Bank of Nigeria should be, at the very least, to try to understand how cryptocurrencies work. It is only through understanding cryptocurrencies that the CBN can fulfil its advisory mandate and recommend the appropriate approach our lawmakers ought to adopt in building a suitable legal framework which quite frankly does not exist presently. The danger of not adopting or regulating digital currencies such as cryptocurrency will be to leave an emerging and over $400billion[161] global sector unchecked and untapped within the Nigerian geographical space.

According to pundits, it would seem that in the not-too-distant future, the CBN will release an elaborate and effective framework for cryptocurrency in Nigeria. Amongst,

[161] https://coinmarketcap.com/charts/. Last accessed on April 24, 2018

other things, these speculations draw breath from comments such as that made by a representative of the apex bank at the *disrupt Africa* conference held on May 19, 2019. According to the said representative, "We are open to regulating cryptocurrency, we are setting up a working group soon and the details would be on our website". Albeit no working group has been constituted to this effect, many are resolutely optimistic that something concrete would be put out soonest.

Nonetheless, again, it is highly recommended that the CBN proposes adoption of the cryptocurrencies as security and regulating the use of the same in the capital markets. For this to come into fruition, the Investment and Securities Act (for example, section 315 thereof) must be amended to recognise cryptocurrencies as securities, and for the attendant rules and laws to apply to it as they do stocks and bonds.

5.0 CONCLUSION

The world is ever dynamic, and developed economies have been known to make use of the dynamism of economic factors to translate to immense economic benefits. The widespread use of the cyberspace in Nigeria is undeniably enormous and the potential of Nigerians to excel in that regard is undoubtedly proven.[162] In light of this, it would be counter-productive for the CBN to leave Nigerians to battle with the whims of cryptocurrency platforms without regulating its use. Also, it would be a grave mistake for the CBN to fail to make use of this immense opportunity to invest in what could possibly become the future of the financial and economic sector of the world.

The software tools that create cryptocurrencies are anything but stable and may result in the beginning of the end of traditional regulatory frameworks. It is necessary for the government to create regulatory sandboxes where developers and customers can experiment with the new forms of relations and transaction where governments can learn. These testbeds can try methods of regulation and smart contracts that make

[162] https:/guardian.ng/saturday-magazine/179453/. Last accessed on April 24, 2018

fraudulent illicit trade harder. The CBN should not turn a blind eye to the immense benefits of cryptocurrency by out-rightly banning it or tagging it illegal.

The rise and far-reaching impact of digital currencies which fall under Blockchain Technology are becoming a major phenomenon that is set to shape the global financial market. Its potential to contribute to national revenue is not in doubt. Although cryptocurrency and cash transactions share the attribute of potential susceptibility to being untraceable, the use of modern technology can subdue the elusiveness of cryptocurrency.

Just like Nigeria, cryptocurrency is not considered a legal tender in South Africa. However, just recently, the country's revenue service made a move to start demanding that gains or losses on cryptocurrency be declared and that normal income tax be paid on them[163].

Southern European country of Malta has become something of a safe haven for cryptocurrency, as it keeps welcoming companies involved in digital currencies. It appears the country has plans towards developing the digital currency industry. While we continue to debate about the future of cryptocurrency on the bases of legality and regulation, it's daily preaching on social media is not dying down. And with countries like Malta wholly embracing the technology, and seeing the influx of many FinTech companies, we might as well discuss its future in Nigeria. The relevance of Foreign Direct Investment and Foreign Portfolio Investment for boosting revenue cannot be overemphasised.

Perhaps it is time for, not just the CBN, but the Ministry of Finance and its agencies to issue regulations that will recognize cryptocurrencies as assets and securities, and the Federal Inland Revenue Service (FIRS) of Nigeria can start taxing gains from digital currencies, being digital assets. It will definitely give the tax-to-GDP ratio a significant

[163] https://www.iol.co.za/business-report/economy/sars-affirms-stance-on-cryptocurrencies-14329014 Last accessed on April 24,2018

boost. After all, our uncommon economic problems warrant ingenious and uncommon solutions.

We must, however, note that tracking cryptocurrency for the purpose of taxation is very difficult. It requires deep efforts. Although some analysts believe that when it is made a legal tender, taxing it is easier.

6.0 RECOMMENDATIONS

1. There is a need for the Nigerian government to play an increased role in regulating cryptocurrency in order to protect the consumers and the integrity of the financial system in Nigeria. The primary obligation of any responsible government has always been to foster and preserve a free and fair economic space where businesses and ventures thrive while the ultimate consumers' interests are protected even as they consume business products.[164] To this end, government's efforts should be geared towards regulating the cryptocurrency phenomenon so that the human society is not at the end of the day plunged into anarchy and sheer lawlessness where no central authority but private individuals produce, regulate, manipulate, and transact with the new money, which is the most essential controlling power, next to politics.[165]
2. There is a need for the Nigerian government to create a separate law to regulate digital currencies such as cryptocurrency as the current law governing the cyberspace such as the Cyber Crime Act 2015 and the terrestrial laws guarding against financial crimes such as the Economic and Financial Act Commission Act, 2004, Advance Fee Fraud and Related Offences Act 2006 etc. are incapable of meeting the challenges that may be posed by cryptocurrency in terms of complexity and sophistication.
3. There is a need for the Nigerian government to adopt unique approaches in regulating cryptocurrency. These approaches include:

[164] http://www.infusionlawyers.com.ng/wp-content/uploads/2017/06/The-Cryptocurrencies%E2%80%94Regulation-Taxation-and-Consumer-Protection-by-Boulevard Aladetoyinbo. pdf.
[165] Ibid

3.1. A need to be receptive, open-minded and flexible;

3.2. The need for some form of identity. The traders can be identified by their codes. This would reduce incidents of fraud and tax evasion and avoidance;

3.3. Modernise the institutional business environment, taking into account trends in the developments of the virtual economy (regulatory, legitimate, cognitive aspect);

3.4. Development of tools that can extract specific data related to cryptocurrency in circumstances where a trader attempts to manipulate the system negatively.

3.5. Create a centralised depository of cryptocurrency for the security of Internet users (data centre);

3.6. Create a program to improve financial literacy, as well as include a section on the use of cryptocurrency;

3.7. Set up and fund a research unit within the CBN and or the Ministry to study global trends and their adoption in Nigeria, so that we are not left behind in the scheme of disruptive technologies or developments

PENALTY AND INTEREST FOR TAX DEFAULT: MATTERS ARISING

TEMITOPE KOLADE[1]

1.0 INTRODUCTION

One of the easy means deployed by tax and regulatory authorities to remediate default is the imposition of penalty and interest on unremitted taxes or levies as stipulated by relevant laws. Needless to say, penalties are sacrosanct for defaults such as failure to send a tax return or pay tax liabilities as and when due even in developed economies such as the United Kingdom and the United States of America.

This article seeks to provide some salient perspectives on the imposition of penalty and interest and the associated controversies and uncertainties.

2.0 TIMELINE FOR APPLICATION OF PENALTY AND INTEREST

The Nigerian Tax Acts are replete with various provisions that support the imposition of penalty and interest for varying tax defaults. Amongst several other sections, the Personal Income Tax Act (PITA, Sections 74, 76, 77, 94 to 97), the Companies Income Tax Act (CITA, Sections 82, 92,94 and 95), the Petroleum Profits Tax Act (PPTA, Sections 46, 51 to 55); the Federal Inland Revenue Service (Establishment) Act (FIRSEA, Sections 40 to 49), Value Added Tax Act (VAT Act, Sections 25 to 37) contain provisions on one form of tax penalty or the other for differing tax defaults. However, one controversial issue with the application of penalty and interest is when they should begin to apply to overdue tax payments. While the revenue authorities

[1] *Temitope Kolade, Manager, Oil, Gas & Power Group, Andersen Tax, Nigeria*

typically compute penalty and interest when issuing assessment notices for audit assessments and overdue tax payments, the relevant tax laws contain provisions that suggest that penalty and interest would only apply to overdue tax payments after the liabilities are deemed final and conclusive. The latter position is also supported by case laws as detailed below.

In a Tax Appeal Tribunal (TAT) Case between Weatherford Services S.D.E.R.L and the Federal Inland Revenue Service (FIRS), the FIRS had imposed penalty and interest on additional CIT assessments arising from a tax audit. However, the TAT ruled that penalty and interest on overdue tax should only start to run when the taxpayer does not object or appeal within two months, as provided under the CITA.

The TAT also delivered a similar judgment in the case between Tetra Pak West Africa Limited and the FIRS, where FIRS had issued additional VAT assessments including penalty and interest charges. The TAT ruled that the FIRS had wrongly computed penalty and interest on the additional assessments, as penalty and interest begin to accrue only when additional assessments have become final and conclusive and the taxpayer fails to settle the liability within the stipulated time. The TAT based its ruling on the provisions of Paragraphs 13 (3) to the fifth schedule to the FIRSEA.

It is instructive to note that there are taxpayers who believe that a similar case could be made for self-assessment and that penalty and interest would not apply when a taxpayer has not complied with the remittance requirement as and when due. The basis of this position is that overdue self-assessment would only become final and conclusive after it is adjudged so to be. However, there is yet to be any judicial precedent in this regard.

3.0 DETERMINATION OF APPLICABLE INTEREST RATES

Besides the timeline for application of penalty and interest, determining the applicable interest rates is not also crystal clear because of the manner in which the relevant provisions of the tax laws are articulated. Some of the Nigerian tax laws require a penalty to be computed on an annual basis using base lending or commercial interest

rates although there are no specified guidelines on whether interest should be one-off, simple or compound.

The tax laws generally provide for penalty at 10% on outstanding tax payments even though applicable interest rate usually varies with certain primary elements. The FIRSA provides that in the case of Naira remittances, tax due will attract interest at the prevailing minimum rediscount rate (MRR) (now the monetary policy rate (MPR)), plus a spread to be determined by the Minister. For remittances in foreign currencies, tax due will attract interest at the higher of the prevailing London Inter-Bank Offered Rate or the prevailing MRR, plus a spread to be determined by the Minister of Finance.

Nonetheless, the FIRS had in the past, issued public notices on "*The Administration of Penalty and Interest Rates Regime under the Companies Income Tax Act, Cap C21, LFN, 2004"* to provide some clarity and certainty on the applicable penalty and interest on unpaid taxes. One of the FIRS' Public Notice which was issued in 2014 stated that the FIRS would subsequently publish the applicable interest rate to tax debts and tax arrears on an annual basis and that this would be done at the beginning of every year.

Based on the public notice, a fixed interest rate of 15% (a rate that compares favourably with the interest rate of 20% / 21% that was typically charged by the FIRS) would apply on unremitted taxes. The rate of 15% represented the prevailing MPR (12%) plus a spread of about 3% at the time of the publication. However, the Minister of Finance approved a spread of 5% for unpaid taxes for the year 2017 in line with the provisions of Section 32(1)(b) of the FIRSA on the power to determine the spread to be added to the Central Bank of Nigeria (CBN) issued MPR. The FIRS' gesture and the Minister's approved rate underscore the need for uniformity in the interest rates charged on tax debts across the Country.

4. RELEVANT AUTHORITY TO IMPOSE PENALTY AND INTEREST CHARGES

A separate twist was introduced to the issue of penalty and interest when the Court of Appeal (CoA) ruled that the National Oil Spill Detection and Response Agency (NOSDRA), being an administrative agency, lacks the power to impose fines and penalties without proper adjudication by a court of law in a case between the NOSDRA and Mobil Producing Nigeria Unlimited (ExxonMobil)[2].

The CoA ruled that the imposition of penalties by NOSDRA was *ultra vires* its powers, especially because no platform was established to observe the principles of natural justice. The underlying principle behind the ruling is that penalties or fines are imposed as punishment for an offence or violation of the law and the power as well as competence to establish the commission of an offence belongs to the courts. If the judgment is applied to other government parastatals that are empowered to collect revenue and have the right to impose penalties, fines or interest on overdue payments, it would imply that such administrative agencies cannot exercise their powers to impose fines without recourse to a court of competent jurisdiction.

5. INTEREST ON REFUNDS

Given that the relevant tax laws impose interest charges on delayed remittances, there is a school of thought that advocates for the refund of excess tax payments with interests. Whereas, the tax refund process in Nigeria is extremely cumbersome, taxpayers in some developed jurisdictions are not only able to process tax refunds easily, they are also entitled to interest on refund of overpaid taxes from their government.

[2] We are aware of a similar case between NOSDRA and Shell Nigeria Exploration and Production Company Limited where the Federal High Court (FHC) reached a contrary position. However, it appears that the FHC failed to consider the CoA's judgment as it would have presumably reached a different decision as the doctrine of ***Stare Decisis*** requires the FHC to adhere to the decision of a superior court (such as the COA) on similar matters.

In the recent past, the Swedish government was being forced to refund billions in taxes after Swedes deliberately paid too much as a consequence of the negative interest rates being implemented in the country after certain individuals and businesses overpaid taxes as a means of generating additional interest income. Whereas the interest rate was -0.5% for cash held in bank accounts and other savings vessels, Swedes were able to earn interest by paying more taxes than they needed to. Thus, a huge number left money in their taxpayer payment accounts that accrued interest at 0.56%, far in excess of the negative bank interest rates in the country.

However, given the difficulty in refunding taxes to taxpayers and the present economic situation of the country, it is unlikely that any move to refund excess tax to taxpayers with interest will ever see the light of day in Nigeria.

6. CONCLUSION

Given that the imposition of interest and penalty is a statutory empowerment and the discretionary power to waive these charges on certain grounds is also enshrined within the same legislative provisions, a number of revenue officers have in the past demonstrated fair judgment in the adjudication of cases that involved the imposition of penalty and interest.

In addition, it is only fair that taxpayers who comply with the relevant filing and tax payment requirements provided for in the law are rewarded and defaulters are punished accordingly. Given that the cannon of certainty is important in designing an equitable tax regime, a uniform interest rate and an articulate guideline on the imposition of penalty and interest is a necessity for the Nigerian tax environment.

TRADE TARIFFS AS A TOOF FOR SOCIO-ECONOMIC DEVEFOPMENT

OLA KAN YE OLUWATOBI[3]

ABSTRACT

Nigeria is well known as the giant of Africa due to its large population numbers and this makes the Nigerian market[4] one of the largest for imported goods. In fact, about US$36.5 billion worth of goods were imported into Nigeria in 2018[5]. This amounts to 82% of the total GDP of Nigeria in 2017. However, we have failed to use our market advantage in charging of tariffs to ensure socio-economic success. This comes at a time where the United States and China (the two largest economies in the world) are using tariffs as a tool for implementing policies that benefit the government.

1.0 INTRODUCTION

It is becoming increasingly clear that the distinction between trade law and tax law is blurring. According to a writer, "every tax solution causes trade problems, and every trade solution has tax problems"

Tariffs are defined as a tax imposed on the import or export of goods. This might otherwise be known as "import duties" charged when goods are imported. Customs duties are either specific (amount based on weight, volume, etc.), or ad valorem (an amount based on value). Ad valorem customs duties have become most common.

[3] Oluwatobi Olakanye LL.B. (in view), can be reached at omolakanye@gmail.com. +2348165112896

[4] Nigeria is the 21st largest economy in the world and the largest in Africa.

[5] World's Top Exports; "**Nigeria's Top 10 Imports", (2019)** Available at http://www.worldstopexports.com/nigerias-top-10-imports/ (Accessed 4th July, 2019)

International trade is a powerful enabler of economic development. Evidence suggests that increased participation in international trade can spur economic growth, which itself is a necessary condition for broader development outcomes to be realized. By connecting global markets to developing-country producers and consumers, trade - both through exports and imports - provides a critical channel for the flow of finance, technology and services needed to further improve productive capacity in agriculture, industry and services. A good example is Singapore which adopted a national development strategy that was dependent on FDI. The Singapore government-designated their whole island as an 'export processing zone', introduced favourable tax incentives to transnational corporations involved in industrial production, and offered prepared industrial infrastructure, providing ready-built factories, telecommunications, transportation links and utilities. All these policies combined to create a cheap, disciplined and 'pro-business' location that would be attractive to transnational corporations[6].

My article will discuss trade agreements and its inter-relationship with tariffs, briefly discuss the different types of trade agreements, the use of trade tariffs in socio-economic development and give recommendations on guidelines on tax provisions that should be included in trade agreements.

2.0 TRADE AGREEMENTS AND TARIFFS

A trade agreement is a wide-ranging taxes, tariff and trade treaty that often includes investment guarantees. The term can be used to describe any contractual arrangement between states concerning their trade relationships[7]. Trade agreements may be bilateral or multilateral—that is, between two states or between more than two

[6] Ann Denis (Editor) & Kalekin-Fishman (Editor); Economic Globalization and Singapore's Development Policies: Competition, Cooperation and Conflict (2009); Devorah The ISA Handbook in Contemporary Sociology: Conflict, Competition, Cooperation, p.384

[7] United Nations Conference on Trade and Development, "The role of international trade in the post-2015 development agenda" (2014)

states. It exists when two or more countries agree on terms that help them trade with each other. The most common trade agreements are of the preferential and free trade types are concluded in order to reduce (or eliminate) tariffs, quotas and other trade restrictions on items traded between the signatories. It is widely accepted that a trade agreement should not only cover tariffs but also other issues such as discriminatory government procurement rules and procedures, administrative procedures such as health and sanitary regulations, quantitative restrictions such as quotas, anti-dumping rules and procedures.

Although, tax treaties prevent double taxation as well as most forms of discrimination against foreigners. However, because of their bilateral nature, the tax treaties do not do a good job of addressing predatory tax protectionism. The trade agreements do a better job in this regard because of their multilateral nature and are not limited in this context to trade in goods but also trade in services or investment activities.

2.1 BI-LATERAL TRADE AGREEMENT

This involves a trade agreement between two countries whereby they loosen their trade restrictions to help out businesses so that they can prosper better and have lower taxes. Usually, this revolves around subsided domestic industries. Examples of bilateral trade agreements include US-Israel, Japan-Singapore, EU-Japan bilateral trade treaties. A bilateral trade agreement usually includes a broad range of provisions regulating the conditions of trade between the contracting parties. These include stipulations governing customs duties and other levies on imports and exports, commercial and fiscal regulations, and transit arrangements for merchandise, customs valuation bases, administrative formalities, quotas, and various legal provisions. Most bilateral trade agreements, either explicitly or implicitly, provide for (1) reciprocity, (2) most-

favoured-nation treatment (trading without discrimination), and (3) "national treatment" of non-tariff restrictions on trade[8]

2.2 MULTI-LATERAL TRADE AGREEMENTS

- General Agreement on Trade and Tariffs (GATT)

The General Agreement on Tariffs and Trade was signed in Geneva on Oct. 30, 1947, by 23 countries, which accounted for four-fifths of world trade. On the same day, 10 of these countries, including the United States, the United Kingdom, France, Belgium, and the Netherlands, signed a protocol bringing the agreement into force on Jan. 1, 1948[9]. The GATT was a specialized institution which has economic and technical features. It is a multilateral treaty that establishes a common code of conduct for international trade and which provides a mechanism to reduce and stabilize tariffs and other trade barriers and to hold consultations on issues related to trade. It took the form of a multilateral trade agreement that set forth the principles under which the signatories, on a basis of "reciprocity and mutual advantage," would negotiate "a substantial reduction in customs tariffs and other impediments to trade, and the elimination of discriminatory practices in international trade."

- World Trade Organization (WTO)

In 1995, the World Trade Organization (WTO) succeeded the GATT as the global supervisor of world trade liberalization, following the Uruguay Round of trade negotiations. Whereas the focus of GATT had been primarily reserved for goods, the WTO went much further by including policies on services, intellectual property and investment[10]. GATT 1994 comprises the modifications and clarifications negotiated

[8] Terence Agbeyegbe, Janet G. Stotsky, and Asegedech WoldeMariam, "Trade Liberalization, Exchange Rate Changes, and Tax Revenue in Sub-Saharan Africa" (2014) IMF Working Paper Fiscal Affairs and Secretary's Departments.
[9] Ayenagbo, Kossi & Kimatu, Josphert & Jing, Zhang & Nountenin, Sidime & Rongcheng, Wang. (2011). Analysis of the importance of general agreement on tariffs and trade (GATT) and its contribution to international trade. Journal of Economics and International Finance. 3. 13-28.
[10] ibid

during the Uruguay Round (referred to as "Understandings") plus a dozen other multilateral agreements on merchandise trade. GATT 1994 became an integral part of the agreement that established the WTO[11]. Other core components include the General Agreement on Trade in Services (GATS), which attempted to supervise and liberalize trade; the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which sought to improve protection of intellectual property across borders; the Understanding on Rules and Procedures Governing the Settlement of Disputes, which established rules for resolving conflicts between members; the Trade Policy Review Mechanism, which documented national trade policies and assessed their conformity with WTO rules; and four plurilateral agreements, signed by only a subset of the WTO membership, on civil aircraft, government procurement, dairy products, and bovine meat (though the last two were terminated at the end of 1997 with the creation of related WTO committees)[12]. These agreements were signed in Marrakech, Morocco, on April 1994, and, following their ratification, the contracting parties to the GATT treaty became charter members of the WTO. The WTO had over 145 members by the early 21st century, with China joining in 2001.

2.3 FREE TRADE AGREEMENTS (FTA)

A free trade agreement (FTA) is a treaty between two or more countries to facilitate trade and eliminate trade barriers. It reduces trade barriers, import quotas and tariffs increase trade of goods and services between member nations[13]. Free trade agreements help create an open and competitive international marketplace. It establishes unimpeded exchange and flow of goods and services between trading partners, regardless of national borders of member countries. FTAs originated from the General

[11] Investopedia, "A Brief History of International Trade Agreements" (2018) Available at https://www.investopedia.com/articles/investing/011916/brief-history-international-trade-agreements.asp (Accessed 4th July, 2019)

[12] ibid

[13] Levy, Philip I. "A Political-Economic Analysis of Free-Trade Agreements." ***The American Economic Review*** 87, no. 4 (1997): 506-19. Available at http://www.istor.org/stable/2951361 (Accessed 8th July, 2019)

Agreement on Tariffs and Trade (GATT 1994). A Free-trade area is a region encompassing a trade bloc whose member countries have signed a free trade agreement.

- North American Free Trade Agreement (NAFTA)

This is an agreement signed by Canada, Mexico, and the United States, creating a trilateral trade bloc in North America. The agreement came into force on January 1, 1994, and superseded the 1988 Canada-United States Free Trade Agreement between the United States and Canada. The NAFTA trade bloc is one of the largest trade blocs in the world by gross domestic product. In September 2018, the United States, Mexico, and Canada reached an agreement to replace NAFTA with the United States-Mexico-Canada Agreement (USMCA). NAFTA will remain in force, pending the ratification of the USMCA[14].

- ASEAN Free Trade Area (AFTA)

The is a trade bloc agreement by the Association of Southeast Asian Nations supporting local trade and manufacturing in all ASEAN countries, and facilitating economic integration with regional and international allies. The primary goals of AFTA seek to increase ASEAN's competitive edge as a production base in the world market through the elimination, within ASEAN, of tariffs and non-tariff barriers and attract more foreign direct investment to Southeast Asian Nations.

- African Continental Free Trade Area (AfCFTA)

African leaders reached an agreement after four years of negotiation on this agreement in March 2019. The AfCFTA bloc consists of 54 of the 55 African countries excluding

[14] Committee of Experts on International Cooperation in Tax Matters, "The Interaction of Tax Trade and Investment Agreements" UN Secretariat Paper Eighteenth session (2019) Available at https://www.un.org/esa/ffd/wp-content/uploads/2019/04/18STM CRP14-Tax-treaties-with-trade-and-investment.pdf (Accessed 4th July, 2019)

Eritrea[15]. It is regarded as the largest trade bloc since the creation of the WTO in 1994. The deal creates a single market, reducing tariffs (on up to 90% of goods) and ensuring fair trade in Africa while permitting producers to benefit from cheaper raw materials and consumers to get cheaper imported products. It is estimated that the agreement will boost intra-Africa trade by 60%[16]. THE AfCFTA aims to unite 1.3 billion people and a $3.4 trillion economic bloc. The supporting instruments to the agreement are rules of origin, schedules of tariff on trade in goods, online non-tariff barriers monitoring and elimination mechanism, digital payments & settlement platform and African Trade Observatory Portal.

3.0 USES OF TARIFFS FOR SOCIO-ECONOMIC DEVELOPMENT

Tariffs can be used as a force for developing the social and economic sectors of Nigeria in several ways including:

1) SOURCE OF REVENUE

Developing nations in particular often lack the institutional machinery needed for the effective imposition of income or corporation taxes. The governments of such nations may then finance their activity by resorting to tariffs on imported goods since such levies are relatively easy to administer[17]. The amount of tax revenue obtainable through tariffs could be essential for nation-building. However, this must be done with care as if the government tries to increase its tariff income by imposing higher duty rates, this may choke off the flow of imports and so reduce tariff revenue instead of increasing it.

[15] "Economic Game changer? African Leaders launch free-trade zone" Aljazeera 7th of July, 2019. Available at https://www.aliazeera.com/amp/news/2019/07/economic-game-changer-african-leaders-launch-free-trade-zone- 190707195025885.html (Accessed 8th July, 2019)

[16] "Nigeria Signs African free trade area agreement" BBC 7th July, 2019 Available at https://www.bbc.com/news/world-africa-48899701 (Accessed 8th July, 2019)

[17] National Bureau of Economic Research, "The significance of International Tax Rules for Sourcing Income: The relationship between income taxes and Trade Taxes" (1996) NBER Working Paper 55526 Available at https://www.ssrn.com/abstract=4184 (Accessed 4th July, 2019)

2) PROTECTIONISM (GROW DOMESTIC INDUSTRIES)

When high tariffs are levied by a domestic government, it reduces the imports of a given product or service because the high tariff leads to a higher price for the domestic consumer and a higher import cost for foreign suppliers or producers[18]. Tariffs are also used to create favourable trading conditions between certain countries while hampering the trading conditions of other countries. Tariffs are usually levied by domestic governments to protect new industries against foreign competition, to protect ageing industries against foreign competition, to protect against foreign companies offering their products for a price lower than their costs and to raise revenue. The tariff acts as an incubator that, in theory, should allow the domestic industry ample time to develop and grow into a competitive position on an international landscape[19]. Adam Smith directly advocated for it in *The Wealth of Nations*[20].

This is generally known as 'Protectionism'[21] and its criticism include that high tariffs must be coupled with well-run domestic firms and favourable government laws to allow for sustained growth. Domestic companies also require access to capital and competitive tax rates. Additionally, other countries may respond by instituting their own sanctions. Other criticisms are that development only occurs where there are gains from trade and that tariffs distort trade, investment and consumption too much for those gains to be realized.

[18] Investopedia, "How do tariffs protect domestic industries?" (2018) Available at https://www.investopedia.com/ask/answers/042315/how-do-tariffs-protect-domestic-industries.asp (Accessed 4th July, 2019)

[19] Investopedia, "What are common reasons for governments to implement tariffs?" (2018) Available at https://www.investopedia.com/ask/answers/041715/what-are-common-reasons-governments-implement-tariffs.asp (Accessed 4th July, 2019)

[20] ibid

[21] **Protectionism** is the economic policy of restricting imports from other countries through methods such as tariffs on imported goods, import quotas, and a variety of other government regulations.

3) QUALITY CONTROL AND ENVIRONMENTAL CONCERNS

Governments may use tariffs to diminish the consumption of international goods that do not adhere to certain environmental standards.

4) NATIONAL DEFENCE

If a particular segment of the economy provides critical products with respect to national defence, a government may impose tariffs on international competition to support and secure domestic production in the event of a conflict. This is a common appeal made by an industry seeking tariff or quota protection is that its survival is essential for the national interest: its product would be needed in wartime when the supply of imports might well be cut off. It has been argued instead that essential industries ought to be given a direct subsidy to enable them to meet foreign competition, with explicit recognition of the fact that the subsidy is a price paid by the nation in order to maintain the industry for defence purposes. Due to its sensitive nature, when national defence justification is proposed, they should be carefully examined to see if there is a true national defence issue or if domestic firms are merely justifying tariffs for protection from competition.

5) AGGRESSIVE TRADE PRACTICES OR DUMPING

International competitors may employ aggressive trade tactics such as flooding the market in an attempt to gain market share and put domestic producers out of business. Dumping occurs when a foreign company or government charges a price in the domestic market which is below its own cost or under the cost for which it sells the item in its own domestic market. Governments may use tariffs to mitigate the effects of foreign entities employing what may be considered unfair tactics.

6) AUTARKY

Autarky is defined as the state of being self-sufficient at the level of the nation. A proposal for the restriction of free international trade through tariffs can be described

as autarkic if it appeals to those half-submerged feelings that the citizens of the nation share common welfare and common interests, whereas foreigners have no regard for such welfare and interests and might even be actively opposed to them. This represents a yearning for national self-sufficiency, for a life free of dependence on the hazards of the outside world. Protectionist arguments often draw heavily on the strength of such autarkic sentiments.

7) PROTECTING DOMESTIC EMPLOYMENT

Tariffs or quotas are also sometimes proposed as a way to maintain domestic employment particularly in times of recession. It is common for government economic policies to focus on creating an environment where constituents have robust employment opportunities[22]. If a domestic segment or industry is struggling to compete against international competitors, the government may use tariffs to discourage consumption of imports and encourage consumption of domestic goods in hopes of supporting associated job growth[23].

Insofar as a higher tariff is effective for this purpose, it simply "exports unemployment"; that is, the rise in domestic employment is matched by a drop in production in some foreign country. Also, that other country is likely to impose a retaliatory tariff increase. Finally, the tariff remedy for unemployment is a poor one because it is usually ineffective and because more suitable remedies are available. It

[22] Office of the United States, "Trade Representative United States-United Kingdom Negotiations Summary of Specific Negotiating Objectives" (February 2019) Available at https://ustr.gov/sites/default/files/Summary of U.S.-UK Negotiating Objectives.pdf (Accessed 5 th July 2019)

[23] Joel Slemrod and Reuven Avi-Yonah, "(How) Should Trade Agreements Deal With Income Tax Issues?" (2001) Available at https://www.law.umich.edu/centersandprograms/lawandeconomics/abstracts/2001/Documents/01-08.PDF (Accessed 5th July 2019)

has come to be generally recognized that unemployment is far more efficiently dealt with by the implementation of proper fiscal and monetary policies[24].

8) TAX AVOIDANCE AND TRANSFER PRICING

FTAs can be used to pursue a policy that benefits society as a whole and promotes core economic interests, putting a greater emphasis on sustainable development, human rights, tax evasion, consumer protection, and responsible and fair trade[25]. FTAs commonly include horizontal provisions on taxation. These horizontal provisions generally apply to the entire agreement. These provisions can be used to prevent tax evasion by improving the exchange of tax information through a Common Reporting Standard for the automatic exchange of information. It could also allow exceptions for taxation in the framework of services and investment. A good example is Article 350 of the EU-Central America FTA which specifies that the parties maintain the right to issue measures to counter money laundering in full respect of any existing Double Taxation Agreement.

4.0 NON-TARIFF MEASURES

Non-tariff barriers as laws or regulations that a country enacts to protect domestic industries against foreign competition[26]. Broadly defined, NTMs include all policy-related trade costs incurred with to final consumer, with the exclusion of tariffs[27]. Such non-tariff measures may include subsidies for domestic goods, import quotas or

[24] Encyclopedia Britannica, "Arguments for and against interference", Available at https://www.britannica.com/topic/international-trade/Arguments-for-and-against-interference (Accessed 4th July, 2019)

[25] European Parliament, "The inclusion of financial services in EU free trade and association agreements: Effects on money laundering, tax evasion and avoidance" (2016) Available at http://www.europarl.europa.eu/RegData/etudes/STUD/2016/579326/EPRS_STU(2016)579326_EN.pdf (Accessed 8th July, 2019)

[26] Inc. Encyclopedia, "Tariffs" Available at https://www.inc.com/encyclopedia/tariffs.html (Accessed 4th July, 2019)

[27] United Nations Conference on Trade and Development, "Non-Tariff Measures To Trade: Economic and Policy Issues Economic and Policy Issues for Developing Countries for Developing Countries" (2013)

regulations on import quality. These measures are generally imposed without protectionist intent. NTMs have become a key factor influencing international trade has implications for economic development, particularly for countries pursuing a development strategy built around integration into world markets. Many forms of NTMs often become formidable obstacles to trade as they may raise costs for foreign suppliers, especially those in developing countries[28]. It is crucial for developing countries to be fully aware of the effects of non-tariff measures in regard to both market access and import competition.

Non-tariff measures include a very diverse array of policies that countries apply to imported and exported goods; some of which are manifestly employed as instruments of commercial policy (e.g. quotas, subsidies, trade defence measures and export restrictions), while others stem from non-trade policy objectives (e.g. technical measures). Unlike tariffs, NTMs are not merely numbered and are often subtle, indirect and case-specific. The multitude of NTMs are often aggregated in various groups i.e. Hard measures (e.g. Price and quantity control measures), threat measures (e.g. anti-dumping and safeguards) and other categories such as export measures, trade-related investment measures, distribution restrictions, restrictions on post-sales services, subsidies, measures related to intellectual property rights and rules of origin.
Each of these groups consists of various and often very different forms of NTMs[29].

4.0 CASE STUDIES

1) United States Tariff on Steel and Aluminium Imports

On March 1, 2018, President Donald Trump announced his intention to impose a 25% tariff on steel and a 10% tariff on aluminium imports to the United States. The United States said the tariffs imposed under Section 232 of the US Trade Expansion Act and justified under Article XXI of GATT were necessary for the protection of its essential

[28] United Nations Conference on Trade and Development, "Non-Tariff Measures: Economic Assessment and Policy Options for Development" (2018)
[29] Erdal Yalcin, Gabriel Felbermayr, Luisa Kinzius, "Hidden Protectionism: Non-Tariff Barriers and Implications for International Trade" (2017)

security interests given the key role steel and aluminium plays in US national defence[30]. Several reasons were cited including national security, pushing back on unfair trade deals, and protecting American manufacturing industries[31]. China, the European Union, Canada, Mexico, Norway, Russia and Turkey have all filed complaints at the WTO and a review is still ongoing by the body on the legality of the tariffs.

Due to the tariffs, federal revenue from customs duties ran at a $75 billion annual pace in the first quarter of 2019, according to the US Bureau of Economic Analysis[32]. The effects, however, have been slow to gain traction. The tariffs have spurred a handful of domestic investments, the reopening of a few idled plants and added a few thousand additional jobs to the economy but have forced American consumers in the short term to pay more for steel and aluminium than other consumers around the world[33]. The metal industry saw a 1.2% increase in jobs from 376,400 jobs to 381,000 jobs a year after the tariffs were imposed[34]. The aluminium industry also had an increase in production making 890,000 metric tons of aluminium in 20 1 8[35]. However, American manufacturers that use aluminium in their products pay 22 percent more for the metal than their international competitors, including countries like Norway and Canada[36]. It is hoped that these are short term effects which will be remedied when the American steel and aluminium industries have become well developed.

[30] World Trade Organization, "Panels established to review US steel and aluminium tariffs, countermeasures on US imports" Available at https://www.wto.org/english/news_e/news18_e/dsb_19nov18_e.htm (Accessed 5th July 2019)

[31] "Trump's metal tariffs end up favoring China's steel and aluminum over Canada's" by Erin Dunne, The Washington Examiner (February 11, 2019)

[32] US Bureau of Economic Analysis, "National Income and Product Accounts" Available at https://apps.bea.gov/iTable/iTable.cfm?reqid=19&step=2#reqid=19&step=2&isuri=1&1921=survey (Accessed 5th July 2019)

[33] "Trump's Metals Tariffs Added Some Jobs and Raised Consumer Prices" The New York Times (May 30, 2019)

[34] Ibid

[35] Ibid

[36] U.S. Geological Survey, Mineral Commodity Summaries, February 2019 Available at https://prd-wret.s3-us-west-2.amazonaws.com/assets/palladium/production/s3fs-public/atoms/files/mcs-2019-feste.pdf (Accessed 5th July 2019)

2) United States Tariffs on Chinese Good Imports

On March 22, 2018, President Donald Trump signed a memorandum under the Section 301 of the US Trade Act of 1974, instructing the United States Trade Representative (USTR) to apply tariffs of $50 billion on Chinese goods due to Chinese theft of U.S intellectual property and a huge trade deficit of about 42 billion dollars[37]. In the past, U.S. officials, businesspeople, academics and organizations have accused China (through its intelligence services) of either stealing American intellectual property and military technology or adopting and enforcing policies which put U.S. patent holders at a disadvantage in Chinese markets by forcing foreign companies to engage in joint ventures with Chinese companies which in turn gives Chinese companies illicit access to their technologies. In response, the Ministry of Commerce of the People's Republic of China announced plans to implement its own tariffs on 128 U.S. products such as fruit and wine, some taxed at a 15% duty and others a 25% tariff. A truce was agreed last December which collapsed and in May the US raised tariffs to 25% from 10%. Again China retaliated with tariffs on $60bn of US goods. Presently, talks have resumed between the nations to resolve their trade differences after a meeting between President Donald Trump and President Xi Jinping at the G20 summit in July 2019 at Japan[38].

5.0 TAX PROVISIONS IN TRADE AGREEMENTS (RECOMMENDATIONS)

1. Bilateral trade agreements should be designed to generate and allocate a single layer of taxation between the taxing jurisdictions[39].
2. The direct tax system should not be included as a vehicle for proscribed actions such as tariffs or export subsidies.

[37] United States Census Bureau, "Trade in Goods with China" (2019) Available at https://www.census.gov/foreign-trade/balance/c5700.html (Accessed 5th July 2019)

[38] "A quick guide to the US-China trade war" BBC 29 June 2019 Available at https://www.bbc.com/news/business-45899310 (Accessed 5th July 2019)

[39] Joel Slemrod and Reuven Avi-Yonah, "(How) Should Trade Agreements Deal With Income Tax Issues?" (2001) Available at https://www.law.umich.edu/centersandprograms/lawandeconomics/abstracts/2001/Documents/01-08.PDF (Accessed 5th July 2019)

3. Accept statutorily uniform source-based system of tax especially for import-intensive sectors.

4. Accept anti-evasion and anti-avoidance provisions which deal with predatory tax protectionism even if they violate non-discrimination protections[40]

6.0 CONCLUSION

The AfCFTA has revolutionized African trade and it is hoped that Nigeria will get the best out of the agreement with its lower tariffs and greater access. Several problems still exist outside of the agreement which needs to be addressed like poor railway and road transport systems and efficiency of tariff processing and collection.

However, Nigeria remains the largest African economy with imports worth around US$36 Billion and 70% of goods coming to the West and Central Africa destined to Nigeria. The Nigerian government can use this naturally given advantage by effecting a comprehensive and effective trade and tariff policy for achieving socio-economic success.

[40] Committee of Experts on International Cooperation in Tax Matters, "The Interaction of Tax Trade and Investment Agreements" UN Secretariat Paper Eighteenth session (2019) Available at https://www.un.org/esa/ffd/wp-content/uploads/2019/04/18STM CRP14-Tax-treaties-with-trade-and-investment.pdf (Accessed 4th July, 2019)

HOW LUXURIOUS ARE LUXURY TAXES?

Emmanuel faith and ife Agboola[41]

"Nothing is certain asides death and taxes" - Benjamin Franklin

1.0 INTRODUCTION

2018 was a year of melodies for Fowler[42] and family as Nigerian hit an amazing heights in terms of tax revenue, recording a stunning sum of 5.3 trillion naira, a notable record and an outstanding figure when you consider the fact that the last time the country recorded that amount of revenue was in 2012, when the revenue generated from taxation was 5.2 trillion naira.

The chorus of diversification has been a resounding mantra and for a multi-resource yet oil-centric nation like country, the recent years have shown glimpse of hope that taxation is a fallow land worth exploring. In the light of this inviting adventure, is Luxury tax a concept to be enunciated in the nation?

2.0 WHAT ARE LUXURY TAXES?

Luxury taxes are *ad-valorem taxes* levied on products or services that are deemed to be superfluous, non-essential or unneeded. It is an indirect tax as it increases the price of goods and service, and this increase is borne by the end consumer who purchases or

[41] Emmanuel Faith is a process analyst at General Electric, he was a former intern at Taxaide Professional Services, where he explored the rudiments of basic taxes like VAT, PIT AND WHT. He is presently the Chief Operating Officer at Taxville, a number one stop shop for everything Tax.
Ife Agboola is budding development practitioner, she leads Frontiers Africa, a non-profit organisation promoting leadership development and civic engagement and awareness among primary and secondary school students in Nigeria.

[42] The FIRS Chairman,Babatunde Fowler.

uses the product. Breaking it down, ***an ad Valorem tax*** is a tax based on the assessed value of an item such as real estate, aircraft and other ostentatious items that depicts wealth.

The kind of good subject to this tax is called ***Veblen goods***. Veblen goods are goods whose demand increases as price increases thanks to their ostentatious perception by its consumers.

The term ***Luxury tax*** found its way into Nigeria's tax-lingo in 2015 when the Federal Ministry of Finance issued a Circular titled ***Implementation of the 2015 Fiscal Policy*** Measures on Luxury Surcharge.

The Circular imposes a surcharge of N3,200 per kilogram (based on the weight of each aircraft) on all registered local and foreign private jets operating in Nigeria, and a levy of N15,000 on first class and business class international air travel tickets.

The expanded version of the proposition included:

- 10% import surcharge on new private jets
- 39% import surcharge on luxury yachts;
- 5% import surcharge on luxury cars;
- Undisclosed surcharge on business and first-class plane tickets
- 3% luxury surcharge on champagnes; wines and spirits; and a
- 1% Federal Capital Territory (FCT) mansion tax on residential properties valued at N300 million and above.

2.1 How has it fared?

The luxury tax has been described as a valid means of redistributing wealth for a country that ranks 126th out of 151 countries in terms of inequality, however its sustainability has been questioned. It is feared that an increase in VAT rate will inevitably impact on consumption and VAT compliance. The combined effect will

reduce the expected revenue. It would also promote buying and selling over the black market.[43]

It is therefore normal that the introduction of any new type or class of tax/taxes would generate heated controversy given the potential impact on someone's income, property or transaction although there are yet to be recorded cases of litigation contesting the newly proposed tax regime in Nigeria.

That a few countries have successfully implemented this is undeniable. Luxury tax has succeeded in countries like Chile, Hungary, Turkey and some African countries have not been left out as Egypt, Tunisia and Botswana have also implemented this new tax, increasing their tax base during the process. However, is Nigeria ready for Luxury Tax?

It would be quite pivotal that the Nigerian government take cues from the U.S government, whose Congress decided to eliminate luxury tax just after two years of its administration, thanks to the lamentation of citizens and expansion of the black market.

In the United States, Luxury tax was initially welcome until it was perceived too excessive and sparked public complaints amongst the citizens. A perfect illustration was the rancorous chorus that burst out in the early part of the 1990s when a 10% Luxury Tax was levied on fur, costly pieces of jewelry, aeroplane and car purchasing worth $30,000 and above. This resulted in a sharp decrease in their purchases, causing problems to the producers of the goods and the retail traders dealing with them. At one point in time, the situation became so grave that Luxury Tax had to be annulled and was replaced by the 1993 Revenue Reconciliation Act.[44]

Popularly three years ago, five women filed a class-action lawsuit against a part of New York state law that grants tax exemptions to products such as Rogaine, but not to tampons and sanitary pads. Plaintiffs say the state’s medical device tax law sets an

[43] Nigeria testing the Waters for Possible VAT HIKE. Retrieved from https://allafrica.com/stories/201904150114.html

[44] Luxury Tax in the United States of America (USA). Retrieved from http://www.economywatch.com/tax/united-states/luxury.html

unfair standard and is in violation of the US and state constitutions' equal protection clauses because it treats women's medical needs differently from men's.[45]

Their names are MARGO SEIBERT, JENNIFER MOORE, CATHERINE O'NEIL, NATALIE BRASINGTON, TAJA-NIA HENDERSON.

Tampon tax ultimately represents an unfair tax burden imposed on nearly one-half the population because of their sex, leading some women to file lawsuits alleging that the tax is a form of gender discrimination. Imposing a tax on a biological necessity unfairly burdens women, who already face a myriad economic and other disadvantages.[46]

Their complaints were on the grounds that tampon tax as a luxury item violates the Equal Protection Clauses of the United States and New York Constitutions. The also complained as well the fact that luxury goods excluded medical items and tampons are medical items used by women.[47]

Following this, eleven states in the U.S have repealed Tampon Tax under Luxury Taxes. As part of the ripple effect of this movement, conversations have started on repealing luxury taxation on Menstrual Hygiene items in Nigeria. Unfortunately, the movement is yet to have its day in the Nigerian courts.

While revenue generation is germane to the progress of an economy, it is also necessary that leakages are blocked, and ensure that Peter is not robbed to pay Paul.

Another major caution is the fact that, although Luxury goods are attributed to the wealthy in the society, the average taxpayers shouldn't be affected, however, what is

[45] The Guardian, Five New York women file class action lawsuit in effort to end tampon tax. Retrieved from https://www.theguardian.com/us-news/2016/mar/03/women-class-action-lawsuit-taxes-tampons-new-york

[46] The Tampon Tax: Sales Tax, Menstrual Hygiene Products, and Necessity Exemptions by Jennifer Benneth. Retrieved from https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1007&context=betr

[47] Tampon-Tax.-Revised-Class-Action-Summons-and-Complaint. Retrieved from http://www.ecbalaw.com/wp-content/uploads/2016/03/Tampon-Tax.-Revised-Class-Action-Summons-and-Complaint-3-3-16-00243311x9CCC2.pdf

viewed as luxury changes over time, and this relativity might become a burden to the masses when normal goods get hit with taxes out of a sense of urgency to raise revenue.

On a flip side, one of the advantages of Luxury tax, like sin tax is that it helps curtail the excessive buying of unnecessary goods and increases the revenue base of the nation if administered faultlessly.

3.0 CONCLUSION

Luxury tax is not a knight in shining armour coming to save the dainty princess of Nigerian economy, and at such, relevant authorities should be wary about its execution and collection.

THE ROLE OF TAX IN THE FUNDING OF GOVERNMENTAL RESPONSIBILITIES

Aduloiu Oluwatofunmi Isaac

ABSTRACT

Every Government at a different level is tasked with the responsibility of the administration of the state, the provision of public goods and services, as well as ensuring the well-being of their citizenry. The financial implication of such a huge task mandates the government to embark on various activities to fund her plans as detailed in the yearly budget. One such activity aimed at generating revenue is the imposition of tax. Due to its underutilisation, it is concluded that the government needs a better and effective procedure for budget funding and taxation presents itself as the most viable option.

This paper discusses the nature of various governmental responsibilities for which funds are required, the structures through which the funds are estimated and allocated, the sources of revenue for funding, and the role which tax plays in that regard.

Upon highlighting the situations of things, this paper further recommends that there should be remodelling and recalibration of government policies to ensure an effective tax system. This can be achieved through the carrot and stick approach where incentives and proper planning is used to bring more taxpayers into the tax base, while proper implementation ofpolicies and aggressive prosecution of tax defaulters is used as a deterrent to others. This ensures tax compliance and in the long run, increased revenue to fund government expenditure.

Keywords: Budget Funding, Taxation, Generating Revenue.

1.0 INTRODUCTION

Nigeria's growing population, the increasing infrastructural deficit, the decay in public institutions, the insurgency, the consistent industrial strike actions, are all pressure points upon the government now more than ever to make a serious attempt to fulfil its duties and responsibilities to the citizenry. It is the responsibility of government to provide for the needs of her citizens in the following areas - education, health, roads, ports, security, power, housing, technology, etc. and also maintain other operations of governments. This begs the questions;

- Can Nigeria cater for her financial needs?
- How effective is our budget funding approach?
- What's the role of taxation in ensuring efficient budget funding?

This article, therefore, discusses the nature of governmental responsibilities for which funds are required, the sources of revenue for funding governmental responsibilities, the role which tax plays in that regard and how to efficiently fund government activities by Taxation.

2.0 NATURE OF GOVERNMENTAL RESPONSIBILITIES

The primary purpose of the government is to provide for the security and welfare of the people.[48] The constitution mandates state and local government councils to perform certain functions which include maintenance of road, streets, drains, public highways, parks, gardens, slaughterhouses, markets, public conveniences, etc.[49] Considering Nigeria's population, the duty to maintain security and provide for the welfare of different set of individuals is tasking, complex and bears huge financial implications. In actual reality, the nature of governmental responsibilities can be best examined by

[48] The Constitution of the Federal Republic of Nigeria, 1999, Cap.23 Laws of the Federation of Nigeria 2004(as amended), Section 14(2).
[49] The Constitution of the Federal Republic of Nigeria, 1999, Cap.23 LFN, Section7 (5) (with particular reference to the fourth schedule thereof).

analysing the needs of society. Despite Nigeria's human and natural resources endowment, 85million of its total population of 185million people live in abject poverty. Thus, it is quite imperative now more than ever for our government to be committed to a rapid exit from this undesirable and unacceptable misery. Furthermore, with an unemployment rate of 23.1% (Q3 2018)[50], Nigeria is purged by various multifaceted security problems such as Piracy, Kidnapping, Cultism, Armed Banditry, Niger Delta Militancy, and Boko Haram Insurgency. Without any intention to downplay or excuse the terrible actions of some police officers, the violation of human rights and indiscriminate disregard for the citizens, our basic security agency, the Nigerian police force is one of the most underfunded, understaffed and least efficient government institutions in Nigeria. This can basically be traced to the cost implication of managing a world-class police force. By conservative estimates, Nigeria has police to population ratio of 1:602, far short of the United Nations recommended ratio 1:400.[51] It is obvious that Nigeria is experiencing challenges in providing adequate training facilities and equipment for her law enforcement and security agencies.

Alongside our security problems, are the problems of comatose infrastructure, a landmass of about 1million sq. km for which there is sparse 3,000 km narrow gauge railway that is mostly run down and non-operational, a road network of about 200,000km of which 18%, 15% and 67% are respectively owned by federal, 36 states and the 714 local governments. But 40%, 78%, and 80% of these roads are in poor condition. Also 98% of all freight in Nigeria is by road haulage as against railway, making Nigerian industrial production extremely costly and eventually uncompetitive in a global world.

[50] Premium Times, "Nigeria's unemployment rate rises to 23.1% - NBS" available at https://www.premiumtimesng.com/news/headlines/301896-nigerias-unemployment-rate-rises-to-23-1-nbs.html (accessed on 14 February 2019).

[51] IGP Ibrahim Kpotun Idris, NPM, MNI, Nigerian Police at the public hearing on a bill for an Act to Establish the Reform Trust Fund and for other related matters, available at http://www.npf.gov.ng/more news.php?id=245(accessed 10th of July 2019).

In the educational sector, it is sad to note that funding of education at all levels in the country is below the benchmark recommended by the United Nations Educational Scientific and Cultural Organisation (UNESCO). While UNESCO's benchmark for funding of education is 26 percent of the national budget and 6 percent of the gross domestic products (GDP), Nigeria has been allocating 6 percent of the national budget to the funding of its education. In the 2017 Appropriation Act, N448.01 billion, representing 6.0 per cent of the N7.30 trillion budget was allocated to education.[52] With the current population of about 185 million, 45 percent of which are below 15 years, there is a huge demand for learning opportunities, which the government clearly is unable to meet.

Undoubtedly, a major cause of these problems is the absence of political willpower. However, the practical reality is that government across different climes even where the political will is unquestionable, still battle with the problem of scarcity of fund for the execution of numerous governmental responsibilities. This is because closely related to government's responsibility for quality service delivery, is the need to ensure a steed source of revenue to offset the huge cost of providing quality public services[53] Thus, it is settled that governmental responsibilities are quite enormous and have a huge cost implication.

[52] The Permanent Secretary, Federal Ministry of Education, Mr. Sunny Echono, made this disclosure at the opening ceremony of the 78th plenary meeting of the Joint Consultative Committee on Education with the theme: "Funding of Education for the achievement of Education, 2030 Agenda in Minna, Niger State.

[53] World Bank, "International Monetary Fund, Government Finance Statistics Yearbook and Data Files and World Bank and OECD GDP Estimates., Washington: World Bank", available on http://databank.worldbank.org/date/Views/Metadata/MetadataWidget.aspx?Name=Tax%20revenue%20(%%20of%20GDP)&Code=GC.TAX.TQTL.GD.ZS&Tyne=S&ReaTyne=Metadata&ddlSelectedValue=IND&ReportID=62602&Reporttype=Table> (accessed March, 2019)

3.0 SOURCES OF GOVERNMENT REVENUE

Government revenue can simply be described as the amount of money that the government makes within a fiscal year which is January 1 - December 31. The Federal Government raises revenue through three main sources which are:

- Oil and gas revenue to the Federation Account
- Tax and Duty (customs duty, company income tax, and value-added tax) s
- Other revenue from companies maintained by the Government

Another source through which the government generates money for the funding of the budget is by borrowing.

1. Oil and gas revenue to the Federation Account

This is the most important source of revenue because it comprises over 80 per cent of the total revenue gathered by the Federal Government.

In Nigeria, crude oil and gas resources are produced by fiscal arrangements between the Nigerian National Petroleum Corporation (NNPC) and private oil companies. The government's share of the crude oil is taken by the NNPC and then sold in the global and local markets, which forms the main proceeds to the Federation Account. Other sources include oil taxes created from levies collected from oil companies. Examples of these are Royalties, Petroleum Profits Tax, Rents, and other oil taxes.

2. Non-Oil Revenue:

Non-oil revenues are revenues from sources other than oil. They include: Companies Income Tax, Customs and Excise Duties, Value Added tax pool etc.

3. Independent Revenue

All revenue, which accrues directly to the Federal Government but does not originate from the Federation Account or the VAT Pool, is described as Independent revenue.

They include MDAs' operating Surplus, government dividends from investments and other sundry proceeds.

Borrowing and Sale of bonds

This is not one of the most consistent means of budget funding, borrowing and sale of bonds/ treasury bills are adopted based on government policy and budget deficit.

4. TAXATION AND BUDGET FUNDING

Tax is a major source of funding for the government. In fact, various definitions of tax by different legal jurisdictions, all agree that taxes exist majorly for the purpose of financing government activities.

In the case of ***Mathew v Chicory Marketing Board,***[54] a tax was defined as a "*compulsory extraction of money by a public authority for public purposes."*

In ***Michigan Employment Sec Commission v Platt,***[5] a tax was defined as *"a non-voluntary or donation, but an enforced/compulsory contribution, exacted pursuant to legislative authority."*

Over the years, taxation has played a major role in the funding of governmental responsibilities. As at the end of the third quarter of the year 2018, the Federal government reported the following[54] [55] [56]

- Company Income Tax (CIT) of N500.37 billion (23% higher than in 2017)
- Value-added Tax (VAT) of N100.37 billion (5% higher than 2017)
- Customs Collections of N229.62 billion (11% higher than 2017).

[54] Mathew v Chicory Marketing Board [1935] 60 CLR, 263 at p: 276,
[55] Michigan Employment Sec Commission v Platt 4 Mich-App 224 14 N.W 2nd 663,
[56] Page 4 of the BREAKDOWN OF 2019 FGN BUDGET PROPOSAL delivered by SEN. UDOMA UDO UDOMA, CON Hon. Minister, Ministry of Budget & National Planning at A PUBLIC PRESENTATION OF THE 2019 BUDGET OF CONTINUITY on Thursday, 20th December 2018

From the above figures, it is safe to conclude that Taxation already plays a major role in the funding of Nigeria's budget, however, the very important question subsist, considering Nigerians debt profile and budget deficit, can taxation be of further help in funding Nigeria's budget and governmental responsibilities?

4.1 EFFECTIVE BUDGET FUNDING THROUGH TAXATION

Despite the success recorded and the present contribution of tax towards funding the budget, the existence of budget deficit running into billions necessitates the need to double effort toward funding such deficit. The Honourable Minister of Budget and National Planning, Senator Udoma Udo Udoma, CON, at a public presentation of the 2018 Appropriation Bill on 14 November 2017, stated that the government was determined to increase its revenue target; including raising tax revenue from the current 6% of Gross Domestic Product (GDP) to about 15%.[57] However, the government is aware that legislating tax increment, may present challenges, hence the emphasis on the reach and efficiency of the Tax system.[58] According to the National Bureau of Statistics, by the third quarter of 2017, Nigeria's labour force had increased to about 85million potentially Taxable people.[59] In June 2017, the minister of finance, Mrs Kemi Adeosun, stated that the number of taxpayers in Nigeria was about 40 million,[60] meaning more than half of potentially taxable people were outside the tax net as at that time. Of equal concern is the revelation that only 214 individuals in Nigeria pay taxes

[57] Premium Times, "How we'll Fund 2018 Budget-Nigerian Govt". available from http://www.premiumtimesng.com/news/more-news/249374-well-fund-2018-budget-nigerian-government.html> (accessed on 2 March 2018)

[58] Mr.Ade Ipaye, "Funding Governmental Services In A Federation: The inevitable Admixture of Law and Politics" at the 2nd Public Lecture Organized by the Department of Commercial & Industrial Law University of Lagos held on the Friday 6th of April 2018.

[59] See Nigeria's labour force increases to 85m in Q3 - NBS available on https://www.vanguardngr.com/2017/12/nigerias-labour-force-increases-85m-q3-nbs/ (accessed 10th of July 2019).

[60] See Only 214 people in Nigeria pay taxes above N20m - Adeosun, available on http://www.premiumtimesng.com/news/top-news/234327-214-people-nigeria-pay-taxes-n20million-adeosun.html. (accessed 10th of July 2019)

above 20 million in a year.[61] Considering this outrageously low level of tax compliance, it is safe to say that the way out of budget deficit and borrowing is the optimisation and efficiency of our tax system.

In a bid to ensure an efficient tax system, the government needs to work on the following:

1. Payment Processing and Collection

Tax authorities should ensure that payment procedures and documentation are convenient and cost-effective. They should work towards ensuring accelerated improvement in the global index of ease of paying taxes. Collection system should leverage modern technology towards advancing ease of payment and prevention of revenue losses. There should be the adoption of technology such as Auto Collection and mobile payment options.

2. Record Keeping

The Tax authorities should partner with the relevant agencies to set up automated systems and adequately train tax officials in the use and maintenance of such systems. Electronic systems of record keeping in line with global best practices should be entrenched to enhance the tax administration process.

3. Exchange of Information

The Tax authorities should develop an efficient framework for cooperation and sharing of information with other tax authorities and relevant local and international agencies. This will mitigate tax evasion and revenue losses.

4. Enforcement of Tax Laws

The Tax authorities should ensure the enforcement of civil and criminal sanctions as provided under the various tax laws. Since the Voluntary Assets and Income

[61] Ibid.

Declaration Scheme is over, the government should embark on calculated enforcement and bring defaulters to the books.

5. Funding for Tax Authorities

The government should provide adequate funding for tax authorities by ensuring that an adequate percentage of revenue collected should be provided to the authority for its operations and to meet refund obligations.

6. Adoption of Presumptive Taxation

In the year 2017, the International Monetary Fund (IMF) valued Nigeria's informal sector at about 65% of the country's GDP. This is equivalent to $263 Billion of untaxed productivity. In order to tap into this goldmine, the government is advised to adopt/ strengthen presumptive taxation.

Presumptive tax is an avoidance measure which aims at imposing a 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. 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 also be applied to non-resident companies, shipping, aviation, retail, and diamond businesses, businesses which provide labour for hire and transport businesses among others.

5. CONCLUSION

The main thrust of this paper is to discuss the governmental responsibilities for which funds are required and the role which tax plays in that regard. Upon understanding the nature of governmental responsibilities, it emphasises the government's needs for as many funds as it can get to carry out its functions properly and as already stated above, the country cannot continue to bank on revenue generated from oil production and

needs to consider alternatives sources of revenue. The intention to generate revenue from various sources is reflected in the budget.

Despite the present contribution of Tax to the funding of the budget, available facts suggest that the tax system still remains underutilised and there is the need for the government to hold tax administrators accountable in relation to their duties of tax collection and remittance, especially in the wake of a huge budget deficit.

Finally, this paper reinforces the role of Taxation in the funding of the Nigerian Budget, the prospect for increased revenue and recommendations to improve the efficiency of the tax system. It recognises the need for technological involvement in the various components of the Tax System [Laws and Administration]

THE WAY OUT OF NIGERIA'S ECONOMIC DOLDRUMS

EXPLORING THE UNCOMMON TAX PATHWAYS AND EXAMINING NIGERIA'S TAX PROBLEMS

Olayiwola Tolulope Priscilla[1]

ABSTRACT

It is no longer news that the Nigerian economy has suffered in recent times. This is largely as a result of our monolithic economy with a strong dependence on the oil and gas sector which until recently accounted for more than 70% of our revenue; the dwindling of oil prices has been fatal to the Nigerian economy.[2] In recent times, the focus has been placed on Taxation as a viable means of revenue generation. Whilst there has been a clamour for improved tax compliance, it has been established that for sustainability and consolidation of the revenue drive, there has to be a conscious effort aimed at creating additional taxable wealth. Also, lacunas in tax laws create uncertainty and lead to litigation. It is only rational for the relevant authorities to take steps to proactively amend or repeal them to put them in sync with our tax policies and to ensure effective administration. Accordingly, this work purposes to ingenuously shed light on key avenues available to Nigeria. They may seem bizarre, adventurous and theoretical, but they most certainly are viable and worthy of attention.

1.0 INTRODUCTION - THE NIGERIAN SITUATION

Financial experts have lamented the country's tax to GDP ratio, describing it as one of the poorest in Africa. The figure, which stands at just 6.1%, is significantly lower than

[1] LL.B. (in view) Faculty of law, University of Lagos. Director of Research, The Tax Club, University of Lagos.

[2] Salami O, 'Between Oil and Diversification of Economy' Nigerian Pilot (July 12, 2015).

Ghana and Egypt at 16%, Morocco at 22 % and South Africa at 27%.[3] In 2016, Nigeria's real Gross Domestic Product (GDP) growth rate declined to -0.36% in the first quarter of the year (Q1 2016) compared to 2.11% in Q4 of 2015.[4] [5] Taxation has since then been repeatedly advocated as the most viable and sustainable source of revenue generation for Nigeria.[5]

The Nigerian tax system is however bedeviled by several challenges, one of which is the issue of tax compliance.[6] This was one of the concerns that necessitated the introduction of the Voluntary Assets and Income Declaration Scheme (VAIDS) in 2017. [7] Although the introduction of the VAIDS is a laudable one, the tax authorities can do more by exploiting other taxable incomes and addressing prevalent issues.

Instead of over-burdening citizens with high tax rates, the tax authorities are advised to look into other taxable income. It is against this brief exposition into the Nigerian system that this essay suggests and recommends the following as viable considerations, in Nigeria's quest to explore the creation of additional taxable wealth.

2.0 REGULATION OF CRYPTOCURRENCIES AND THE TAXATION THEREOF

Although this work is not entirely focused on Cryptocurrency and its very essence, it will, however, attempt to concisely foray into its nature and the calls for its regulation and taxation as it appears to be the new gold.

[3] Tobi Awodipe "Nigeria's tax: GDP ratio remains one of the poorest in Africa "available at https://guardian.ng/business-services/nigerias-tax-gdp-ratio-remains-one-of-the-poorest-in-africa/ (accessed 2 August 2019).

[4] James Emejo "Nigeria's GDP Falls to Historic Low, Heads towards Recession" available at https://www.thisdaylive.com/index.php/2016/05/21/nigerias-gdp-falls-to-historic-low-heads-towards-recession/ (accessed 3 August 2019).

[5] Aguolu O Taxation and Tax Management in Nigeria (2004), 3rd Edition, Meridian Associates Enugu

[6] Akan David Chucks and Odita Ogomrgbunam Anthony "Tax Morale and Its Effect on Taxpayers' Compliance to Tax Policies of the Nigerian Government" available at http://iosrjournals.org/iosr-jbm/papers/Vol12-issue6/E01263555.pdf (accessed 3 August 2019).

[7] Ndubuisi Francis "In New Executive Order, Osinbajo Gives Tax Defaulters Nine Months to Pay Up", available at https://www.thisdaylive.com/index.php/2017/06/30/in-new-executive-order-osinbajo-gives-tax-defaulters-nine-months-to-pay-up/ (accessed [4] August 2019).

Essentially, Cryptocurrency is a form of digital money that is designed to be secure and, in many cases, anonymous. It uses cryptography, which is the process of converting legible information into an almost un-crackable code to track purchases and transfers. It is an accepted legal tender in several jurisdictions and in others, a commodity (such as Japan, Estonia, Sweden, Singapore).[8]The features of Cryptocurrency which amongst other things include its perceived volatility and lack of security have caused regulators to be apprehensive towards it. Owing to this, the Central Bank of Nigeria issued a circular[9] stating that Cryptocurrency is not legal tender in Nigeria and that Nigerians who deal with it, do so at their own risk.

Despite the fears, it appears that this currency is becoming very popular in Nigeria by the day, as at 2018, Nigerians traded $4,000,000 (United States dollars) weekly in Bitcoins (a kind of Cryptocurrency)[10]. It is therefore obvious that there are benefits for the governments in adopting and regulating Cryptocurrency. World over, it is a known fact that tax systems flourish even better when there are new avenues via which wealth can be created. It is therefore only reasonably construable that an emerging and highly lucrative venture such as the cryptocurrency market is explored by governments.[11]

The United States of America's (US) Internal Revenue Service (IRS) [12]addressed the taxation of virtual currency transactions in Notice 2014-21. Depending on the taxpayer's circumstances, therefore, cryptocurrencies, such as Bitcoin, may be seen as property. Following this, general tax principles applicable to property transactions must

[8] Crypto Orders "Most Bitcoin-Friendly Countries" available at https://medium.com/@cryptoorders/most-bitcoin-friendly-countries-ffcc9e55683d (accessed 4 August 2019).
[9] Central Bank of Nigeria "Virtual Currencies not Legal Tender in Nigeria" available at https://www.cbn.gov.ng/out/2018/ccd/press%20release%20on%20virtual%20currencies.pdf (accessed 5 August 2019).
[10] Lubomir Tassev, "Nigerians Trade $4 Million in Bitcoin Weekly, despite Warnings" available https://news.bitcoin.com/nigerians-trade-4-million-in-bitcoin-weekly-despite-warnings/ (accessed on 29th of July 2019).
[11] David Meyers "Cryptocurrencies Like Bitcoin Are Commodities, Federal Judge Says. Here's why that Matters" available at http://fortune.com/2018/03/07/bitcoin-cftc-commodities-coin-drop-markets/ (accessed 5 August 2019).
[12] Saunders S. "Tax Treatment of bitcoin" available at https://www.taxation.co.uk/Articles/2015/03/10/332784/cryptic-currency (accessed 5 August 2019).

be applied to exchanges of cryptocurrencies. A taxpayer who receives cryptocurrency as a means of payment for goods or services is obligated to include the fair market value of the cryptocurrency in computing his/her gross income. Hence, in the US, cryptocurrencies are by their status seen as assets or intangible properties subject to Capital Gains Tax. Also, personal earnings from exchanges or transactions with the currency are subject to income tax.

In conclusion, Nigeria can borrow a leaf from other countries that acknowledge Cryptocurrencies, most especially the United States.

2.1 EXPLORING THE REVENUE POTENTIALS OF MARIJUANA

Nigeria can be described as a sinner that sins different but criticizes other sinners for their sins because it believes other sins are greater, whereas sin is sin. The rationale behind the criminalisation of marijuana is one which can't be understood in any form- be it health-wise or based on morals. Cigarettes and Alcohol are just as injurious to the health as marijuana (recreational smoking), it is therefore surprising that Nigeria chooses to legalize some and criminalise others. Legalising the consumption of these substances will bring it under the government's control, giving them the power to effectively regulate the production, importation or exportation and consumption whilst earning revenue from it.

In his book Revenue Law and Practice in Nigeria, M.T Abdulrazaq described taxation as "...the jack of all trades. [13]"This description was given as a result of the different functions that tax performs, one of which is to affect behaviour. Higher import and excise duties on particular goods ultimately result in higher retail prices, which tend to lower the demand for such goods.[14] It is therefore surprising that Nigeria has restricted herself to just Cigarettes and Alcohol as the major substances that fall under the net of her sin taxes whilst other substances are been illegally consumed in extremely large

[13] M.T Abdulrazaq, Revenue Law and Practice in Nigeria, 3rd Ed (Lagos, 2015), Ch. 1, p.3.
[14] Ade Ipaye, Nigerian Tax Law and Administration, A Critical Review, (London, 2014), Ch. 1, p.7.

quantities under her nose. Earlier in the year, it was reported by the Nigerian Bureau of Statistics that the drug prevalence rate was 14.4%.[15]

Universal reports have shown that although the use of marijuana known as Cannabis Sativa or Indian hemp is illegal in Nigeria,[16]it is still heavily consumed. In 2011, the United Nations Office on Drugs and Crime (UNODC) World Drug Report stated that cannabis use was prevalent among 14.3% of 15 to 64-year-olds in Nigeria. In 2014, Nigeria, according to this same report had made the highest number of cannabis seizures of any African country. On the world cannabis chart, Nigeria ranks eight ahead of the United States, Jamaica(where it is legal to possess it in small quantities) and just a little short of North Korea which tops the chart.[17]

Unlike alcohol and cigarettes, marijuana has various health benefits. The Business Insider on 20th April 2014 published a list of some of the known health benefits of marijuana consumption[18]. Such as, reversing the carcinogenic effects of tobacco use; helping in controlling epileptic seizures; encouraging hair growth; curing depression; curing migraines; reducing menstrual pains (Queen Victoria was known to use marijuana to treat her menstrual cramps)[19] etc. This list shows that marijuana has a place in the medical sphere.

According to a report from New Frontier Data, [20]states with legalised marijuana are on track to generate approximately $655 million in state taxes on retail sales in 2017. In

[15] "10.6 million people use Cannabis in Nigeria" *The Punch* 30 January 2019
[16] Indian Hemp Act, Cap I23 LFN 2004, S.2, S.3, S.4 and S.5.
[17] Lifestyle "15 Most Marijuana Smoking Countries of the World- Africa has a fair share" available at https://answersafrica.com/indian-hemp-is-from-god-see-countries-of-the-world-where-marijuana-is-most-enjoyed.html (accessed 5 August 2019).
[18] Muna Michael "A Case For The Legalization/Decriminalization Of Medicinal Marijuana Consumption In Nigeria" available at http://thenakedconvos.com/case-legalizationdecriminalization-medicinal-marijuana-consumption-nigeria/#_ftn3 (accessed 5 August 2019).
[19] Government of Canada, "Information for Health Care Professionals: Cannabis (marihuana, marijuana) and the cannabinoids" available at https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/information-medical-practitioners/information-health-care-professionals-cannabis-cannabinoids.html (accessed 5 August 2019).
[20] Debra Borchardt "$1 Billion in Marijuana Taxes Is Addictive to State Governors" available at https://www.forbes.com/sites/debraborchardt/2017/04/11/1-billion-in-marijuana-taxes-is-addicting-to-state-governors/#671884952c3b (accessed 6 August 2019).

these times of dwindling state resources, such an amount will be very useful to states. The legalisation of the substance will cause industries to rise. The pharmaceutical and hair industry will largely benefit from it, creating more taxable income asides the imposition of excise duties and value-added tax. The time for Nigeria to legalise, control and tax this substance is now. There is no justification for the continued criminalisation. The country only loses on both ends-financially and health-wise. The further criminalisation only exposes consumers to marijuana that is unsafe for consumption.[21]

While there may be fear as to the effects of the recreational use of this substance, Robert Melamede, a cannabis researcher made it known in the Harm Reduction Journal in 2005[22] that although cigarettes and marijuana smoke have similar chemical properties, they aren't equally carcinogenic. Marijuana has anti-cancer qualities. However, this is not to say that marijuana doesn't have negative side effects, the effects are however not worse than that of Cigarette[23], so why the criminalisation?

Nigeria is a country that believes strongly in its values and morals, however, in keeping up with the rest of the world, alcohol, and tobacco have been legalised in Nigeria, while marijuana remains banned. The continued ban of the substance can be said to be illogical because there has been a lot of advancement in research in the area of marijuana consumption.[24]

[21] Patients for Medical Cannabis "Marijuana vs. Cigarettes" available at https://patients4medicalmarijuana.wordpress.com/marijuana-info/marijuana-vs-ciagarettes/, (accessed 6 August 2019).

[22] Robert Melamede "Harm Reduction Journal" available at https://harmreductionjournal.biomedcentral.com/ (accessed 6 August 2019).

[23] *Ibid at 17.*

[24] Yemi Adebo "A panoramic view of the calls for the legalisation or decriminalisation of Marijuana in Nigeria, especially for revenue purposes" available at https://www.linkedin.com/pulse/panoramic-view-calls-legalisation-decriminalisation-marijuana-adebo/ (accessed 7 August 2019).

3.0. DEATH TAXES

"...but in this world, nothing can be said to be certain, except death and taxes. "

Benjamin Franklin.[25]

The quotation above means that both death and taxes are two certainties that must surely occur. The question, however, is whether a dead man ought to pay taxes and in what circumstances. It is important to note at this point that nowhere in the definition of tax is it said that taxes are only meant to be paid by living people. Although it may seem impossible for a dead man to physically pay his taxes himself, it is not impossible for such to earn income or to have owned property during his lifetime. After death, taxes can still be paid through his trustees, heirs or estate administrators as long as he still earns income (this could be rents, dividends, profits, salaries, etc.).

However, just like every other taxes, tax authorities can't exercise their power to collect death taxes without statutes backing them. It is sad that there is no express legislation that governs the income, and assets of a deceased. Although the tax authorities can get little monies under the Personal Income Tax Act, Nigeria has no exact legislation governing income or assets of deceased people. This makes it very possible for a lot of families to enjoy the properties and incomes of the deceased without paying taxes to the tax authorities, thus leading to large generational acquisitions of wealth without redistribution of wealth by the government.

Section 31 of the Personal Income Tax Act[26] provides for an instance where a person had ceased to carry out a trade, business, and profession in Nigeria as a result of his death. The income that accrues from such will be treated as if the person earned it on the last day he carried out such trade, business or profession. This is however just one kind of income which a deceased earns. The section provides for receipt of the income by the deceased or his representatives and the taxing of such. What if it was received

[25] Benjamin Franklin, in his letter to Jean-Baptiste Leroy, 1789.
[26] Personal Income Tax Act 1993, Cap. P8 LFN 2004.

by other people not listed? What about income accruing from ownership of property, copyrights, etc.? It can be seen that with proper tax planning, the family of the deceased may be able to escape and evade this kind of tax.

Although under the Pay as You Earn, an employer may be able to withhold taxes before any money is paid to the next of kin of the deceased,[27] it nevertheless doesn't cover an instance where the deceased used to pay his taxes directly. The PITA also excludes sums received by way of death gratuities or as consolidated compensation for death or injuries.[28]It stands to reason also, that payments received through a court award for wrongful death or injuries would be taken by the estate of the deceased or the injured, as the case may be, tax-free for personal income tax.[29]

For example, in the USA, when a person leaves an account called Payable on Death account which is like a *Donatio Mortis Causa for* a beneficiary, any profit made before such account was transferred i.e. Prior to the death of the donor of such an account to the beneficiary will be liable to be taxed upon transfer[30]. Proper legislation should be put in place to address this matter.

The idea behind death taxes is to discourage the total transfer of continuous transfer of enormous wealth from generation to generation as this will lead to a lot of money been the hands of a few people and their children. One of the major duties of taxation asides from raising revenue is the distribution of wealth. It is, therefore, necessary that a framework is put in place to tackle this issue.[31]

[27] *Ibid.* Operation of PAYE Regulation No. 6.
[28] *Ibid.* item 23, 3rd schedule.
[29] Temi Oladele "Death And Taxes: An Overview Of The Tax Considerations Of A Natural Person In Death" available at http://www.mondaq.com/404.asp?404;http://www.mondaq.com:80/Nigeria/x/708580/Capital+Gains+Tax/DEATH+AND+TAXES+AN+OVERVIEW+OF+THE+TAX+CONSIDERATIONS+OF+A+NATURAL+PERSON+IN+DEATH&login=true#_ftn11 (accessed 8 August 2018).
[30] Julie Garber "What Happens to a Payable on Death Account When the Owner Dies?" available at https://www.thebalance.com/consequences-inheriting-pod-account-3505238 (accessed 9 August 2018).
1.0 [31] Ibid note 28.

4.0. THE NEED FOR APPOSITE AND CLEAR TAX LEGISLATION

It is a known fact that laws must be clear and precise, as ambiguity in laws causes confusion in interpretation. Although the issue of the lack of clear and inadequate laws is one that continues to plague the Nigerian Tax system in various areas, two key examples of this situation will be discussed shortly.

4.1 The Tax Appeal Tribunal[32] issue

The Tax Appeal Tribunal by virtue of paragraph 11 (1) (i-vi) of the Federal Inland Revenue Service (Establishment) Act (FIRSEA) is vested with the power to adjudicate over disputes arising from the Companies Income Tax Act; Personal Income Tax Act; Petroleum Profits Tax Act; Value Added Tax Act; Capital Gains Tax Act; and any other law specified in the first schedule to the Act or any other Acts of the National Assembly.

The 1999 Constitution of Nigeria in Section 25 1[33]grants the Federal High Court the exclusive powers to adjudicate over matters relating to the revenue of the government of the federation. Furthermore, section 251 (1) (b) vests the Federal High Court with exclusive jurisdiction over matters of taxation of companies and other bodies established or carrying on business in Nigeria and all other people subject to federal taxation.

On the first look, the conflict between both laws can be noticed. Although not directly, the Tax Appeal Tribunal jurisdiction can be seen as usurping the exclusive power of the Federal High Court and this is against the provision of section 1(3) of the CFRN which provides that if any law is inconsistent with the provisions of this constitution, that law will as to the extent of the inconsistency be void.[34] Also considering the fact that all the taxes enumerated in paragraph 11 (1) (i-vi) of the FIRSEA are either paid into the Consolidated Revenue Fund of the Federation Account, it is only logically construable that they form part of the revenue of the government of the federation as envisaged by section 251 (1) (a) of the CFRN.[35] [36]

Although the Court of Appeal's decision in the case of *CNOOC Exploration and Production* Nigeria Limited & Anor. V *NNPC & Anor*[i6]*took* a different turn. It goes to

[32] Hereinafter referred to as TAT.
[33] *The 1999 constitution of Nigeria, CAP C23, Laws of the Federation of Nigeria*
[34] *Ibid at 27.*
[35] Yemi Adebo "An analysis of the jurisdiction of the Federal High Court and the Tax Appeal Tribunal in Tax Disputes" available at https://www.linkedin.com/pulse/analysis-jurisdiction-federal-high-court-tax-appeal-tribunal-adebo/ (accessed 9 August 2018).
[36] (Unreported), CA/L/1144/2015 and CA/L/1145/2015.

show that we have a lot of issues with our tax laws. The court overruled the decision of the Federal High Court which held that the TAT sought to usurp its powers and held it is after first recourse to the TAT and the exhaustion of that option, that the powers of the Federal High court can be evoked. In a nutshell, according to the court of appeal, approaching the TAT is a condition precedent for an aggrieved party who wishes to approach the Federal High Court for redress; thereby obviating the exclusive jurisdiction of the FHC thereon.[37] This can however still be subjected to appeal.

It is thus submitted that the provision of the FIRSEA should be reconciled to be in tandem with the provisions of section 251 of CFRN as regards the jurisdiction of TAT concerning the resolution of tax disputes to give a clear understanding to the taxpayers which encourages compliance.

4.2. Vodacom v. FIRS[38]

In the recent case of *Vodacom* v. *FIRS*[39], the issue of Reverse charge on Value Added Tax[40] was given judicial backing although at a cost. Though the case may still be appealed, it shows a clear example again, of how our laws are inadequate.

The case bordered on withdrawal of VAT by a resident company- Vodacom who employed the services of a non-resident company, New Skies Satellite ("NSS") for the supply of bandwidth capacities. Although other issues were discussed such as whether the supply could have been said to be carried out in Nigeria since the non-resident company wasn't in Nigeria physically to carry out the transaction,[41] the issue that is the decision of the court on Reverse charge. Is a resident company obligated to withhold taxes from the payment made to non-resident companies that don't register with the FIRS? Reading section 10 of the VAT Act[42] which makes provisions for registration of non-resident companies, nowhere can it be seen that where a non-resident company fails to register itself for tax and further fails to include the VAT in the invoice sent to the purchaser of the goods in Nigeria, the purchaser ought to bear the liability. However, the court held that it was the duty of the non-resident company to ensure that the VAT is deducted and paid to the appropriate tax authorities. This is against the

[37] *Supra note29.*
[38] (Unreported), FHC/L/4A/2016.
[39] *Ibid at 32.*
[40]Hereinafter known as VAT.
[41] Andersen Tax "FHC Ruling on Vodacom v. FIRS on Supply of Bandwidth Capacities" available at https://andersentax.ng/fhc-ruling-on-vodacom-v-firs-on-supply-of-bandwidth-capacities/ (accessed 11 August 2018).
[42] VAT Act CAP.VI LFN 2014

proferentem rule.[43] The rule is that where a tax law is ambiguous, it is to be interpreted in favour of the taxpayer

The ambiguity of Section 10 of VAT had a double effect in this case. One, wasteful spending of already needed funds on litigation by Tax authorities and two, the judgment obtained is one that lays a bad precedent on the issue of interpretation of tax statutes. This is just one case of ambiguity; imagine how much more is being lost due to unclear laws

5.0. CONCLUSION

In all, the foregoing suggestions are as envisaged in the title, uncommon. However, the hallmark of progressive nations is the ability to subject recommendations to empirical analysis and then decide as against sitting back and being docile. Our laws, most importantly our tax laws are a reflection of how progressive our government is. The test of good governance is in the responsiveness of our government to clamour for changes. The government of Nigeria should effect the changes were necessary to create more taxable wealth and increase compliance.

[43] IRC V. Duke of Westminster Case, {1936} A.C 1.

A CASE BY CASE ANALYSIS OF RECENT DECISIONS OF THE TAX TRIBUNAL

Chisom Ndubuisi[1] and Abidemi Paramole[2]

1.0. INTRODUCTION

By virtue of Section 59 of the *Federal Inland Revenue Service (Establishment) Act* (the "Act"), the Tax Appeal Tribunal (the "TAT") was set up to settle tax disputes between the tax authorities and taxpayers[3] [4]. It is now settled from the Court of Appeal's decision on 10th March 2017, in the case of *CNOOC Exploration and Production Nigeria Limited & South Atlantic Petroleum Limited v. Nigerian National Petroleum Corporation & Federal Inland Revenue Service*[4] that the TAT has jurisdiction to adjudicate on tax disputes as an administrative appeal body. Aside from the challenge to its jurisdiction, the TAT has over the years, been presented with the opportunities of making pronouncements on very many, and indeed disparate, tax-related issues and disputes. It is without doubt that the decisions of the TAT have helped to enrich the body of law on tax disputes as well as simplifying the process for the resolution of tax disputes in Nigeria[5]. For tax practitioners, these decisions are significant in that they help to tailor opinions and advice issues to their client periodically.

This paper seeks to examine some recent decisions of the TAT in order to highlight the

[1] Chisom Ndubuisi is an Associate and a member of the Dispute Resolution and Tax teams of Udo Udoma and Belo-Osagie

[2] Abidemi Paramole is an Associate and a member of the Tax team of Udo Udoma and Belo-Osagie

[3] Prior to the TAT, there were other adjudicatory bodies created for the resolution of tax disputes: The Body of Appeal Commissioners (under section 71 of the Companies Income Tax Act) and then the now defunct VAT Tribunal (under section 20 of the Value Added Tax Act.)

[4] CA/L/1144/2015 and CA/L/1145/2015, (2017) LPELR-43800(CA)

[5] Kayode Sofola, SAN, ***"Review of Contentious Issues in Previous Judgments of the Tribunal: 2010-2016",*** being a paper presented at the Tax Appeal Tribunal 2019 Retreat, Abuja.

attitude of the TAT to some of the issues raised in those matters. With the aid of decided cases, we will, at the end of this paper, understand the TAT's view on:

a. the issue of payment of penalties and interest that accrue for unpaid taxes;
b. whether a company is not liable to pay penalties and interests where it has paid the negotiated sum reached with the tax authorities;
c. the issue of voluntary pension contribution being a tax-deductible item; and
d. Whether companies are agents of the tax authorities when they collect and remit PAYE payments to the tax authorities.

2.0. NEXEN PETROLEUM NIGERIA LIMITED V. LAGOS STATE INLAND REVENUE SERVICE[6]

2.1. Background

The facts of this case are that following a tax audit on the Appellant in respect of its 2013 and 2014 tax records, the Appellant was issued with two Assessment Notices with an additional tax liability in the sum of N3,265,404.72 and N5,981,109.69 for the 2013 and 2014 Years of Assessment respectively. The Appellant objected to the assessments and subsequently filed its Notice of Appeal before the TAT.

Both parties to this matter agreed that the appeal should be determined through the interpretation and application of the provisions of the relevant statutes to the established facts. The issues for determination by the TAT were as stated below.

2.2. Issues

1) Whether the Appellant has fulfilled its statutory obligation of deducting and remitting the correct Pay as You Earn (PAYE) for the 2013 and 2014 years of assessment thereby exculpating the Appellant from any additional tax

[6] Appeal No.: TAT/LZ/PIT/031/2018. This appeal was decided by the Lagos Zone of the TAT on 18th June 2019.

obligation arising from the voluntary pension contributions made by the Appellant's employees.

2) Whether an agency relationship exists between the parties, this making the Appellant an agent of the Respondent for the purposes of remitting PAYE under the PAYE scheme and not a taxpayer for purposes of any future actions of its employees with their earned income or statutory deductions.

3) Whether Voluntary Pension Contribution qualifies as a tax-deductible contribution and remains so in relation to the Appellant as an agent of the Respondent.

4) Whether the Respondent acted judicially and judiciously by rejecting the Appellant's computed PAYE on actual gross emoluments for its expatriates without any basis and failure to consider documents submitted before making its best judgment assessment.

5) Whether under Section 10(4) of the Pension Reform Act, for a Voluntary Pension Contribution made on behalf of employees to be treated as tax-exempt, it must be known that the voluntary contribution was not withdrawn by the employee affected for a period not less than 5 years.

2.3. Arguments

The Appellant argued that by virtue of Section 8 of the Personal Income Tax (PITA) and Regulation 2 and 4 of the PAYE Regulations, once an employer can show that it has fully discharged its statutory duty by remitting PAYE on behalf of its employees, it has satisfied its statutory obligation and that no further obligation is required to be satisfied in this regard. The Appellant further argued that the PAYE is one that represents the taxes of the employees and not a tax which is to be levied on the

employer which in this case, is the Appellant. The Appellant contended that it had done what was required by law i.e. remitting the PAYE taxes to the Respondent and as such, has satisfied the condition of the law and should not be made to pay any additional taxes in this regard. The Appellant argued this on the basis that the PAYE tax is a form of withholding tax which is held by the employer on behalf of the employee and which the employer has a statutory duty to remit to the Respondent and thus it is an administrative duty to be performed by the Appellant as agents (by operation of law) of the Respondents. As such, the Appellant argued that PAYE was not an additional tax to be paid by the Appellant. The Appellant, therefore, posited that its income is subject to the Companies Income Tax Act (CITA). The Appellant also argued that the combined reading of the provisions of Sections 10 of the Pensions Reform Act (PRA) 2014, Section 20 (1) (g) of the Personal Income Tax (PITA) and paragraph 2 and 3 of the 4th Schedule to the PITA reveals that all pension contributions whether voluntarily or statutorily, as long as they are covered under the statutory scheme, reduce the tax payable by the employees and invariably reduce the PAYE to be remitted by the Appellant to the Respondent.

Furthermore, the Appellant argued that the Respondent unilaterally rejected its tax computation for its expatriates based on actual gross emoluments in 2014 and proceeded to assess the Appellant to deemed gross emoluments without giving appropriate consideration to the justifications presented by the Appellant as the cause of the decline in the emoluments of the expatriates which the Appellant had proved by submitting a document to establish same. As such, the Appellant posited that the Respondent did not exercise its right to use its discretionary power of Best Judgment judicially and judiciously.

On its part, the Respondent stated that the Appellant must prove its claim that the voluntary contributions made by its employees are tax-exempt and that it is not obligated to deduct PAYE on such contributions and that merely stating so is not sufficient. Also, the Respondent argued that for the Appellant to sustain its claim, it

must satisfy the conditions for the voluntary contribution to be treated under the Pensions Reform Act. The Respondent further argued that the provisions of Section 10 of the PITA is not a blanket provision and that while it states that there should be remittance for withdrawal made from Retirement Savings Account within 5 years of its creation, as long as the voluntary contributions made, form part of the emolument of the employees, the employer maintains the duty to deduct and remit taxes on amount contributed and withdrawn before 5 years.

The TAT, after a thorough and thoughtful examination of the submission of both parties, held that the position of the Appellant to the effect that all contributions whether voluntarily made or statutorily prescribed, as long as covered under a statutory scheme, reduce the tax payable by employees and therefore the PAYE to be remitted by the Appellant is recognised by law.

On the issue of the Respondent debunking the report of the Appellant that it was entitled to make deductions of the pension contributions of its employees (voluntarily or statutorily) and doing so without exercising its discretionary powers judicially and judiciously, the TAT ruled in favour of the Appellant to the effect that the Respondent did not exercise its discretion judiciously. In making this conclusion, the TAT stated that the Appellant had provided documentary evidence to establish its point and the Respondent failed to lend credence to this and as such, arrived at a conclusion that did not show that it exercised its discretionary powers judiciously.

On the issue of the Appellant being an agent of the Respondent by law and saddled with the responsibility of remitting the PAYE tax on behalf of its employees to the Respondent, the TAT held that the Appellant, by virtue of the provisions of the PITA, is an agent of the Respondent for the purposes of collecting, deducting and remitting PAYE payments. The TAT held that this was an administrative duty imposed by law on the Appellant and which the Appellant had dutifully discharged and that no additional obligations were attached to this. The TAT in arriving at its

decision relied on the decision of the Court of Appeal in *Fenton Keynes Finance Ltd & Anor v Transply Nig Ltd*[7] to the effect that once an agent has discharged the duty of its office, it is discharged from further responsibility. The TAT also ruled and agreed that PAYE is a form of withholding tax which employers make on behalf of their employees.

On whether Voluntary Pension Contributions (VPC) qualify as tax-deductible contributions and remain so in relation to the Appellant as an agent of the Respondent, the TAT held that PRA exempts all classes of pension contributions from tax in the hand of an employer or employee and as such VPC qualifies as a tax-deductible contribution and therefore was the legitimate reason for the deduction in the taxable emoluments of the expatriates as well as the reduction in the PAYE payments.

The TAT then ordered that the Notices of Assessment issued to the Appellant be discharged.

3.0. SHELL NIGERIA GAS LIMITED V LAGOS STATE BOARD OF INTERNAL REVENUE[8]

The core of this matter centred round whether penalties and interests arising as a result of unremitted taxes within the stipulated time, can be imposed by the tax authorities where the assessment issued by the tax authority is in contention.

3.1. Background

The facts of this case were that on December 4, 2014, the Respondent issued a Demand Notice to the Appellant which imposed the sum of N19,620,849.84 as outstanding Pay as You Earn (PAYE), Withholding Tax (WHT), State Development

[7] (2010) LPELR-4156
[8] Appeal No.: TAT/LZ/PIT/003/2015. This appeal was decided by the Lagos Zone of the TAT on 24th May 2019

Levy, as well as interests and penalties for the 2007-2012 years of assessment.

The Appellant being dissatisfied with the decision of the Respondent in the Demand Notice, challenged this decision by filing a Notice of Appeal dated February 9, 2015, but filed on February 10, 2015 seeking the TAT to set aside the Demand Notice.

Whilst the appeal was pending before the TAT, the parties to the case and their counsel had several reconciliatory meetings with a view to resolving the issues in the appeal amicably. Eventually, the parties reached an agreement to settle their differences relating to the claim of additional PAYE, WHT, Development Levy and Business Development which was evidenced by the filing of the Terms of Settlement dated 10th April 2017 as a full and final settlement of the aspects of the dispute. The Terms of Settlement was entered as Consent Judgement on the 21st day of November 2018.

The Terms of Settlement was however limited to the heads of taxes and not to interests and penalties which the parties were unable to compromise on. The contention between both parties was therefore on the interest and penalties on the additional PAYE, WHT, Development Levy and Business Development.

The TAT then had to decide whether the provisions of PITA allows for this interest and penalties to be imposed by the Respondent. The Appellant argued that until the liability was final and conclusive, the Respondent could not impose penalties. The Respondent argued that the law prescribed a time frame for the remittance of taxes and that the Respondent had failed to do so and as such, was liable to pay the penalties.

3.2. Decision

The TAT after examining the provisions of Section 74 and 82 of PITA, Paragraph 7, 9 and 17 of the PAYE Regulation, ruled that these authorities are collectively to

the effect that penalties and interests will accrue for failure to remit taxes within the stipulated time. The TAT, therefore, decided that the Appellant is to pay 10 per cent penalty on the negotiated sums in the Terms of Agreement plus interest at the prevailing monetary policy rate of the Central Bank of Nigeria.

4.0. SHELL NIGERIA EXPLORATION AND PRODUCTION COMPANY LIMITED V LAGOS STATE BOARD OF INTERNAL REVENUE[9]

This case addresses the issue of penalties and interests arising as a result of unremitted taxes within the stipulated time and whether they can be imposed by the tax authorities where the assessment is in contention.

4.1. Background

The facts of the case are that the Appellant objected to a Demand Notice dated 26th June 2014 (the Demand Notice) issued by the Respondent where it was imposed with the sum of N 581,880,394.73 as additional assessment of personal income tax and State Development Levy as well as penalty and interest for the 2012 year of assessment. This amount was in addition to the sum of N 2,802,122,203.42 which had earlier been served on the appellant as outstanding PAYE, WHT, State Development Levy plus penalty and interest for 2009-2011 years of assessment.

The Appellant objected to the Demand Notice and requested that the Respondent discharge its Demand Notice. The Respondent refused to discharge the Demand Notice and on the 3rd of December delivered and issued its decision dated 26 November 2014 to the Appellant. By way of an objection, the Appellant filed a Notice of Appeal dated and filed 23 rd December 2014 seeking a decision of the TAT to set aside the Demand Notice. While the appeal was before the TAT, the Appellant, the Respondent as well as their respective counsel had several reconciliatory

[9] Appeal No.: TAT/LZ/PIT/084/2014. This appeal was decided by the Lagos Zone of the TAT on 14th May 2019

meetings and reached an agreement to settle their differences with regard to the claim of additional Personal Income Tax and Development Levies.

These agreements were contained in a Terms of Settlement dated 10th April 2017 which was stated to be the full and final settlement of the stated aspects of the dispute. This Terms of Settlement was entered by the TAT as Consent Judgment on 4th December 2018. However, the parties did not reach a settlement on the penalties and interests on the Demand Notice.

4.2. Issues

Flowing from the above, the issues which were to be considered by the TAT was whether the Demand Notice was final and conclusive and if so, if the Appellant can pay penalties and interest on the unremitted WHT, PAYE for the 2007 to 2012 years of assessment.

4.3. Arguments

The Appellant's argument was that because it had objected to the Demand Notice issued to it by the Respondent within the time prescribed by the statute, the demand notice had not become final and conclusive. In arriving at this position, the Appellant relied on the provisions of Sections 58, 60 and 68(2) of the Personal Income Tax Act, Paragraph 13 (3) of the Fifth Schedule to the FIRS Act and Sections 39(1), 49 and 54 of the Lagos State Revenue Administration Law to the effect that these provisions state that once there is an objection, the assessment goes into abeyance until the assessment is determined. The Appellant also relied on the cases of *Ahmadu v.* Governor of Kogi State[10], Federal Board of Internal Revenue v. Integrated Data Service Limited[11], Tetra Pak West Africa Limited v FIRS to support its assertion.

[10] *(2000) 3 NWLR (pt. 755) 502 at 519*
[11] *(2009) 8 NWLR (pt. 1144) 615*

On the other hand, the Respondent argued that by virtue of the provisions of the PITA particularly Section 32 and 74, where a taxpayer has defaulted in remitting his PAYE and WHT as and when due, penalty and interests become due on the tax which was not remitted and that the Demand Notice and the assessment which it issued was done in compliance with the law. The Respondent also relied on the case of *Federal Board of Inland Revenue v. Integrated Data Services Limited*[12]

4.4. Decision

The TAT, relying on Section 54 of the Lagos State Revenue Administration Law and the case of *Federal Inland Revenue Service v. Vital Needs Engineering Limited*[13] ruled that where an objection to an assessment has been filed within the prescribed time, the assessment issued by the tax authority is not final and conclusive. The TAT ruled further that there is no legal basis for imposing interests and penalties on a contested tax assessment because interests and penalties are not applicable under the relevant laws of Nigeria where an assessment is not final or conclusive. The TAT noted that in the instant case, interests and penalties cannot be computed on the assessment as the assessment is still in contention. The TAT also relied on Section 64 of the PITA that states that where there is an objection to an assessment, the collection of income tax shall be in abeyance until such an objection or appeal is determined.

However, with regard to the specific taxes in question i.e. PAYE and WHT, the TAT stated that just like VAT, these taxes are to be remitted by entities which are regarded as collecting agents and that these agents have a moral and legal responsibility to remit these taxes. The TAT referred to Section 32 and 74 of the PITA to support this point but goes further to state that although it has established that where there is an objection, an assessment is not final, it notes that this principle cannot enable these agents to shift away from this responsibility imposed by law by simply objecting to a

[12] *(2010) 3TLRN1*
[13] (2016) 23 TLRN 83,
197

Demand Notice. Again, the TAT held that the tax authority does not have any discretion as to whether to impose a penalty or charge interest as Section 32 (1) (a) and (b) uses the term “shall” and by virtue of that, the tax authority must impose the penalties and interests.

The TAT, therefore, held that the Respondent has a right in law to impose the penalties and interests on the WHT and PAYE which are taxes collected on behalf of the government. The TAT, however, stated that the interest and penalty to be imposed on the Appellant should be on the agreed sum in the Consent Judgment which by virtue of its registration, is now a judgment of the TAT and also establishes the liability of the Appellant in this matter.

5.0. CONCLUSION

From the analysis above, two things are evident. First, where a sum has been negotiated with the tax authorities as the tax payable, it does not negate the payment of the penalties and interest payable from the unpaid taxes. It is therefore imperative that when taxpayers enter into negotiations with tax authorities, they endeavour to discuss every matter in detail and to particularly a factor in the aspects of penalties and interests. Secondly, employers who make PAYE remittances, do so as agents of tax authorities and the mere fact that they make these remittances on behalf of their employees, do not necessarily translate to the fact that PAYE is a type of tax to be levied on an employer; rather, it is simply a type of tax which is remitted on behalf of employees. Also, it is evident from the judgment above that voluntary pension contribution as long as is covered under a statutory scheme, reduces the tax payable by employees which invariably reduces the PAYE to be remitted by employers.

The recent decisions being put forward by the TAT are shaping the administration of tax in Nigeria and presents a bright hope for the future of tax administration. It will be interesting to watch developments arising from these decisions in the nearest future.