Publication of:

The Tax Club, University of Lagos, Akoka.
The Anthology is an up-to-date compendium on tax in Nigeria. It intends to explicate on current as well as dated subjects that deal with taxation.

Contact:

Faculty Building,
Faculty of Law,
University of Lagos.
www.thetaxclubng.com

FOREWORD

The Tax Club, University of Lagos was set up to stir and develop the interest of students and youths in taxation and its practice in Nigeria. It is the first of its kind and aims to enlighten students of the University and the public at large on tax and tax-related matters. This goal is being realized through the various programs of the Club such as the Tax Walk, the National Tax Debate and the Professor Abiola Sanni Writing Contest which is in partnership with the International Centre for Tax Research and Development (ICTRD) led by Mrs. Babington Ashaye. As well as doing its best to deal with current tax issues in Nigeria, the tax club is also dedicated to creating impact in the tax industry by producing brilliant tax experts who will carry on the work outside the walls of the University. The need for Tax education has led to formation of sister clubs in other universities such as Obafemi Awolowo University, the University of Ibadan, the University of Ilorin, the University of Maiduguri, the University of Abuja, Babcock University, Lagos State University, amongst others.

The Tax Anthology is therefore an extension of the Club's mission to educate and enlighten on tax matters. It is currently the most diverse students published journal containing articles, essays, case notes and reports from students from a wide range of faculties, such as Law and Management sciences and from different universities, as well as Law firms, Accounting, Tax Advisory and Regulatory firms.

The Anthology intends to explicate on current as well as dated subjects that deal with taxation. To put this succinctly, the Tax Anthology is an up-to-date compendium on tax in Nigeria.
The uniqueness of this body of work is that the idea was conceived, edited and reviewed entirely by students. And although it is a commendable feat, I hope that it will serve a higher purpose by encouraging other tax clubs and student bodies in general to take such bold steps in the quest to educate and spread information on subjects of interest.

This work was the product of selflessness and devotion by the academic and research committees for their constant work on the manuscripts, the wonderful people who wrote the articles and everyone who made a contribution to the project by way of suggestions or corrections. It is a testament to the power of will and dedication to a goal.
My heartfelt appreciation goes out to; Mr. Babatunde Fowler, Alhaji T.K Oseni, the head of the Federal Engagement and Enlightenment Team and the entire staff of FIRS for taking on this project and their constant support and commitment to Tax education and awareness at the Youth level. Deloitte Nigeria for their contributions towards the success of the Journal.
Professor Abiola Sanni and our other staff advisers (Dr. Folarin and Mrs. Ilobinso) for their immeasurable assistance despite busy schedules. Also, Professor Bolodeoku for his relentless support. My executives and those who

worked on the Journal. Past executives of the Tax Club who have paved the way (special shout out to Ola Gamaliel Olayiwola, Tobi Oyedeji, Yemi Adebo, Ayodele Kadiri, Omesham Mogbolu, Busayo Oladapo and Bola Folarin-Coker, for their constant support and love for the Tax Club).
To every member of the Club who has helped in one way or the other, especially Olufolajimi Otitoola, Olabode Akindele, Bolaji Ogalu, and the Editors of the Journal, led by the Director of Research, Samuel Ajayi. I say a big thank you.

To the reader, I hope that you find this Anthology educating and ultimately useful to your knowledge of tax. I also hope that this work furthers your interest in tax and tax related matters as this is the aim of the Anthology and the Tax Club.

Hilary Odinaka Ekezie,
President,
The Tax Club, University of Lagos (2017/2018)

EDITOR'S NOTE

From the Tax Anthology in 2016 to that of 2017 and now, the 2018 Tax Anthology, the Unilag Tax Club has proven itself to be a star in the cloud of associations with the great output it delivers and the member strength of soon-to-be giants it is reeling off to the world.
The Tax Anthology is birthed out of the need to have a compiled piece of great reads on various issues and segments in the world of taxation even with a great focus on Nigeria. We are guided in this cause by living up to our tripod-natured mission and objectives which are;

- To **unlock** potentials by unleashing the tax genius in Nigerian youths. To this end we have succinct articles and essays from our students in the anthology.

-To **spread** the tax gist by preaching the gospel of tax to every Nigerian through ingenious programmes. In this regard, we are partners with the Federal Inland Revenue Service (FIRS) to secure a nation-wide impression, circulation and publication of the anthology.

-To **network** with tax geeks from both public and private sectors. Thus, we have entries featured in the anthology by professional and legal tax experts all around.

Glory be to God for the completion of this project. I thank the members of the Editorial Board without whom, there would not have been a qualitative work. Good thanks are to our Staff Adviser, Professor Abiola Sanni for his ever-fatherly role. I thank the President of the club, Odinaka Hilary Ekezie for his constant belief in my capacity to deliver. Unreserved gratitude to my team members in the Academic and Research Directorate. You all are the best. I thank unreservedly, the Tax Power House constituting of the Tax Club Executive members. I thank specially, my brothers, Jimi Otitoola, Bolaji Ogalu and good friend, Taiwo Famakinde for their availability upon my unending calls. Finally, great thanks to the FIRS for the constant support and in particular, for getting this piece in your hands published.
The anthology is a top-class piece of literature on diverse aspects of taxation featuring articles, essays, case review and reports from great minds all around Nigeria. I assure you that you have in your hands, an enlightening and delightful piece on taxation.
Cheers!

Samuel O. Ajayi ,
Editor In Chief, The Tax Anthology 2018.

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; 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

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RETHINKING THE LEGISLATIVE COMPETENCE OVER TAXABLE GOODS AND SERVICES WITHIN THE STATES IN NIGERIA: *ATTORNEY GENERAL OF LAGOS STATE V. EKO HOTELS LIMITED* IN FOCUS

By Okechukwu Orisakwe*

1.0 INTRODUCTION

It is now basic knowledge that in the hierarchy of laws in Nigeria, the 1999 Constitution (as amended) occupies the apex position and the validity of all other laws must be measured by its provisions[1]. It thus follows that the power to make laws by any of the legislative bodies established by the Constitution is a constitutional matter which can only be determined by reference to the relevant constitutional provisions.

There have been several debates on the legislative competence of the National and State Houses of Assembly to enact a law on the imposition and collection of taxes on taxable goods and services within the states.[2] These debates have found their ways into the courts on a good number of cases[3] but regrettably, the courts have been unable to put an end to the discordant tunes in these debates. Recently, the Supreme Court had the opportunity to lay the matter to rest, but further aroused the flow of juristic thoughts and inks in respect of the matter. This work, therefore, seeks to convey the writer's position on legislative competence in respect of taxable goods and services within the states which is fast becoming an issue of national and legal concerns. For a better flow of this discourse, the writer has adopted the approach to, first and foremost, briefly examine the Value Added Tax (VAT) Act as it relates to the subject-matter for discussion herein; present the case of ***Attorney-***

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* Associate, Aluko&Oyebode

[1] See section 1 of the 1999 Constitution of the Federal Republic of Nigeria (as amended, hereinafter referred to as "the Constitution" or "CFRN").0

[2] See, for example, A. Sanni. Indirect Taxes in Nigeria (Chartered Institute of Taxation of Nigeria, Lagos, 2014) Pg. 103.

[3] See Attorney General of Ogun State v. Aberuagba (1985) 1 NWLR (Pt.3) 395; Nigerian Soft Drinks Ltd. v. Attorney General of Lagos State (1987) 2 NWLR (Pt.57) 444; Attorney General of Lagos State v. Attorney General of the Federation & Ors (2014) LPELR 22701 (SC); to mention a few.

General of Lagos State v. Eko Hotels Limited[4] and discuss the decision in the case and the constitutional questions arising there from.

2.0 THE VALUE ADDED TAX ACT

Value Added Tax is chargeable on the supply of taxable goods and services. The Black's Law Dictionary[5] offers a more general and clearer definition as follows: A tax assessed at each stage in the production of a commodity, based on the value added at each step by the difference between the commodity's production cost and its selling price.

The legal framework regulating VAT in Nigeria is the Value Added Tax (VAT) Act[6], an Act of the National Assembly which appears to have been enacted in pursuance of the powers conferred on the National Assembly by Section 4 of the 1999 Constitution and reiterated by the combined provisions of Section 1(1) and Part 1 of the Schedule to the Taxes and Levies (Approved List for Collection) Act[7]. Under the VAT Act, tax is chargeable and payable on the supply of all goods and services other than those goods and services exempted under the Act[8]. The rate at which VAT is computed in Nigeria is 5 per cent on the value of all the goods considered by the VAT Act as taxable goods and services[9].VAT is collected through registered persons who are required to be registered as taxable persons[10] with the Federal Inland Revenue Services (FIRS) six months from the commencement of business. The FIRS, through the VAT directorate and a network of local VAT offices throughout the federation ensure that VAT is collected on behalf of the Federal Government. It is an offence for a taxable person to fail to remit VAT.

[4] Hereinafter referred to as the "Eko Hotels Case" or "the case".
[5] B.A. Garner. Black's Law Dictionary (West Publishing Co, 2009, 9th ed) Pg. 1597- 1598
[6] Cap VI, Laws of the Federation of Nigeria (LFN) 2004.
[7] Cap T2, LFN 2004
[8] See section 2 and First Schedule to the VAT Act for taxable and non-taxable goods and services.
[9] See section 4 of the VAT Act.
[10] A taxable person is a person who trades in taxable goods and services.

3.0 *ATTORNEY-GENERAL OF LAGOS STATE V. EKO HOTELS*[11] AND THE VAT ACT: ANALYSIS

As we pointed out in the introduction to this discourse, the debate as to where the legislative power to impose tax on goods and services within the states lies, has become stronger. The *Eko Hotel's* case is a perfect example of a situation where the contention was stretched to its elastic limit. The facts of the case are briefly as follow: Eko Hotels by way of an Interpleader Summons, sought a determination of the Federal High Court on the question as to which authority, as between the Lagos State government and the FIRS, was entitled to the remittance of taxes collected by it on the sale and consumption of goods and services by its customers. The FIRS had argued that by the provisions of the VAT Act, it was entitled to the sums collected as taxes. The Lagos government on its own part argued that by virtue of the Sales Tax Law of Lagos State[12], it was entitled to collect the sums. The Federal High Court held[13] that the authority to collect the sums was vested in the FIRS pursuant to the VAT Act. An appeal to the Court of Appeal[14] against the decision of the Federal High Court was dismissed and the decision of the Federal High Court upheld. Still aggrieved, the appellant lodged an appeal at the Supreme Court which unanimously upheld the decisions of the Court of Appeal and the Federal High Court and dismissed the appeal. For a smoother understanding of the central message of this discourse, we would be dealing with the judgment of the Supreme Court in the case, in the light of the first two (out of the four) issues[15] submitted to it for determination. The issues under reference are reproduced from page 12 of the report hereunder:

> *1. Whether the Court below was right when it held that the cases of:*
> *(i) Attorney General of Ogun State v. Aberuagba (1985) 1 NWLR (Pt.3) 395,*
> *(ii) Nigerian Soft Drinks Ltd. Vs Attorney General of Lagos State (1987) 2 NWLR (Pt.57) 444, cited to the trial Court as stare decisis, is a non-issue and that none of those decisions was authority to say*

[11] (2017) 12 S.C. (Pt I) 107
[12] Cap S3, Revised Laws of Lagos State 2003
[13] See Suit No FHC/L/CS/205/2004
[14] (2008) ALL FWLR (Pt 398) 235
[15] A discussion of the third issue would unavoidably be subsumed in the discussion of the first and second issues while the fourth issue being on jurisdiction of the Federal High Court to entertain the suit, is clearly of no relevance to the issues to be discussed in this work.

that the 1st respondent is obliged to remit proceeds of Sales Tax to Lagos State Government. (Ground1).
2. Whether the lower Court was right when it held that the Value Added Tax Act has covered the field of Sales Tax and its provisions prevail over the Sales Tax Law of Lagos State. (Ground 2).

On the first issue, counsel for the appellant maintained that the cases of ***A.G Ogun v. Aberuagba***[16] and ***Nigerian Soft Drinks Limited v. A.G. Lagos State***[17] which were cited to the trial court and which both decided that Sales Tax Laws of the states imposing taxes on consumption of goods within the states are valid, were supposed to be authorities binding on the Federal High Court to direct it into pronouncing in favour of the Lagos state government. The respondents' counsel reacted by arguing that the cases were not on all fours with the facts before the trial court in this case and was correctly distinguished by the trial court. In resolving this issue against the appellant, the Supreme Court held, *inter alia*, as follows:

> *In order to address this issue, it is important to take another look at the suit filed before the trial Court. As rightly pointed out by learned counsel for the 1st and 2nd respondents, the 1st respondent was not challenging the validity of the Sales Tax Law of Lagos State…"The rule of adherence to precedents finds its expression in the doctrine of stare decisis. The doctrine is simply that, a point or principle of law which has been once officially decided or settled by the ruling of a competent Court in a case in which it is directly and necessarily involved, it will no longer be considered as open to examination or to a new ruling by the same tribunal, or by those which are bound to follow its adjudication, unless it be for urgent reasons and in exceptional cases"… As the 1st respondent did not challenge the validity of the Sales Tax Law of Lagos State, Aberuagba's case cannot constitute stare decisis in respect of the interpleader proceeding before the trial Court. In the Nigerian Soft Drinks Ltd case, the issue was whether, having regard to the decision of this Court in Aberuagba's case, the Sales Tax Law of Lagos State is similar to the Ogun State Sales Tax Law and is therefore unconstitutional being a legislative exercise in respect of Item 61 of the Exclusive Legislative List to the extent that it imposes sales tax on interstate trade and commerce and interferes with taxable goods, the prices of which have been controlled by the Federal Government. The Lagos State Sales Tax Law was held to be valid because, unlike the Ogun State Law, Section 2 thereof did not impose tax in respect of taxable goods whose prices have been*

[16] (1985) NWLR (Pt 3) 395
[17] (1987) 2 NWLR (Pt 57) 444

> *controlled by the Federal Government. The persons liable to pay tax were purchasers or consumers of any taxable commodities listed in the schedule to the law. In other words, under the Lagos State Sales Tax Law, the tax is not upon the goods but upon the consumer whereas under the Ogun State Sales Tax Law the charge was upon goods brought into the State. Again, the appellant did not challenge the validity of the Sales Tax Law. The case has nothing to do with a determination as to which of two contending parties is entitled to tax already collected under the VAT Act. I am of the view and I do hold that the two cases were rightly distinguished by the lower Court from the facts of the instant case. They did not constitute stare decisis and were not relevant to the determination of the issue before them. I accordingly resolve this issue against the appellant.*[18]

With the greatest respect to his Lordship, the above pronouncement puts the doctrine of *stare decisis* on a path too narrow. It is difficult to reasonably agree with his Lordship that the *Aberuagba's* case and the *Nigerian Soft drinks'* case which had earlier decided on the validity of the Sales Tax Law could not, at least, guide the Federal High Court in deciding the case under review. Imposition and collection of taxes being a policy that is capable of expropriating, to say the least, the monies of citizens, must be in accordance with a written law. Therefore, it is difficult to see how a court of law can reach a conclusion that an authority is entitled to tax remittance in a situation where another authority claims to be entitled to collection of same tax without considering the provisions of the law under which each authority makes its claim and decide on which of the competing laws would prevail. The collection of taxes cannot exist *in vacuo*. The Supreme Court's conclusion that the tax which was subject of the dispute in this case was collected pursuant to the VAT Act and should be remitted to the FIRS was, with due respect, without plausible basis. Again, we strongly note that the Court laid no premise for this conclusion. In so far as the goods and services in respect of which the taxes in question were collected were within the provisions of the Sales Tax Law of Lagos, the Federal High Court could not have pretended to shut its eyes to the extensive pronouncements of the Supreme Court in the *Aberuagba's* case, one of which was that states have the power to enact Sales Tax Laws imposing and providing for

[18] Supra at 132 to 134, 136 to 137

collection of such taxes. While this case was pending at the Supreme Court, a learned writer had argued and predicted that:

> *There is no doubt that the states have power to impose sales tax on transactions within the states based on the decision in Aberuagba. I have no doubt that the appeal of Lagos State has a good chance of success at the Supreme Court in the case of* ***AG Lagos State v Eko Hotel****.*[19]

Unfortunately, the sound prediction of the learned writer above has been greeted with disappointment. In the final analysis on this first issue, we are of the firm view that a proper resolution of the *Eko Hotel's* case could not have been achieved without deciding which law was valid and competent to give power to the competing parties to collect the taxes in question. It is from that foundation that the court could have proceeded to then identify which authority was recognised by that law to collect the taxes. There needed not be an invitation by the parties to the court to pronounce on the validity of the laws. It was a necessary inquiry that was not severable from the facts of the case. The court did not even need to raise it *Suo motu*. It is the writer's belief that this case, in the heydays of the apex court, could have warranted the invitation of *amici* briefs from other Attorneys-General, at the instance of the court, considering the national economic importance which the case carried. The writer is, however, aware of the fact that there was a suit initiated by Lagos State in 2008 at the Supreme Court[20] to determine the validity of the VAT Act. The case was struck out in 2014 on grounds of jurisdiction, having suffered setbacks for so long a time. It is hoped that Lagos State government would reinstitute this case at the Federal High Court to have it determined on the merits.

The second issue submitted to the Supreme Court was whether the Federal High Court which tried the case was right in holding that the VAT Act had covered the field, thereby, putting the provisions of the Sales Tax Law in abeyance. The Supreme Court answered this question in the affirmative. It held as follows:

> *A convenient place to commence the resolution of this issue is to examine the application of the doctrine of covering the field as it*

[19] See A. Sanni. Indirect Taxes in Nigeria (Chartered Institute of Taxation of Nigeria, Lagos, 2014) Pg. 103

[20] Attorney General of Lagos State v. Attorney General of the Federation & Ors (2014) LPELR 22701 (SC).

relates to the powers of the National Assembly and State Houses of Assembly to make laws. In ***A.G. Ogun State & Ors. Vs. A.G. Federation (1982) NSCC (Vol.13) 1 @ 35 lines 18 to 30****, His Lordship, Kayode Eso, JSC stated thus: "I take the view that when one considers this doctrine, the phrase covering the field means precisely what it says. Where a matter legislated upon is in the concurrent list and the Federal Government has enacted a legislation in respect thereof, where the legislation enacted by the State is inconsistent with the legislation of the Federal Government it is indeed void and of no effect for inconsistency. Where, however, the legislation enacted by the State is the same as the one enacted by the Federal Government, where the two legislations are in parimateria I respectfully take the view that the State Legislation is in abeyance and becomes inoperative for the period the Federal Legislation is in force. I will not say it is void. If for any reason the Federal Legislation is repealed, it is my humble view that the State legislation, which is in abeyance, is revived and becomes operative until there is another Federal Legislation that covers the field"….In the absence of any relief challenging the legitimacy of the VAT Act, I am of the considered view that the only issue the Court needed to determine was whether, as the law stood at the time the cause of action arose, the money already collected by the plaintiff under the VAT Act should be remitted to the 2nd respondent rather than the appellant. In the instant appeal, there is also no issue seeking the invalidation of the VAT Act. As rightly observed by learned counsel for the 2nd respondent, the Value Added Tax Decree No.102 of 1993 was promulgated by the Federal Military Government and remained in effect, with necessary amendments, until the coming into effect of the 1999 Constitution. Section 315 (1) of the 1999 Constitution provides as follows: "315 (1) Subject to the provisions of this Constitution, an existing law shall have effect with such modification as may be necessary to bring it into conformity with the provisions of this Constitution and shall be deemed to be (a) An Act of the National Assembly to the effect that it is a law with respect to any matter on which the National Assembly is empowered by this Constitution to make laws; and (b) A law made by a House of Assembly to the extent that it is a law with respect to any matter on which a House of Assembly is empowered by this Constitution to make laws." At the time the cause of action arose, the VAT Act was deemed to be an Act of the National Assembly. At the risk of repetition, there was no prayer before the trial Court or the lower Court seeking to nullify the Act. Until there is a decision of a Court of competent jurisdiction invalidating it, it remains valid and subsisting… As rightly observed by the two lower Courts, the goods and services covered by both legislations are the same. It follows that the VAT*

Act has effectively covered the field in that regard. Section 7 (1) of the Act provides that the tax shall be administered by the 2nd respondent. In the circumstances, I am in complete agreement with the Court below, which affirmed the finding of the trial Court, that the VAT Act having covered the field on the issue of sales tax, its provisions prevail over the provisions of the Sales Tax Law of Lagos State. Thus, even if the Lagos State House of Assembly has the requisite legislative competence to enact the Sales Tax Law, which is not an issue before us, once an existing Federal law or an Act of the National Assembly has covered the field, the Act of the National Assembly or such existing Federal law must prevail. This issue is accordingly resolved against the appellant.[21]

In his concurring judgment, Okoro JSC added what we consider to be an obituary to the doctrine of covering the field by interpreting out of context, the provision of Section 4(5) of the Constitution.[22] His Lordship held:

There is no doubt that both the Value Added Tax Act and the Sales Tax Law of Lagos State provide for the collection of tax from the customer on consumable items stated in the schedules of the two laws. The rates and goods upon which charges are made under both laws are similar. It follows naturally that there is unhealthy competition between the two laws, thus throwing the consumer and collection agents into confusion. This is not the purpose of governance. Be that as it may, the law does not leave us without a remedy. By Section 4(5) of the 1999 Constitution of the Federal Republic of Nigeria (as amended), 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. I shall limit myself to the issue before this Court. We are neither asked to determine on the validity of Value Added Tax Act nor the Sales Tax laws of Lagos State. The issue for determination is whether the Value Added Tax Act has covered the field such that the Lagos State Sales Tax Law remains in insignificance. The doctrine of covering the field is essentially that where the main, principal or superior law has covered a given field or area, any other subsidiary law made in that area or field cannot operate side by side with the main, principal or superior law. If the inferior law is inconsistent with the principal law, it has to be declared void to the extent of its inconsistency. But where it is consistent with the principal law, it has to be left in abeyance.[23]

[21] Supra at 141-142, 145-146
[22] 1999 Constitution of the Federal Republic of Nigeria (as amended).(CFRN)
[23] Ibid at 163 to 164

Before we proceed to examine the above judicial pronouncements, we need to observe that the Supreme Court has, by the decision in this case, created more confusion than it sought to remove. In one breath, the court stated that it would not pronounce on the validity or otherwise of the VAT Act because it was not invited to do so, while in another breath the Court held that the VAT Act was an existing law under the constitution which was “valid and subsisting until declared invalid”. For a better flow of this discourse, we shall return to this issue. Let us look at the doctrine of covering the field which seems to constitute the bulk of the *ratio* in this case.

The court correctly recited the principle of covering the field but, unfortunately, failed to apply it correctly to the facts of this case. The consensus of judicial opinions is that the doctrine only applies where both the federal and regional legislatures have enacted a similar law in pursuance of their concurrent powers. For the avoidance of doubt, the matter legislated upon must be on the concurrent list, empowering both the federal and regional governments to enact laws in respect thereof.[24] Taxation of goods and services within the states, as a matter, is neither on the exclusive nor the concurrent list, either expressly or by necessary implication, and therefore the issue of covering the field does not arise. The VAT Act to the extent that it imposes tax on goods and services within the commercial spheres of the states, as we would shortly explain, was enacted without legislative competence and has no field to cover in respect of taxable goods and services within the states. The law is long settled that where a matter is left out in both the exclusive and concurrent legislative lists, it becomes a residual matter over which the states alone can legislate.[25] In the *Aberuagba's* case, the Supreme Court, per Bello JSC (as he then was), held:

> *A careful perusal and proper construction of section 4 [of the 1979 Constitution] would reveal that the residual legislative powers of government were vested in the States. By residual legislative powers within the context of section 4, is meant what was left after the matters in the Exclusive and Concurrent Legislative Lists and those matters which the Constitution expressly empowered the*

[24] See A.G. Ogun State &Ors. v. A.G. Federation (1982) NSCC (Vol.13) 1; Osun State Government v. Estisione H. Nigeria Limited &Anor (2012) LPELR-7936 (CA)
[25] See A.-G., Lagos State v. A.-G., Fed. (2003) 12 NWLR (Pt.833) 281 para C

Federation and the States to legislate upon had been subtracted from the totality of the inherent and unlimited powers of a sovereign legislature. The Federation had no power to make laws on residual matters.[26]

It follows from the foregoing that the concurring judgment of Okoro JSC which largely took umbrage under section 4(5) of the Constitution is unsupportable. Section 4(5) provides that any state law which is inconsistent with any law "validly" enacted by the National Assembly is void to the extent of its inconsistency. What the clear and unambiguous provision of this section means is that the validity of the Act of the National Assembly to which the section relates is indispensably crucial in any determination as to whether a state law is inconsistent with that Act. We have pointed out that the VAT Act is not, in all its provisions, validly made and section 4(5) of the Constitution is inapplicable to it in the circumstances. It is for a similar reason to this that section 315 of the Constitution referred to in the leading judgment cannot cure the defect in the VAT Act. Section 315 provides:

(1) Subject to the provisions of this Constitution, an existing law shall have effect with such modification as may be necessary to bring it into conformity with the provisions of this Constitution and shall be deemed to be

(a) An Act of the National Assembly to the effect that it is a law with respect to any matter on which the National Assembly is empowered by this Constitution to make laws; and

(b) A law made by a House of Assembly to the extent that it is a law with respect to any matter on which a House of Assembly is empowered by this Constitution to make laws.

It is glaring from the provisions reproduced above that an existing law is preserved only if it is in accordance with the legislative powers granted under the Constitution. Thus, although the VAT Act was enacted before the Constitution took effect, the legislative *vires* of its maker must at all times from the emergence of the 1999 Constitution, be determined according to the provisions of the Constitution. This now drives us to the point where we should explain strongly why the VAT Act remains questionable against the backdrop of constitutional provisions.

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[26] Supra at 405

We have earlier made the point that the VAT Act is enacted by the National Assembly, in the purported pursuance of the powers granted to it by the Constitution and later, by a community effect of section 1(1) and the Schedule to the Taxes and Levies (Approved List for Collection) Act, Cap T2, Laws of the Federation of Nigeria 2004. Let us pause here for a while to examine the latter. Section 1(1) of that Act provides as follows:

> *Notwithstanding anything contained in the Constitution of the Federal Republic of Nigeria,…or in any enactment or law, the Federal Government, State Government and local government shall be responsible for collecting the taxes and levies listed in Part I, Part II and Part III of the Schedule to this Act, respectively*.

The opening statement of the above provision obviously seeks to fortify itself to wrestle the Constitution. Of course, it is obvious, from the words used thereat that the legislature, while it embarked on the voyage of enacting the Taxes and Levies Act, was aware of the constitutional atrocity it was proposing to commit. So, it wanted to intimidate the Constitution so it could have its way. However, the Constitution remains fearless to any provision of any law, notwithstanding the seeming strength of the language of such law. The Court of Appeal has had the opportunity to forcefully strike down a statute that challenged the constitution in this manner, relying on the decision of the Supreme Court in ***Nkwocha v. Governor of Anambra State.***[27] That statute is the Land Use Act which provides that the provisions of its section 47 would stand, "notwithstanding" the provisions of the Constitution. The Court of Appeal, per Omololu-Thomas JCA held, and rightly too, that:

> *[Section]…47 of the Land Use Act 1978 [does] not have …the same legislative force as…the Constitution…and therefore to the extent that those sections…are inconsistent with…the constitution, they are void…*[28]

The legislative powers of the legislatures in Nigeria are only traceable to the Constitution and any law empowered by it further to vest legislative powers on the legislatures. The Taxes and Levies Act deviates from the expectation of the

[27] (1984) 6 S.C. 362
[28] Lemboye v. Ogunsiji (1990) 6 NWLR (Pt 155) 210 at 224-225

Constitution to the extent that it gives the National assembly powers to enact the VAT Act, to impose taxes on goods and services consumed within the states. Thus, both Acts are, to this extent, void for their inconsistencies with the Constitution.[29] We respectfully differ from the view taken by the Supreme Court to the effect that the VAT Act would remain valid until it is declared invalid by a court of competent jurisdiction. Section 1(3) of the Constitution provides that any law inconsistent with the provisions of the Constitution shall, to the extent of its inconsistency, be void. The meaning of the term "void" in law has become a legal catechism. Although a judicial decree is most appropriate to declare a thing void so as to allay all conjecture, any void thing is void *ab initio* and requires no judicial decree to make it so because a void thing never existed in the eyes of the law: a repost of Lord Denning's popular statement here would be most appropriate:

> *If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse*[30]

The VAT Act (to the extent that it imposes taxes on goods and services consumed in the states), being void under the Constitution cannot be said to be valid even without a judicial order. In the light of the foregoing, we are of the view that the States are the only competent authorities to enact a law, by whatever name christened, for the imposition and collection of taxes on goods and services within the states. It is also important before ending this discourse, to concede that no state has the power to enact any law for the imposition of taxes on goods and services having international and inter-state dimensions in their production and sales level before they are consumed. Sanni explains this point better:

> *While Sales Tax is a local tax, VAT has a local, inter-state and international dimension. The VAT borne by a final consumer in Lagos may have international and inter-state dimensions at the production and wholesale stage before getting to the retail stage. While a state in Nigeria is incapable of imposing a VAT under the*

[29] See section 1(3) CFRN
[30] See MacFoy v. UAC (1962) AC 150 at 160

> *Constitution, it is submitted that the Federal Government could do so pursuant to the decision in Aberuagba. Thus, it is possible for the VAT Act to be voided only to the extent that it imposes tax on supply of goods and services within the states while VAT on inter-state and international stages are preserved.*[31]

We agree with the submission of the learned author above. We only need to add that it does not really matter the title the law is given: it should walk within its constitutionally allocated path. This view is supported by the pronouncement of the Supreme Court in the *Agberuagba's* case wherein it was held that:

> *It is axiomatic that in the absence of any constitutional provision, express or implied, to the contrary the respective taxing power of the Federation and of a State includes sales taxing power. Accordingly, the Federation is entitled to levy sale tax on any saleable matters within its competence. A state can also do the same within its competence. It must, however, be emphasized that it is not within the competence of a State:*
>
> *(1) to make sales tax law affecting any of the matters in the Exclusive Legislative List; or*
> *(2) to make any sales tax law in the Concurrent Legislative List which is inconsistent with any law validly made by the Federation; or*
> *(3) to make any sales tax law in the Concurrent Legislative List on any matter in the Concurrent List where any law validly made by the Federation has covered the field.*[32]

Later at the same page, the court continued on the powers of the Federation to levy tax on saleable matters:

> *Although the validity of the Ogun State Sales Tax Law is the only question in issue on this appeal, the validity of all the Sales Tax Laws of the other States are indirectly involved…having regard to all the relevant provisions of the Constitution, I am of the firm view, that the Constitution does not confer on the Federation exclusive power over trade and commerce in item 61. I hold that all the Governments (Federal. State and Local) have been accorded their respective shares to control trade and commerce. Accordingly, I would construe the words "in particular" in item 61 to be words of limitation and that the trade and commerce power of the Federation is limited to the sub-items (a) to (f) therein. For the avoidance of any doubt, I may emphasize that the Federal*

[31] Ibid at 103
[32] Supra at 413

> *Government had power to make law on the items specified in sub-items (a) to (f). In this respect, international trade and commerce and inter-state trade and commerce are specifically reserved for the Federation while trade and commerce within a State is left as a residuary matter to the States. Accordingly, I would not invalidate the Sales Tax Law of Ogun State by reason of the proposition that, having regard to the generality of item 61, a State has no power at all over trade and commerce. I reject the proposition because it has no constitutional basis.*[33]

Every court, especially the Supreme Court, must be on the guard at all times to protect the Constitution in the slightest of opportunities given to it. Our noble Lord, Niki Tobi JSC, has put it more succinctly in the celebrated case of ***A.G. Abia State v. A.G. Federation***[34]:

> *The Constitution of a nation is the fons et origo, not only of the jurisprudence but also of the legal system of the nation. It is the beginning and the end of the legal system. In Greek language, it is the alpha and omega. It is the barometer with which all statutes are measured. In line with this kingly position of the Constitution, all the three arms of Government are slaves of the Constitution, not in the sense of undergoing servitude or bondage, but in the sense of total obeisance and loyalty to it. This is in recognition of the supremacy of the constitution over and above every statute, be it an Act of the National Assembly or a law of the House of Assembly of a State. The supremacy clause is provided for in section 1(1) of the Constitution of the Federal Republic of Nigeria, 1999. All the three arms of Government must dance to the music and chorus that the Constitution beats and sings, whether the melody sounds good or bad. Regarding the first place section 1 occupies in the constitution, it is the adjectival variant of the noun gold. It is the same golden position in sports that the Constitution occupies in any jurisprudence and legal system, including ours. While I recognize the constitutional right of the legislatures, that is, the National Assembly and the House of Assembly of the States, to amend the Constitution, until that is done, they must kowtow (using the Chinese expression) to the provisions of the Constitution, whether they like it or not.*[35]

[33] Supra at 415-416
[34] (2006) 16 NWLR (Pt 1005) 265
[35] Supra at 381

4.0 CONCLUSION

It is our respectful view that the *Eko Hotels'* case was not given the requisite judicial attention it deserved. Again, Sanni[36] reveals that while the appeal was pending before the Supreme Court, it suffered several setbacks due to the court's lack of commitment to give it the attention it required. The constitutional issues raised by this case were, in our respectful view, glossed over by the apex court and should be revisited in the next opportunity. The case was not only of monumental economic importance to the revenue generation of the federal and state governments but was indeed an avenue to inquire and ensure that an organ of the government did not commit infraction on the hallowed provisions of our Constitution.

Although the writer respectfully allocates a fair share of the blame to counsel who represented Lagos for the outcome of this case, the failure of the Supreme Court in this case to pronounce conclusively on where the legislative competence lies in respect of taxable goods within the states cannot be said to have met the justice of the case and would continue to create problems, especially, that of double taxation. The writer has had a personal experience of this problem when he took a bottle of beer at a pub in Lagos which sold for One Thousand Naira but paid additional One Hundred Naira as tax. He was told that 5% of the beer price (that is Fifty Naira) was collected under the VAT Act while another 5% (another Fifty Naira) was collected under the Hotel Occupancy & Restaurant Consumption Law[37] (popularly known as the "Consumption Tax Law"). This law was passed immediately after the Court of Appeal's decision in the *Eko Hotels'* case, perhaps, to mitigate the challenges faced by the Lagos government whose Sales Tax Law was declared void by the appellate court. Although it was christened a different name, it is substantially the same as the Sales Tax Law with restriction to the hospitality circles. One cannot blame the Lagos State government for enacting such a law because it is well within its constitutional *vires* to so do and there's no judicial precedent (including the case under review) foreclosing the states from making such laws. If anything, *Aberuagba's* case fortifies the power of the states in this

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[36] Ibid at 102
[37] Cap H8 Vol 5, Laws of Lagos State 2015 (came into force on 22nd June 2009)

regard. However, the application of that law, side by side with the VAT Act, would create the problem of double taxation which is not only unconstitutional but also an indirect robbery on the poor citizens.

VOLUNTARY ASSETS AND INCOME DECLARATION SCHEME (VAIDS)

By Taiwo Oyedele*

Taxes, after all, are the dues that we pay for the privileges of membership in an organised society. -Franklin D. Roosevelt

1.0 INTRODUCTION

It is often said that tough times call for tough measures. For Nigeria and its tax system, these are not just tough times but extra-ordinary times going by the key indicators from tax to GDP ratio, to non-oil revenue, budget deficit, debt servicing cost, internally generated revenue by states and so on. In addition to the direct symptoms, the poor tax revenue problem contribute to other macro-economic challenges such as high interest rate, poor sovereign credit rating, and even agitation for resource control among others.

Nigeria's tax revenue profile is at a crisis level and we must find a turning point or we are bound for the tipping point with dire consequences. This calls for an urgent, drastic and robust response by all stakeholders. The convenient narrative is to say people donot pay tax because government is corrupt whereas in reality, and based on empirical evidence, the reason why government is corrupt is partly because people donot pay tax.

It has been indisputably established that when citizens pay their taxes correctly, they are more engaged and therefore hold their leaders accountable. So we have a much bigger problem with tax than anything else. Here are some numbers, and as the saying goes "numbers don't lie."

Table – Comparison of tax data	**Nigeria**	**South Africa**
Population (2016)	182.2M (NPC)	55.6M(Stats SA)
Labour force (2016)	79.9M (NBS)	21.8M(Stats SA)

* Taiwo Oyedele is the Head of Tax and Regulatory Services at PwC Nigeria and Tax Leader for PwC West Africa. He is an author and prominent public speaker on tax, business and economic matters.

Unemployment rate (2016)	13.9% (NBS)	26.6% (Stats SA)
Registered individual taxpayers	14M (JTB)	19M (SARS)
Top taxpayers paying N10m or more	943 [FGN/JTB]	950,000 (SARS, Derived)
Total tax revenue (all levels)	N6T [NBS, Derived]	R1.07T (N27T) [SARS]
Personal income tax revenue (2016)	N802B [NBS]	R390B (N9.7T) [SARS]
Tax to GDP ratio (all taxes)	6% (FGN)	26.2% [SARS]
Personal income tax to GDP ratio	0.8% [Derived]	9.5% [SARS]
Ease of paying taxes ranking (2017)	182 /190 (World Bank)	51 / 190 (World Bank)

2.0 THE REVENUE PROBLEMS

Nigeria is generally regarded as an "oil rich" nation and everything seems to centre on or around it including national budgets. This illusion of wealth means we are fixated on how to share our small national cake rather than focus on how to bake a bigger one. If the tax system had been working well, oil revenue should be miscellaneous income not the main revenue. The United States of America for instance produces over 9 Mbpd compared to just over 2 Mbpd by Nigeria yet the US is not generally referred to as an "oil rich" country – well the reason is not far-fetched, the economy runs on tax revenue, not oil.

In 2016, total tax revenue collected by all levels of government in Nigeria was about N6 trillion compared to about N27 trillion in South Africa – more than Nigeria's oil and tax revenue combined. Altogether with oil revenue, Nigeria generates about N10 trillion (circa $33B). Even without corruption, this amount is barely enough to fund transportation alone (roads, rail, water and air travel infrastructure and maintenance).

So, more than anything else, the problem is that not many of us pay the right amount of tax as required by law. The tax net is small and the tax base is even smaller and seems to be shrinking year in year out.

3.0 THE TAX COMPLIANCE CHALLENGE

From the table only 14 million people are registered with all 36 tax authorities and the FIRS out of almost 80 million workforce. This is even smaller than South Africa (SA) with less than one-third of Nigeria's population and higher unemployment rate. Out of the 14 million, 96% are captured through the PAYE tax system while only 4% (or 560,000) file returns through direct assessment as self-employed and high net-worth individuals (HNIs). Within the direct assessment population, only 943 people pay N10m or more in personal income tax (including 214 who paid N20 million or more) compared to about 950,000 in SA. To pay N10 million in income tax, one needs to earn about N50 million annual income (or about N100m to pay N20m tax). Interestingly all the 943 people are resident in Lagos except 2 in Ogun state. It is not surprising that Lagos state accounts for almost 40% of total IGR collected by all 36 states, more than all other states combined excluding Ogun, Rivers and Delta. But even Lagos is only just scratching the surface.

While the rest of the world worries about tax avoidance, where people do smart stuff to minimise their tax bills within the law, ours is audacious tax evasion and outright disregard for the law that is so pervasive, it is more difficult to find those who have paid the right amount of tax than evaders. It's like hiding in plain sight or at best behind a single finger. One would expect that it should be quite easy to find tax evaders in the "hide and seek" game but unfortunately the "seekers" are in blindfolds and shackles. The blindfolds being the lack of reliable data or tax intelligence and the shackle is lack of political will to enforce the law especially for the elephants in the room – politicians, HNIs, wealthy religious leaders etc.

4.0 THE PROPOSED ACTION PLAN

On 29 June 2017, the Acting President, Prof. Yemi Osinbajo, formally launched the Voluntary Assets and Income Declaration Scheme (VAIDS), an initiative designed to encourage voluntary disclosure of previously undisclosed assets and income for the purpose of payment of all outstanding tax liabilities.

4.0.1 Direct Benefits

The main objective of VAIDS is to increase the number of taxpayers in the tax net and raise revenue for government. Specifically, it is expected to increase Nigeria's tax to GDP ratio from the current 6% to between 10% and 15%, broaden the national tax base, curb tax evasion and discourage illicit financial flows.

4.0.2 Indirect Benefits

Beyond the direct benefits, high tax compliance rate and improved tax revenue will invariably lead to:

- **Good Governance**– there is a direct correlation between tax compliance and good governance. This is because citizens take more interest in governance and hold their leaders accountable.
- **Better Quality of Life**- even if you can afford to provide for yourself and your household, it is far more affordable if provided centrally using tax money. A functional pipe borne water is better than a million individual boreholes.
- **Reduction in the Size of Black and Informal Economy**- by transitioning them into the formal economy, which is better regulated and can serve the people better.
- **Robust National Planning**- invariably, a lot of useful data is provided through tax compliance which can be used for sound economic policies and national planning.
- **Sovereign Credit Rating**– if the country's revenue base is diversified, and more reliant on tax rather than oil, lenders will see Nigeria as more credit worthy and hence our sovereign credit rating will improve leading to lower borrowing rate/cost. This will also result in lower interest rate within the economy to promote growth.
- **Stable Exchange Rate**- better credit rating means more inflow of foreign exchange which will inevitably strengthen the Naira.

- **Inflation Control** – government will have less need to borrow as a means of controlling inflation. Tax will take care of this. It’s like issuing zero coupon, non-repayable government instruments. Monetary Policy Rate can then be reduced to drive down interest rate and real sector players will be able to access funds.
- **Savings and Investment**- lower interest rate will lead to a more likely positive real returns on savings once inflation is lower than interest rate. This will also make the capital market more buoyant.

4.1 HOW WILL THE SCHEME OPERATE?

Structure: The Scheme would be implemented by the Federal Inland Revenue Service (FIRS) in collaboration with all 36 State Internal Revenue Services and the FCT IRS.

Framework: The legal basis for the Scheme is an Executive Order signed into law by the Acting President and a Memorandum of Understanding signed between the federal and state governments.

Duration: The Scheme will commence on 1 July 2017 for a period of 9 months.

Incentives: Taxpayers who make full and honest declarations will enjoy waiver of interest and penalty, immunity from prosecution, confidentiality of information supplied, exemption from tax audits for the periods covered by the disclosure and flexible payment of tax due.

Scope and Applicable Taxes: The Scheme is applicable to all persons (individuals, companies, executors, trustees, partnerships e.t.c) that are liable to tax in Nigeria. Taxes covered include Companies Income Tax, Personal Income Tax, Withholding tax, Petroleum Profits Tax, Capital Gains Tax, Value Added Tax, Stamp Duties, Tertiary Education Tax and NITDA levy.

Non Declaration: Taxpayers who fail to participate in the Scheme will be investigated and if found culpable will be subject to criminal prosecution. A “name and shame” list of tax evaders will be published. Government will rely on tax intelligence gathering, whistle-blowing and various international conventions and multilateral agreements to obtain information required for prosecution of defaulting taxpayers or those who make false declarations. An international forensic and asset tracing company has been engaged to support this process.

Tax Awareness: There will be sensitization for taxpayers and the general public. About 7,500 Community Tax Liaison Officers (CTLO) are being recruited and trained for this purpose. Effective from 29 June 2017, every Thursday will be declared as **'Tax Thursday'** to focus on tax matters.

5.0 CONCLUSION

Given the current state of the economy in the face of huge revenue challenges, ballooning budget deficit and rising debt servicing cost, this measure is expedient to change the country's tax narratives. According to an IMF survey, it is difficult for any country to achieve sustainable development with a tax to GDP ratio under 15%. Tax is however not a stand-alone issue, there must be economic prosperity for individuals and businesses to pay tax. So this Scheme should go hand in hand with the Economic Recovery & Growth Plan, implementation of the new National Tax Policy and efforts aimed at enabling the business environment. Other measures should be put in place to compliment the Scheme including a comprehensive tax law reform, simplification of tax compliance, transparent reporting of tax revenue and utilization.

All taxpayers should embrace this opportunity to correct any areas of non-compliance with their tax obligations and going forward hold government accountable for effective utilization of revenue collected. Politicians should lead the way in remediating their tax affairs. All stakeholders need to work together for effective implementation. The proposed Bill on tax amnesty currently before the House of Representatives should complement and provide more legal backing for the VAIDS.

TAXATION IN NIGERIA: A RESULT OF IMPOTENT LAWS OR CLOGGED MACHINERY FOR EXECUTION?

By Olufolajimi Otitoola[*] and Munirah Yaqoub[**]

ABSTRACT

There are a lot of questions relating to the current economic state of the country to be answered. However, the most pertinent concern is the inability of Nigeria to achieve the immense potential of revenue generation from taxation and to subsequently use such revenue to positively impact the economy. The root of these issues can be narrowed down to two important areas: impotent laws and failed administration of laws.

This paper covers an overview of the Nigerian tax system, the imperatives of a tax system as it relates to the tripod on which the tax system stands, proper assessment of the provisions of the tax laws and its implementation with the aim of discovering where the "real problem" lies. The writers make recommendations, where needed, to curb the problems of the Nigerian tax system.

1.0 OVERVIEW OF THE NIGERIAN TAXATION SYSTEM

Cicero, an ancient Roman writer, pointed out so succinctly, when he called it *"the sinews of the state"*, that taxation is central to the existence and proper functioning of a nation, as well as to the functioning of its lower levels of government.[1] According to him, taxation forms the backbone of the society, and is the primary way in which the society allocates the burden of the government to its people. Tax is explained as monetary charge on residents living in, and non-residents that are

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[*]Olufolajimi Otitoola is a 300 level law student of the Faculty of Law, University of Lagos who has interests in Arbitration, Tax and Energy Law.

[**]Munirah Yaqoub is a 300 level law student of the Faculty of Law, University of Lagos with a flair for human rights, tax law and food.

[1] Winer S.L., Hettich W. (2004) The Political Economy of Taxation: Positive and Normative Analysis When Collective Choice Matters. In: Rowley C.K., Schneider F. (eds) The Encyclopedia of Public Choice. Springer, Boston, MA, pp. 173-191.

doing business in Nigeria. Taxes can be direct or indirect, and can possibly be imposed on an individual basis, corporate entities, assets and transactional basis. Taxation is basically the process of collecting taxes within a particular state or country. It refers to the compulsory and sometimes coercive money collection by a levying authority, usually a government. It also applies to all types of involuntary levies ranging from income to capital gains to estate taxes. The core importance and objectives of taxation is to ensure that revenue is generated for all tiers of government for its various expenditures. Taxation has been a strong driver for economic development in the country right from the pre-colonial era to the post-colonial era. Apart from oil, tax is the second most important revenue source for the government.[2] According to *The Punch*, Nigeria earned a total of ₦2.92 trillion from taxes in the first nine months of 2015. Quite notable is the fact that there is dwindling revenue from oil and thus great focus has been on how to drive revenue through tax.

The Nigerian Tax System dates back to 1904 when the personal income tax was introduced in Northern Nigeria before the unification of the country by the colonial masters, which was later implemented through the Native Revenue Ordinances, to the western and eastern regions in 1917 and 1928 respectively.[3] The Nigerian tax system is a tripartite structure comprising of: Tax Policy, Tax Legislation and Tax Administration. Tax Policy forms the basis for the Tax Laws, although the laws are sometimes made before the tax policy. Tax policies are the government's guide as to how taxation should operate in its entirety to fulfil the objectives that the government finds pertinent. Tax policy affects government's attitude in making laws, amending existing laws and administering tax laws. The Nigerian National Tax Policy provides information on all the necessary information on taxation in Nigeria. It enumerates the monetary charges imposed on the government for the

[2] "Taxation remains most sustainable source of revenue for government, Fasoto" Vanguard Newspaper, May 23 2010

[3] Damian Nwosu, Tax Structure and Economic Growth in Nigeria, (Master's Thesis 2010) p. 2.

purpose of revenue generation. It imposes taxes directly or indirectly on the following bases:

A. On Individuals' incomes

i. Personal Income Tax;

ii. Development Levy

B. On Companies' incomes (Corporate Entities)

i. Companies Income Tax;

ii. Petroleum Profits Tax ;

iii. Education Tax;

iv. Technology Levy

C. On Transactions

i. Value Added Tax;

ii. Capital Gains Tax;

iii. Stamp Duty;

iv. Excise Duty;

v. Import Duty;

vi. Export Duty;

vii. Tax on Assets

The Tax Administration is the implementation of the tax laws. This shows that, in a bid to achieve effective and efficient tax system that will be the pivot for national development, appropriate tax laws and policies should be put in place and properly administered.

Broadly, there are three categories of tax authorities in Nigeria, namely, the Federal Inland Revenue Service[4]; the Inland Revenue Service of various states[5]; and the Local Government Revenue Committee[6]. Nigeria has a series of tax laws in place which aid in efficient running of Nigeria's tax system. However, the tax sector still faces a lot of problems. These problems include the problem of tax evasion, poor

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[4] Federal Inland Revenue Service (Establishment) Act 2007 No. 13.

[5] It was established for every state by virtue of Section 85(1) of the States (Creation and Transitional Provisions) Decree No. 14, 1967, e.g. Lagos State Internal Revenue Service Law.

[6] It was established by Decree No. 104, 1993.

understanding of income assessment by tax payers and the rather unsatisfying number of tax payers in the country. A news report in 2017 showed that only 3% of Lagosians pay tax.[7] This is rather unsatisfying considering that Lagos alone has a population of over 22 million. These problems make us wonder what the true hindrance to the development of the Nigerian tax system is. Could it be bad laws or bad administration of these laws?

2.0 PRESENT SYSTEM OF TAXATION IN NIGERIA

There are several laws regulating taxes in Nigeria at the Federal, State and Local Government level. These tax laws in force in Nigeria can be classified based on their imposition of taxes on three broad bases. They are:

a. On Income (of both individuals and corporate entities)[8]
b. On Property[9]
c. On Consumption[10]

As previously mentioned, the two major issues with the Nigerian Taxation System are the irregularities inherent in the tax legislations and its machinery for implementation. This paper will analyze five (5) major tax laws in Nigeria to highlight the issues relating to some of their provisions. These laws include:

1. Value Added Tax Act;
2. Personal Income Tax Act;
3. Capital Gains Tax Act;
4. Companies Income Tax Act; and
5. Petroleum Profit Tax Act.

2.1 Value Added Tax Act (VAT) 1993.

According to Oseregbo and Associates, Value Added Tax[11] is a consumption tax levied at each stage of the consumption chain and borne by the final consumer of

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[7] "Out of 22m only 600000 Lagos residents pay tax-Ambode" Vanguard News on July 12, 2017.
[8] CITA, PITA, CGTA PPTA
[9] Land Use Charge Law of Lagos State 2018
[10] VAT, Sales Tax Law etc.
[11] Hereinafter "VAT".

the product or service.[12] Each person is required to change and collect VAT at a flat rate of 5% on all invoiced amounts on all goods and services not exempted from paying tax[13]. The VAT Act was introduced on the 24th of August 1993 as a federal tax by the *Value Added Tax Decree.*[14] Since then, the relative success of VAT in Nigeria has surpassed the expectations of all sceptics including the International Monetary Fund (IMF). Statistics showed a great improvement in VAT returns on a yearly basis. For instance, ₦8 billion was realized from the tax in 1994, ₦21 billion in 1995, ₦32 billion in 1996, ₦34 billion in 1997, ₦37 billion in 1998, while ₦12.59 billion had been collected in the first quarter of 2000.[15] The VAT emerged as a significant source of income for all the levels of government.[16]

The provisions of the act are quite standard save for a few provisions which create problems for the tax payers and give loopholes to certain taxpayers to evade tax. *The First Schedule to the VAT Act* lists goods and services which are exempted from VAT, amongst which is basic food. However, the scope of what is meant by "basic food" is not clear, as the meaning of basic food varies among persons and countries. However, the present practice by the Federal Inland Revenue Service (FIRS) is to limit the meaning of basic food to uncooked and unprocessed food items, while processed food items like spaghetti, milk and cornflakes, are taxable. It has been submitted that, in the absence of a clear definition of what amounts to "basic food", the current practice which imposes tax on processed and manufactured food should be challenged.[17]

Section 8 provides for the time limit a taxable person is supposed to register. Failure of which warrants a penalty of ₦10,000 for the first month in which the failure occurs, and ₦5000 for each subsequent month in which the failure continues. *Section 9* simply requires a taxable person to register for VAT collection which presupposes a single registration. However, in practice, the FIRS have directed that,

[12] Project "Comparative analysis of Value Added Tax revenue among different sectors in Nigeria" available at http://project.com.ng/accounting/final-year-project-topics (accessed 11 August 2018)
[13] First Schedule to the Value Added Tax Act 1993.
[14] No. 102 of 1993.
[15] The budget speech and breakdown by the Minister of Finance.
[16] Abiola Sanni "Current law and practice of Value Added Tax in Nigeria" (2012).
[17] Ibid.

where a taxable person has more than one branch of business, each branch should be registered separately at the nearest tax office. The implication is that, such a business entity is obliged to have multiple registration and maintain independent records of its VAT transactions at each branch. This directive has been severely criticized as imposing avoidable hardship on affected taxable persons.[18]

Section 10 mandates a non-resident company carrying on business in Nigeria to register for VAT by using the address of the person with whom it has a subsisting contract. This provision however, poses certain administrative challenges in practice. For instance, where a foreign company has business dealings with more than one person, each located in different parts of the country, it will be required to register with the tax office at the different locations where its customers are located, which may be administratively discouraging.[19]

2.2. Personal Income Tax Act (PITA) 1993 and Personal Income Tax (Amendment) Act 2011

The Personal Income Tax Act[20] is an act to impose income tax on individuals, communities and families and on executors and trustees; and to provide for the assessment and collection and administration of the tax.[21] In Nigeria, PIT for salaried employees is based on "pay as you earn" (PAYE) system[22]. Basically, the mode of assessment under the PITA 2004 is self-assessment.[23]However, government assessment only comes in when there is failure or lateness in filing a return or where the information filed by the taxpayer in his return is adjudged by the tax authority to be incorrect or fraudulent.[24] The PITA 1993 makes salient provisions for the assessment and collection of the tax.

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[18] R.O. Ojukola "Value Added Tax in Nigeria: A critical appraisal of its legal and administrative framework" (Unpublished).
[19] Abiola Sanni "Current law and practice of Value Added Tax in Nigeria" (2012).
[20] 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, [hereinafter "PITA"].
[21] Personal Income Tax Act 1993.
[22] Section 81 of PITA.
[23] Sections 41 (1) – (3) and 44 PITA.
[24] Sections 54 (1) & (2) (b) & (3).

Section 10(1) has also been significantly amended. The effect of the amendment follows that, the argument that a person must be in Nigeria for a consecutive period of 183 days to be caught up by this section and be taxable in Nigeria is no longer valid. The section has become more stringent such that it includes the *annual leave or temporary leave of absence.* A major shortcoming of this section is that it may result in double taxation. This is especially so considering that all the conditions are conjunctive and inseparable. Thus, regardless of the fact that the person may be in the country where there is "*avoidance of double taxation treaty*", such a person will still be taxable if he falls short of any of the stipulated conditions.[25]

The Amendment Act has changed the method of computation of taxes after the removal of all allowances and permissible deductions as:

Income to be taxed rate of tax per centum:

First ₦300,000 at 7%

Next ₦300,000 at 11%

Next ₦500,000 at 15%

Next ₦500,000 at 19%

Next ₦1,600,000 at 21%

Above ₦3,200,000 at 24%

The impact of the change in this section is that, lower income earners will pay less tax, and the burden of tax will be carried more by the higher income earners. It is noticeable that, in the 1993 Act, high and low income earners paid closely related percentages in taxes regardless of the disparity in the income earned. The amendment act on the other hand, takes into cognizance this disparity which reflects in the difference in percentage of taxes paid by each class.

2.3 Capital Gains Tax Act

Capital Gains Tax is a tax charged on owner of any disposable asset on the profit derived from selling the asset, over and above the original costs of his purchasing the asset, maintaining the asset, costs of disposal, etc. Simply put, Capital Gains Tax is a tax payable on the profit on the disposal of assets. The law does not

[25] Newsletter "Highlights of the major changes introduced by the Personal Income Tax (Amendment) Act 2011" available at http://www.detailsolicitors.com.

recognise or include losses in this definition. It covers all profits coming to a taxpayer from the sale or lease or other transfer of rights which are subject to a capital gain tax.[26] The most common capital gains are realized from the sale of stocks, bonds, precious metals and property.

Despite the importance of the Capital Gains Tax, there are always persistent controversial issues surrounding the taxing of capital gains and this not surprising. These issues raise a host of questions ranging from the philosophical to the practical. It involves theoretical economic concepts of income as well as practical economic considerations concerning the distorting effects on marketplace decisions caused by capital gains taxation.[27] Politically, the capital gains debate raises the issue of what income should be taxed, regardless of economic definitions, and in what manner. Political and economic analyses of these questions may differ from philosophic explorations of who should bear the burdens of taxation. Finally, at a purely administrative level, capital gains taxation creates problems for the tax system.[28]

In Nigeria, the Capital Gains Tax Act governs taxation of capital gains.[29]The Act contains comprehensive guidelines on how Capital Gains should be taxed. It also included the terms, conditions, and clauses attached to their taxation. According to

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[26] Capital Gains Tax in Nigeria – Onipede Ibidunni Seun (February, 2012) available at https://www.bartleby.com/essay/Capital-Gains-Tax-in-Nigeria-FKR85Y4KRYYS (accessed 10 July 2018).

[27] The two major areas of economic distortion are the lock-in effect and the preferential treatment of capital gains. Lock-in occurs because only realized gains are taxable. Thus, so long as a taxpayer retains his property the unrealized gain is not taxed. The longer the property has been held, the greater (potentially) the gains realized on disposition. Thus, a tax upon these gains creates a deterrence to changing capital assets. Because investments are frozen or locked-in to avoid taxation, assets may not be used efficiently. The capital gains tax preference mitigates the lock-in effect but creates market distortions and inefficiencies since an artificial preference is created for those assets that produce capital income as opposed to ordinary income. The literature on the economic distortions related to capital gains taxation is voluminous. See, e.g., L. Seltzer, The Nature and Treatment of Capital Gains and Losses 13 (1951); Clark, The Paradox of Capital Gains, in 2 Tax Revision Compendium 1243, 1243-45 (1959); Popkin, The Deep Structure of Capital Gains, 33 CASE W. RES. L. REV. 153, 155 (1983). B. Bittker, Federal Taxation of Income Estates and Gifts 50-54 (1981).; R. Goode, The Individual Income Tax 195-97 (1976); R. Musgrave & P. Musgrave, Public Finance in Theory and Practice 438 (1980); Minarik, Capital Gains, in How Taxes Affect Economic Behavior 241 (H. Aaron & J. Pechman eds. 1981).

[28] The Origins of Capital Gains Taxation: What's Law Got To Do With It, Marjorie E. Kornhauser, pp. 869-870 SMU Law Review Vol. 39 (1985).

[29] Capital Gains Tax Act, CAP C1 LFN 2004.

Section 2 of the Act, the rate of capital gains tax is set at 10% of the profit made from assets disposal yearly.

By virtue of *Section 4 of the Act*, the Act is not limited only to disposal of assets situated inside Nigeria, but also disposal of assets situated outside Nigeria. It underlines the compliance involved in the taxation of capital gains situated outside Nigeria. This section states that a disposal would be taxed where the disposal of assets is by an individual who is temporarily in Nigeria for a purpose, stays in Nigeria for the sum of a period exceeding 182 days in that same year. This provision appears to also apply to non-Nigerian citizens, which this writer submits to be quite unreasonable.

Although the Capital Gains Tax Act is a Federal legislation, in practice, the States Board of Internal Revenue (SBIR) are responsible for collecting capital gains tax from individuals while the Federal Board of Internal Revenue (FBIR) is responsible for the ones from corporate bodies.[30]

2.4. Companies Income Tax Act (CITA) 1990 and Company Income Tax (Amendment) Act (CITAA) 2007

Companies Income Tax[31] is tax on the profits of incorporated entities in Nigeria. It also includes the tax on the profits of non-resident companies carrying on business in Nigeria to the extent that such profits are derived from Nigeria. Limited liability companies as well as public limited liability companies pay the tax. It is therefore commonly referred to as corporate tax. CIT was created by the Companies Income Tax Act (CITA) 1979 and has its root from the Income Tax Management Act of 1961. This law makes provisions for the taxation of companies in Nigeria. It is one of the taxes administered and collected by the FIRS, and it contributes significantly to the revenue profile of the Service.

[30] Thus, administratively, it is valid, by virtue of Item D7, 8 Concurrent List of the 1999 Constitution. However, the enactment as law is invalid.
[31] Hereinafter "CIT".

The taxation of the profit of companies is under the *Company Income Tax (CIT) Act,*[32] and the term "company" for the purpose of CITA is defined under *Section 105* to mean "any company or corporation (other than a corporation sole) established by or under any law in force in Nigeria or elsewhere".[33] The significant nature of CIT to the Nigerian government calls for a need to have in place, a strong and vibrant tax administration of CIT at all levels of government, in order to ensure that the objectives of the tax system are achieved. The provisions of CITA has been amended severally, the latest amendment being *CIT (Amendment) Act (CITAA) 2007*. The highlights of the amendment act include;

1. The entire Part 1(Sections 1-8) of the Principal Act relating to the establishment, powers and proceedings of the FBIR has been repealed by *Section 2(1) of the Amendment Act 2007.* This repeal is consistent with the establishment of the FIRS as the successor of the FBIR.
2. Section 4 of the Amendment Act requires an insurance company that engages the services of an insurance agent, loss adjuster or broker, to include a schedule in its annual returns showing details of name, address, duration of employment and payments made to such agent.
3. Section 5 of the Amendment Act exempts profits of companies operating in Export Processing Zone (EPZ) or Free Trade Zones form tax under the Act provided that 100% of the company's production is for export otherwise proportionate tax is payable on local sales.
4. Fine payable as general penalty has been increased from ₦200 to ₦20,000 while fine payable for failure to furnish statement or keep records has been increased from ₦40 to ₦2000[34].
5. The power to vary or revoke the rate of companies income tax earlier vested in the president by *Section 100* is now vested in the National Assembly, on the proposal[35].

[32] Cap 60, LFN, 1990; Companies Income Tax Act, Cap C21, LFN, 2004 (as amended by the CIT (Amendment) Act, 2007)
[33] Section 105 of CIT Act.
[34] See Section 21(a) (i) and (ii) of CIT (Amendment) Act 2007.
[35] Section 23 CIT (Amendment) Act No. 56 2007.

2.5 Petroleum Profit Tax Act (PPTA)

In Nigeria, the petroleum industry is the bedrock of the economy, accounting for about 90% of her total revenue.[36]No one would doubt that the taxation of severed mineral interests as well as oil and gas production is an important issue as governments hope to capitalize on this burgeoning industry, while maintaining an attractive environment for business expansion. The principal legislation applicable to petroleum operation in Nigeria is the Petroleum Profits Tax Act.

In Nigeria, there are the Upstream and Downstream petroleum operations. While the Upstream refers to petroleum product exploration, mining and drilling, the Downstream refers to the simple sale and distribution of processed oil products by local corporations.[37] Thus, corporations engaged in upstream exploration are subject to the Petroleum Profit Tax Act,[38] while downstream corporations are subject to Companies Income Tax Act[39]. Generally, companies and corporations are taxed principally under the Companies Income Tax Act, while companies engaged in petroleum operations are taxed specially under the PPTA because of the peculiar and complicated nature of the oil industry.

The PPTA is meant to regulate the financial activities of oil companies comprising those in crude oil production, petroleum marketing and the servicing companies such as seismic survey, drilling and data collection. It is the profits generated by companies that engage directly or indirectly in petroleum operations that are subject to tax under the Act, while profits generated by marketing and servicing companies are taxed under the Companies Income Tax Act.

An oil producing company is defined as a company engaged in petroleum operations. By virtue of *Section 2 of the PPTA*, "petroleum operations" is:

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[36] Physics as the Bedrock of Petroleum Exploration and Nigeria's National Development – Onuoha, K. M., University of Nigeria Virtual Library (1996).

[37] "The New Petroleum Industry Bill and Taxation of Petroleum Products in Nigeria" – Olumide Olusegun-Obayemi, available at: https://www.proshareng.com/news/Oil%20Sector/The-New-Petroleum-Industry-Bill-and-Taxation-of-Petroleum-Products-in-Nigeria-/19303. (accessed 10 July 2018)

[38] Cap 354, LFN, 1990; Petroleum Profit Tax Act Cap. P13 LFN, 2004 (as amended by the PPT (Amendment) Act, 2007), [hereinafter "PPTA"].

[39]Cap 60, LFN, 1990; Companies Income Tax Act, Cap C21, LFN, 2004 (as amended by the CIT (Amendment) Act, 2007).

The winning of, obtaining and transportation of petroleum or chargeable oil in Nigeria by or on behalf of a company for its own account by any drilling, extracting or other like operations or process, not including refining at a refinery, in the course of a business carried on by the company engaged in such operations and all operations incidental thereto and any sale or any disposal of chargeable oil by or on behalf of the company.

All profits generated by companies engaged in such operations are chargeable to tax under *Section 8 of the PPTA,* which provides:

There shall be levied upon the profits of each accounting period of any company engaged in petroleum operations during that period a tax charged, assessed and payable in accordance with the provisions of the Act.

Therefore, companies involved in petroleum exploration and production fall into this class because by their various contractual agreements, they win and obtain and engage in petroleum operations on their own account. The other companies who "win or obtain petroleum" entirely under the umbrella of the Nigerian National Petroleum Corporation (NNPC)[40] account fall outside the scope of the provisions of the Act.

The provisions of the PPTA reveal that it covers basically every area of petroleum operations. It is divided into eleven parts: preliminary matters such as short title and interpretation through administration, imposition of tax and ascertainment of chargeable profits;[41] ascertainment of assessable tax[42] and of chargeable tax;[43] persons chargeable;[44] accounts and particulars; assessments; appeals; collection, recovery and repayment of tax;[45] offences and penalties;[46] to miscellaneous

[40] Such companies include inter alia, Shell Petroleum Development Company and Mobil Production Nigeria, Agip Oil, Chevron and Total (Nig.) Plc. Etc.
[41] Sections 1 & 2 of the PPT Act.
[42] Section 21 of the PPT Act.
[43] Section 22 of the PPT Act.
[44] Sections 24-29 of the PPT Act.
[45] Sections 44-50 of the PPT Act.
[46] Sections 51-59 of the PPT Act.

provisions.[47] Four schedules bring up the rear of the PPTA. A cursory look at the above reveals that the Act even covers the operations of companies, which produce liquefied natural gas with its current income tax rate at 85% of chargeable profits during the accounting period of the company. However, companies holding oil concessions and starting oil production on or after 1st April 1977 shall pay 65.75% until their production costs are fully amortized.

In summary, the PPTA provides for the collection of tax imposed on the profits made from petroleum operations. The PPTA is meant to apply to the taxation of the assessed income profits of companies engaged in petroleum operations. It contains provisions relating to the definition of the operations of companies that are subject to the Act. It also defines factors to be considered in calculating tax payable by any affected company with provisions for effecting petroleum profits tax payment. Provisions have also been made by the Act for appeals against the Federal Board of Inland Revenue's (FBIR) assessed levies by dissatisfied companies in addition to the stipulation of offences and penalties for violation of the provisions of the Act by affected persons and companies. And by virtue of *Section 2 of the PPTA*, the FBIR is saddled with the onerous task of collecting taxes from the various companies including those engaged in the oil business.

3.0 ISSUES WITH ADMINISTRATION OF TAX LAWS

First it must be stated that, the mere existence of tax laws is not sufficient; strict enforcement of the regulation is key. This is because, a look at the plethora of tax laws and their provisions will agitated a reasonable man to ask what the issues with taxation in Nigeria are. This is due to the fact that, despite the potentials of taxation as a dynamic tool for sustainable national development, Nigeria tax system has been unable to achieve its objectives. Yes, it can be said that the Tax system in Nigeria has undergone various policy changes geared at a more effective and efficient way of tax collection and administration. Such policies include; the introduction of the taxpayer's identification number (TIN, which became effective since February

[47]Sections 60-63 of the PPT Act.

2008); an automated tax system that enhances the tracking of an individual taxpayer's positions and challenges, launching of an e-payment system which promotes smooth payment procedures and reduces the incidence of tax tout, etc. Despite these changes, and the fact that tax laws are constantly being reviewed with the aim to revoking obsolete provisions and simplifying the main ones, there are still a number of issues that need to be looked into immediately.

The most common issue faced by the Nigerian taxation system is the multiplicity of taxes, which is the most common issue. This means paying similar taxes on the same or substantially similar tax base. Individual taxpayers as well as corporate bodies suffer the triple effects related with the repetition.[48] Examples of multiple taxes include Companies Income Tax, Information Technology Tax, Education Tax, and Nigerian Content Development Levy, all of which are based on income or profits. There also exists the issue of appropriate tax authority to administer several taxes e.g. the crisis between Lagos state and the federal government on the tax jurisdiction of VAT in the state. Multiple taxes should be distinguished from numerous taxes which mean many but different taxes on different tax bases.

Certainly, the mere existence of taxation provisions is not sufficient; strict enforcement of the regulation is key, thus making poor tax administration another problem of tax in Nigeria,[49] which leads to lack of transparency in the management of taxpayers' money.[50] Tax evasion characterizes the major problems of tax administration in a developing countries including Nigeria.[51] According to the FIRS, about 30% of companies in Nigeria are involved in tax evasion and also 25% of registered companies in the country are not paying tax.[52] When this is quantified in terms of potential revenue lost, it is worrisome. The Act, in its provisions, has made a manageable system of tax collection available to the FBIR.. It is however

[48] Odusola, A. (2008). Tax Policy Reforms in Nigeria- Research Paper No 2006/3, United Nations University-World Institute for Development Economics Research.

[49] Hadacolarl (2008).The Importance of Income Tax in South-East Western Nigeria. Journal of Economic and Financial Mirror, 7 (10), 11-13.

[50] Kiabel B. D. & Nwikpasi M. N. (2010).Selected Aspects of Nigeria Taxes. Springfield Publishers, Owerri.

[51] Modugu, K. P. & Omoye A. S. (2014). An Appraisal of Personal Income Tax Evasion in Nigeria. Asian Economic and Financial Review, 4(10), 33-40.

[52] "FIRS: 30% of firms in Nigeria evading tax" Daily trust newspaper September 3, 2014.

regrettable that the typical Nigerian taxpayer, in an attempt to continue operating in business, would rather circumvent tax laws in any feasible way. The taxpayer often opts to negotiate with corrupt staff in return for some gratification and pay a minimum sum to the coffers of the government.[53] This is despite the sanctions imposed by the same act for such conduct. The problem here seems not to be lack of adequate provisions deterring such conduct, but rather the lack of enforcement of the provisions of the act.[54]

In addition, Ministries, Departments, and Agencies (MDAs) suffer from limitations in manpower, money, tools, and machineries to meet the ever increasing needs of individual taxpayers. As a matter of fact, the negative attitude of most tax collectors can be linked to poor remuneration and motivation. Also, the staff are not provided with regular training to keep them ahead of developments in tax related matters. This makes the administration of taxes in terms of coverage and assessment very weak.

Thirdly, there is that of separate source of income. *Section 25(1) of Companies Income Tax Act (CITA)*states that the profits of any company for each year of assessment from such sources of profits shall be the profits of the year immediately preceding the year of assessment from each such source.[55]*Section 27(2) of the Act* goes further to restrict the losses that may be relieved in any year to the assessable profits from the trade or business in which the loss was incurred.[56] The combined effect of these sections could be interpreted to mean ring fencing of different sources of income to the effect that losses from one line of business cannot be used to offset profits from other lines of business by the same company. This practice is not equitable and it seems to punish genuine businesses for incurring real losses.

Furthermore, the non-availability of a database is a major challenge of Taxation in Nigeria. Unavailability of database of all individuals that are taxable, the tool use for assessing and collecting of taxes are inadequate and the absence of firm methods

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[53] Victoria E.K. 'Nigeria's Petroleum Profit Tax act: An assessment' available at http://www.nigerianlawguru.com (assessed 31 January 2015)

[54]Dr. Maryam Ishaku Gwangdi "Administration of Companies Income Tax in Nigeria: Issues of Compliance and Enforcement" European Journal of Business and Management Vol. 7, No. 8, 2015.

[55]Section 25(1) of the CIT Act.

[56]Section 27(2) ibid.

in place[57] are issues that should be addressed for an effective tax system. This suggests that the Nigerian Tax System is inefficient and ineffective in its entirety.

Tax Touting is another common problem with Taxation in Nigeria. Tax Touting in the local governments is a common practice especially at the level where individuals that are unprofessional and not trained are engaged and used in enforcing and collecting taxes and levies.[58] In Obio/Akpor and Port Harcourt City Local Governments in Nigeria, it is a common practice, where touts are involved and used in collecting various taxes and levies.

Failure of refunding of taxes is another concern. Although there are specific provisions in the tax laws especially under the FIRS Establishment Act, 2007 for tax refunds this is yet to be fully functional. There should be appropriate funds allocated or retained out of tax collection to cater for tax refunds both at the federal and state levels.[59] The FIRS Act requires the tax authorities to pay a tax payer's refund claim within 90 days of the application subject to appropriate audit. These audits are usually slow and time consuming sometimes running into several years. Fairness and equity requires that cash refunds be made promptly to deserving tax payers. Failure to pay refund within the stipulated timeframe should attract commercial interest.

In addition, there is the Tax Clearance Certificate. Taxpayers are required to obtain a Tax Clearance Certificate (TCC) annually which is often needed to conduct many business transactions. Tax officials often use this as a tool to harass taxpayers by bringing up issues outside the period covered or contrary to the provisions of the law regarding TCC. For instance, the CITA requires that TCC must be issued within 2 weeks of application otherwise the tax authority must explain. TCC should be issued automatically within 2 weeks of every new calendar year provided a taxpayer has no outstanding undisputed tax liability on the last day of the previous year of assessment.

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[57] Olabisi, J. (2010). An Assessment of Tax Evasion and Tax Avoidance in Lagos State.Journal of Research in National Development. Vol 8, No. 1.

[58] Price Waterhouse Coopers (2010). Nigeria @ 50: Top 50 Tax Issues. Available at: https://www.pwc.com/ng/en/pdf/nigeria-top-50-tax-issues.pdf (accessed 10 July 2018).

[59] Section 23 of the FIRS Establishment Act 2007.

Paying particular attention to CITA, strict enforcement of its provisions is key. According to the FIRS, about 30% of companies in Nigeria are involved in tax evasion, while 25% of registered companies in the country are not paying tax[60]Also the failure of the FBIR to indict and prosecute companies for the offences stated under the Act has further exacerbated the problem[61]. In fact, Professor Abiola Sanni argued that no tax payer has been successfully prosecuted for tax evasion in Nigeria.[62] This is largely because tax authorities at the federal and state levels prefer to institute civil actions to recover any tax due with interest and penalty ostensibly with the aim of meeting their revenue target.[63]

An important issue with Nigerian taxation is the lengthy period used in resolving tax disputes. Tax disputes in Nigeria are primarily resolved by the Federal High Court (FHC), states' High Courts and the Tax Appeal Tribunal (TAT). Appeals from the TAT lie to the FHC, appeals from the FHC and states' High Courts lie to the Court of Appeal, while appeals from the Court of Appeal lie to the Supreme Court. Tax disputes have been held by the Nigerian courts to be outside the purview of arbitration and other alternative dispute resolution mechanisms. The Court of Appeal in the case of ***SNEPCO & 3 Ors* v. *FIRS***, recently upheld the decision of the FHC that disputes over company taxation are exclusive to the FHC and, thus, not arbitral as they pertain to the revenue accruing to the sovereign government. Experience has shown that only on very few occasions do aggrieved taxpayers refer the outcomes of tax audits in Nigeria to the appropriate judicial forum for resolution. This reluctance is generally attributable to the slow pace of resolution and high cost of adjudication associated with the Nigerian judicial system, which has made it unattractive.

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[60] "FIRS: 30 of the firms in Nigeria evading tax" Daily trust newspaper pf 03/09/2014
[61] Ibid.
[62]Abiola Sanni, 'The Power To Prosecute Tax Offences: A Critique of Unipetrol Nigeria Plc V. Edo State Board of Internal Revenue' (2011) Vol. 1 NIALS Journal on Criminal Law and Justice, p.201.
[63]Ibid.

3.1 INTERNATIONAL STANDARD OF TAXATION

Taxation is the most important source of revenue for modern governments, typically accounting of about 70-90% or more of their income while the remainder of government revenue comes from borrowing both domestic and external. Systems of taxation vary among governments, making generalizations difficult. Specifics are intended as examples, and relate to particular governments and not broadly recognized multinational rules. Jurisdictions often impose different income based levies on enterprises than on individuals. Entities are often taxed in a unified manner on all types of income while individuals are taxed in differing manners depending on the nature or source of the income. In most developed countries, individuals pay income taxes when they earn money, consumption taxes when they spend it, property taxes when they own a home or land, and in some, estate taxes when they die. Income taxes pay a critical role in the revenue system of all developed countries. In the U.S., PIT is the single largest source of revenue for the government, accounting for nearly 50% of all federal revenue in 2006. Many jurisdictions impose tax at both an entity level and at the owner level, on one or more types of enterprises.[64] These jurisdictions often rely on the company law of that jurisdiction or other jurisdiction in determining whether an entity's owners are to be taxed directly on the entity income. However, there are notable exceptions, including U.S. rules characterizing entities independently of legal form.[65]

Countries that tax income generally use one of two systems: territorial or residence-based. In the territorial system, only local income (income from a source inside the country) is taxed. In the residence based system, residents of the country are taxed on their worldwide (local and foreign) income, while non-residents are taxed only on their local income. A very small number of countries, notably the United States, also tax their non-resident citizens on worldwide income. Countries with a resident based system of taxation usually allow deductions or credits for the tax that residents already pay to other countries on their foreign home. Many countries also

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[64] For example, the U.S. taxes corporations on their income and their shareholders on dividends distributed from the corporation. See U.S. IRC Sections 1, 11 and 61.
[65] U.S. Internal Revenue Service (U.S. IRS).

sign tax treaties with each other to eliminate or reduce double taxation. In the case of company (corporate) income tax, some countries allow an exclusion or deferment of specific items of foreign income from the base of taxation. Countries do not necessarily use the same system of taxation for individuals and corporations. For example, France uses a residence-based system for individuals but a territorial system for corporations[66] while Singapore does the exact opposite, and Brunei and Monaco taxes corporate but not personal income.[67]

Many systems provide for specific exclusions from taxable income. For example, several countries, notably Cyprus, Luxembourg, Netherlands and Spain, have enacted holding company regimes that exclude from income dividends from certain foreign subsidiaries of corporations.[68]These systems generally impose tax on other sorts of income, such as interest or royalties, from the same subsidiaries. They also typically have requirements for portion and time of ownership, in order to qualify for exclusion. Some countries, such as the United States and Singapore,[69] allow deferment of tax on foreign income of resident corporations until it is remitted to the country.

Tax treaties also exist between many countries on a bilateral basis to prevent double taxation.[70] In some countries, they are also known as double taxation agreements, double tax treaties or tax information exchange agreements (TIEA). Most developed countries have a large number of tax treaties, while developing countries are less well represented in the worldwide tax treaty network.[71] The United Kingdom has treaties with more than 130 countries and territories, making it one of the world's largest networks. The United States has treaties with 67 countries. Tax

[66] International tax – France Highlights 2012, Deloitte, available at https://dits.deloitte.com/#TaxGuides (accessed 10 July 2018).

[67] International tax – Brunei Darussalam highlights 2012, Deloitte, available at https://dits.deloitte.com/#TaxGuides (accessed 10 July 2018). Monaco might not charge residents income tax, but it's no tax haven

[68] Nexia International "European Holding Company Analysis" (2017), available at http://advicero.eu/wp-content/uploads/2017/09/EuropeanHoldingCompanyAnalysis-2017Extended-FINAL.pdf (accessed 10 July 2018).

[69] "What is taxable income?" – Inland Revenue Authority of Singapore.

[70] Taxes levied twice on the same income, profit, capital gain, inheritance or other item).

[71] Christians Allison, "Tax treaties for investment and aid to sub-Saharan Africa: A case study," North-Western Public Law Research Paper No. 5-10.

treaties tend not to exist, or to be of limited application, when either party regards the other as a tax haven. There are a number of model tax treaties published by various national and international bodies, such as the United Nations and the Organisation for Economic Co-operation and Development (OECD).[72] Tax treaties tend to provide reduced rates of taxation on dividends, interest and royalties, and also tend to impose limits on each treaty country in taxing business profits, permitting taxation only in the presence of a permanent establishment in the country.[73]

4.0 RECOMMENDATIONS –THE WAY FORWARD

Although the Nigerian tax system is plagued with different issues and challenges, there is still a way out. First, and seemingly most important, there should be disclosure and sharing of information. There is a need for mutual co-operation among different government agencies. This collaboration should enhance exchange of information, and reduce the incidence of tax evasion as well as fraudulent tax practices. Also, independence of tax authorities (Boards of Internal Revenue) should be made certain of. The tax authorities in the local, state and federal governments should be given an independent status. This will allow the tax authorities take responsibility of their actions and how they go about the business of tax administration.

Secondly, high transparency and accountability of public institutions is key. Lack of transparency and accountability in the use of public funds contributes to public distrust both with respect to the tax system as well as the government. This, in turn, increases the willingness to evade taxes. If due to high levels of corruption, citizens cannot be certain whether their paid taxes are used to finance public goods and services their willingness to pay suffers and it becomes more likely that they evade their tax liabilities. A taxpayer might consider evading taxes if the cost of bribing a tax auditor is lower than the potential benefit from tax evasion.

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[72] Model Tax Convention on Income and on Capital 2014" OECD. October 30, 2015.

[73] Permanent establishment is defined under most treaties using language identical to the OECD model. Generally, a permanent establishment is any fixed place of business, including an office, warehouse, etc.

Beneficial/Welfare Schemes should be taken into consideration also. To elicit voluntary compliance, the government should be more responsive to the welfare needs of the citizens. The Nigerian tax system can effectively generate more revenue when the citizens have trust and confidence in the authority. Lagos state in recent times, is generating huge revenue due to the fact that many corporate bodies and individuals feel that they can visibly feel the development impact of their contributions. In addition, there can be dedicated lines or emails, where issues, observations and queries can conveniently reach the authority; this will contribute to the reduction of tax fraud and avoidance.

Furthermore, in Nigeria, most of the citizens are religious and faithful people. Thus, with religious provisions that explicitly support fulfilling religious obligations, tax payment could be enhanced. Therefore, tax education can be encouraged to be part of religious education among the adherents. Evoking religious injunctions could elicit more voluntary compliance and reduce tax evasion and avoidance. For instance, the Biblical saying of *"Give unto Caesar, what is for Caesar and to God what is for God"* is apt and relevant to the Christians while the Qur'an calls on the Muslims thus: *"O you who believe, fulfil all obligations"* (Q5:V1).

Likewise, a streamlining collection mechanism should be engaged and an abolition of multiplicity of taxes. The three tiers of government should advance a solid base for taxpayers; restructure the means and methods used for collection and end multiplicity of taxes, which has been a reprieve to the industrial sector and the economy as a whole. A situation where an individual pays rates and licenses to local government, pays sales tax and personal income to the state government and at the same time pays VAT is not one that will encourage voluntary compliance. In addition, numerous taxes should be reduced and the approved taxes and levies should be streamlined and strictly followed by the three tiers of the government.

There is the vital need for the introduction of Tax Technology. Filling and payment online should be introduced in Nigeria as this will reduce the time of compliance and cost associated to it and should also accept tax technology in support of electronic remittances and filling of returns which will ease the burden on taxpayers, ease human contact existing between the taxpayers and the tax officials. This can assist in checking sharp practices and make doing business easier. There should be a constant update of Tax record/database. There is the urgent need for public enlightenment. The media should be effectively used to communicate the existing and new tax laws, the need for compliance and the penalty for defaulters. This is because most tax payers are not informed or are ill-informed.

Furthermore, we need to simplify the Tax Laws. One of the essential principles of any tax system adjudged good is that it must be simple, certain and clear. The tax laws should be phrased to ensure that taxpayers and tax officials understand it clearly. In addition to this, regular amendment to the tax laws is encouraged. The tax laws should be regularly up-dated and provision should be such that are reasonable and easy to comply with.

Since failure to refund taxes is a major problem, ensuring the refund of taxes overpaid is should be done. Tax authorities of the three tiers of the government should embark on refunding genuine overpayment of taxes. The government as a matter of urgency should make funds available for refund, as this will boost the confidence of tax payers on the government.

It is important to address the issue of corruption among tax officials. Taxpayers will prefer to pay a token as tax to the government and give kick back to tax officials. The low salary of tax officials has made many of them compromises with tax offenders hence the need to address the issue of corruption and corrupt practices among tax officials. The corrupt officials should be prosecuted without allowing any top government official to influence the outcome of the prosecution. The government on her own should pay them adequately or contract out tax administration for effectiveness.

In relation to the slow pace of resolving tax disputes, it is imperative to consider the adoption of other modes of dispute resolution in the resolution of tax disputes. The extant National Tax Policy[74] encourages the use of Alternative Dispute

[74] Adopted by the Federal Executive Council on 1 February, 2017, see Tim Sanders (Ed.) The Inward Investment and International Review (2017) The Law Reviews p. 308.

Resolution ("ADR") Mechanisms[75], especially arbitration in the resolution of tax disputes.[76] The use of ADR has proven to be an efficient and effective means of resolving disputes because of its advantages. Some of the advantages in contradistinction to litigation are that: it encourages the use of experts; the parties are allowed to choose a person vast in their area of dispute to help them resolve the dispute e.g. a tax expert for tax matters; unlike the court where the judge, who is a lawyer, adjudicates on all type of cases; it allows some flexibility in terms of procedure; parties are allowed to choose venue and even the people to resolve the dispute; and it is faster in most cases. However, in practice, tax authorities frustrate the use of arbitration in tax disputes. In several cases, the courts have held that, arbitral tribunals has no jurisdiction to determine any dispute with tax implication as same is exclusively vested in the Federal High Court.[77] These decisions clearly foreclose the use of arbitration in the resolution of tax matters, unless the Supreme Court holds otherwise. With the greatest respect, the Court of Appeal appears to be inconsistent on the interpretation of the implications of the exclusive jurisdiction of the Federal High Courts under section 251 of the CFRN 1999. This is more as the Court of Appeal had recently in ***CNOOC Exploration & Production Ltd & Anor v Nigerian National Petroleum Company & Anor.***, held that the exclusive jurisdiction of the Federal High Court does not preclude the existence of Tax Appeal Tribunal and that all tax matters must commence at TAT. It follows by necessary inference that the exclusive jurisdiction of the Federal High Court should not be a bar on the use of arbitration in the resolution of tax disputes. It is hoped that at the earliest opportunity the Court of Appeal will revisit their position on the non arbitrability of tax dispute. This is more so as, it will be better to interpret the exclusive jurisdiction of the Federal High Court section 251 of CFRN 1999 in

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[75] Paragraph 4.5.

[76] Newman U. Richards "An Examination of Tax Dispute Resolution Mechanisms in Nigeria: A Case For The Adoption Of Alternative Dispute Resolution Methods" UNIPORT Law Review, Vol. 1 (2017).

[77] See Federal Inland Revenue Service v Nigerian National Petroleum Corporation & 4 ors. (2012) 6 TLRN, 1; per Court of Appeal, Abuja Division in Esso Petroleum and Production Nigeria Limited & SNEPCO v NNPC (Unreported) Appeal No. CA/A/208/2012 delivered on 22 July, 2012.); Shell (Nig) Exploration and Production Ltd. &3 ors.v Federal Inland Revenue Service (Unreported) Appeal No. CA/A/208/2012 delivered on 31 August, 2012.

relation to other courts created by the constitution and not to extend it to arbitral tribunals that run on a separate track[78]. It is therefore suggested that the tax dispute resolution mechanism in Nigerian can be strengthened by exploiting the use of Alternative Dispute Resolution Mechanism, especially Arbitration. Most disputes arising from taxation are based on assessment and computation of taxable income. Thus, if an expert sits on an ADR panel, he may be able to resolve the dispute on assessment and computation faster than a Judge. It is further suggested that the law and rules regulating the Tax Appeal Tribunal should be amended to allow parties elect to subject their dispute to any of the Alternative Dispute Resolution Mechanisms. In that case the parties shall be bound by the outcome of the Alternative Dispute Resolution process and can only appeal to the Federal High Court. Furthermore, the Federal High Court should be vested with powers to enforce the awards on tax matters from Alternative Dispute Resolution processes. In addition, it reduces the workload of the courts.

5.0 CONCLUSION

Taxation is key in every progressive state, as it affects both governmental policy implementation and investment decisions. However, the question is not, and has never been, whether tax would be paid, rather it is the uncertainty of what, when, how and how much. This study reviewed the Nigerian Tax System with the aim of ascertaining the issues and challenges inherent in the Nigerian Tax System and proffer solution in form of recommendations on the way forward. However, although Nigeria has made some improvements to the tax system in the recent past, there is still a long way to go and the status quo is not an option. As the findings show, the Nigerian taxation system is still faced with numerous problems and challenges. Based on the findings, recommendations such as, streamlining collection mechanism, ensuring good, effective and efficient tax administration, simplifying and abolishing some of the tax laws, independence of tax authorities (boards of internal revenue), addressing the issue of corruption among tax officials,

[78] See Olaniwun Ajayi,' Tax Dispute in The Oil and Gas Sector: Are they Subject to Arbitration, op cit, 3.

establishing special courts to handle tax issues, and stiffer penalty for tax evasion and other tax offences were made to counter the challenges and improve the Nigerian tax system. If taxes are to be collected effectively and fairly, both in monetary and equitable terms, for the benefit of all Nigerians, our desired development will appear achievable; especially with good leaders. For there to be effective enforcement and compliance of tax laws in Nigeria, there is the need for a virile tax culture to be instituted in Nigeria and to enforce the laws governing taxation to the letter. In developed countries, governments are run by tax payers' money, which confers on the citizenry the legitimacy and stake in public governance. Nigeria cannot and should not be an exception in this regard. This can only be done when corporate citizens pay their taxes and live up to their corporate responsibilities.

THE IMPLEMENTATION OF VOLUNTARY ASSETS AND INCOME DECLARATION SCHEME (VAIDS) IN NIGERIA: A CRITICAL EXAMINATION OF THE CHALLENGES AND PROSPECT

Bowen University, Iwo

ABSTRACT

In 2016, total tax revenue collected by all levels of government in Nigeria was about N6 trillion compared to about N27 trillion in South Africa – more than Nigeria's oil and tax revenue combined. Altogether with oil revenue, Nigeria generates about N10 trillion (circa $33 Billion). Even without corruption, this amount is barely enough to fund transportation alone (roads, rail, water and air, travel infrastructure and maintenance). So, more than anything else, the problem is that not many of us pay the right amount of tax as required by law. The tax net is small and the tax base is even smaller and seems to be shrinking year in year out.

1.0 INTRODUCTION

This write-up aims at discussing extensively the Voluntary Assets and Income Declaration Scheme which was approved by the then Acting President, Yemi Osinbajo. The Scheme was aimed at providing tax defaulters an opportunity to pay all unsettled tax liabilities, voluntarily declare their assets and income among other aims. But over a year since the approval of this scheme, has it recorded the amount of success it was foretold to record? What are the pitfalls, if any, that the scheme has suffered? What is the way forward?

In February 2017, the Nigerian Federal Executive Council (FEC) approved the National Tax Policy which amongst others prescribed some recommendations regarding taxation in Nigeria. The then Acting President of Nigeria, Prof Yemi Osinbajo issued an executive order on 30th June, 2017 by the virtue of the constitutional powers vested in him ordering the Federal Ministry of Finance to set up the Voluntary Assets and Income Declaration Scheme (VAIDS). The scheme is applicable to all persons (individuals, companies, executors, trustees, partnerships, etc.) that are liable to tax in Nigeria. Taxes covered include Companies Income Tax, Personal Income Tax, Capital Gains Tax, Value Added Tax, Stamp duties, Tertiary Education Tax and NITDA levy.

2.0 PURPOSE OF THE SCHEME

It is basically targeted at persons/entities who have been defaulting in the payment of their taxes, and seeks to bring them within the confines of the tax regulation. The scheme provides a timeframe of nine (9) months from (July 2017 – March 2018) for persons who have defaulted in paying their taxes, to declare their assets and income derived from sources both within and outside Nigeria for the preceding six (6) years of assessment. However, for the declaration of assets and income to be valid, it has to be voluntary, complete and verifiable. In addition, the scheme is open to persons and entities who have failed to make full disclosure of their income to the tax authorities. It is also applicable to persons and entities who have been under remitting their taxes.

The scheme covers all taxes administered by the Federal Inland Revenue Service as well as all state tax authorities. The assessments of the tax payable on the income and assets declared would be made by the authorities themselves rather than the usual self-assessment system as provided under the Personal Income Tax Act 2004 and Companies Income Tax Act 1990 as amended.

3.0 BENEFITS OF THE SCHEME

Taxpayers who make full and honest declarations will enjoy waiver of interest and penalty, immunity from prosecution, confidentiality of information supplied, exemption from tax audits for the periods covered by the disclosure and flexible payment of tax due.

Non declaration: Taxpayers who fail to participate in the Scheme will be investigated and if found culpable will be subject to criminal prosecution. A “name and shame” list of tax evaders will be published. Government will rely on tax intelligence gathering, whistle-blowing and various international conventions and multi-lateral agreements to obtain information required for prosecution of defaulting taxpayers or those who make false declarations. An international forensic and asset tracing company has been engaged to support the process.

Objective of VAIDS

The main objective of VAIDS is to increase the number of taxpayers in the tax net and raise revenue for government. Specifically, it is expected to increase Nigeria's tax to GDP ratio from the current 6% to between 10% and 15%, broaden the national tax base, curb tax evasion and discourage illicit financial flows.

Asides this immediate benefit that the scheme is expected to give, high tax compliance rate and improvement in generation of tax revenue will provide for:

- Better quality of life: even if you can afford to provide for yourself and your household, it is far more affordable if provided centrally using tax money. A functional national power grid providing electricity is better than several generators within an estate.
- Robust national planning: invariably, a lot of useful data is provided through tax compliance which can be used for sound economic policies and national planning.
- Sovereign credit rating: if the country's revenue base is diversified, and more reliant on tax rather than oil, lenders will see Nigeria as a credit worthy and hence our sovereign credit rating will improve leading to lower borrowing rate and cost.
- Inflation control: government will have less need to borrow as a means of controlling inflation. Tax will take care of this. It's like issuing zero coupon, non-repayable government instruments. Monetary Policy Rate can then be reduced to drive down interest rate and real sector players will be able to access funds.
- Savings and investments: lower interest rate will lead to more likely positive real returns on savings once inflation is lower than interest rate. This will also make the capital market more buoyant.

4.0 THE REVENUE PROBLEMS

Nigeria is generally regarded as an 'oil rich' nation and everything seems to centre on or around it including the national budgets. This illusion of wealth means we are fixated on how to share our small national cake rather than focus on how to bake a bigger one. If the tax system had been working well, oil revenue should be miscellaneous income not the main revenue. The United States of America for instance, produces over 2Mbpd compared to just over 2Mbpd by Nigeria yet the US is not referred to as an 'oil-rich' country; the reason for this is that the economy of the US is run by tax revenue and not oil.

In 2016, total tax revenue collected by all levels of government in Nigeria was about N6 trillion compared to about N27 trillion in South Africa – more than Nigeria's oil and tax revenue combined. Altogether with oil revenue, Nigeria generates about N10 trillion (circa $33 Billion). Even without corruption, this amount is barely enough to fund transportation alone (roads, rail, water and air, travel infrastructure and maintenance). So, more than anything else, the problem is that not many of us pay the right amount of tax as required by law. The tax net is small and the tax base is even smaller and seems to be shrinking year in year out.

4.1 THE TAX COMPLIANCE CHALLENGE

TABLE – Comparison of tax data	**Nigeria**	**South Africa**
Population (2016)	182.2M (NPC)	55.6M (Stats SA)
Labour Force (2016)	79.9M (NBS)	21.8M (Stats SA)
Unemployment Rate (2016)	13.9% (NBS)	26.6% (Stats SA)
Registered individual taxpayers	14M (JTB)	19M (SARS)
Top taxpayers paying N10m or more	943 (FGN/JTB)	950,000 (SARS, Derived)
Total tax revenue (all levels)	N6T (NBS, Derived)	R1.O7T (N27T) (SARS)

Personal income tax revenue (2016)	N802B (NBS)	R390B (9.7T) (SARS)
Tax to GDP ratio (all taxes)	6% (FGN)	26.2% (SARS)
Personal income tax to GDP ratio	0.8% (Derived)	9.5% (SARS)
Ease of paying taxes ranking (2017)	182/190 (World Bank)	51/190 (World Bank)

From the table, only 14 million people are registered with all 36 tax authorities and the FIRS out of almost 80 million workforce. This is even smaller than South Africa with less than one-third of Nigeria's population and higher unemployment rate. Out of the 14 million, 96% are captured through the PAYE tax system while only 4% (or 560,000) file returns through direct assessment as self-employed and high net-worth individuals (HNIs). Within the direct assessment population, only 943 people pay N10m or more in personal income tax (including 214 who paid N20 million or more) compare to about 950,000 in South Africa. To pay N10 million in income tax, one needs to earn about N50 million annual income (or about N100m to pay N20 million tax). Interestingly, all the 943 people are resident in Lagos except 2 in Ogun State. It is not surprising that Lagos state accounts for almost 40% of total IGR collected by all 36 states, more than all other states combined excluding Ogun, Rivers and Delta states. But even Lagos is only just scratching the surface. While the rest of the world would worry about tax avoidance, where people do smart stuff to minimize the tax bills within the law, ours is audacious tax evasion and outright disregard for the law that is so pervasive, it is more difficult to find those who have paid the right amount of tax than evaders. It's like hiding in plain sight or at best behind a single finger. One would expect that it should be quite easy to find tax evaders in the "hide and seek" game but unfortunately the "seekers" are in blindfolds and shackles. The blindfolds being the lack of reliable data or tax intelligence and the shackle is lack of political will to enforce the law especially for the elephants in the room – politicians, HNIs, wealthy religious leaders, etc.

4.2 CHALLENGES OF THE SCHEME

The scheme was made with a target, but a year own after it was made, it has not really experienced that much level of success. An evaluation of the impact of the scheme will show glaringly that the scheme has experienced pitfalls in its attainment of its targeted goals and revenue expectations. Take for instance, a total revenue of $1 Billion which is equivalent to ₦305 Billion was projected to be recovered under the scheme, but what has in reality been recovered is ₦20 Billion. Not even up to 10% of its target.

The reasons for this are however easily ascertainable. To start with, there is a lack of awareness of tax laws by majority of the Nigerian populace. Only very few citizens are aware of their tax obligations and only an even smaller fraction of this minority are aware of the scheme. This would definitely be a cog in the wheel of the successful implementation of this scheme because how do you enforce a scheme on basically tax-illiterate citizens.

In furtherance of this, there is the huge misconception that the scheme is targeted exclusively at High Net-worth Individuals (HNIs) and businesses. This misconception would be the death of this scheme because in most developed countries where tax revenue is the horse on which the economy rides, the importance of small-scale businesses paying their tax regularly is usually underscored. Take a look at the table, where only 14 million people out of the 80 million workforce are registered to be tax compliant. Imagine the number of small scale businesses that would fall within this bracket. Let us do a very quick assessment, if the remaining 66 million of the workforce and paid tax of ₦1000 each, that would be a N66 Billion to add to our tax earnings. Imagine how much the scheme is losing because of the illiteracy of majority of the citizens to their tax responsibilities or may I say, the VAID scheme.

Also, the scheme can only be successfully implemented by government from a position of strength and not that of perceived helplessness. It is of no use having laws that are not enforced, least to say tax offenders. For the scheme to achieve its anticipated outcomes, the government must be seen to be prepared to invoke the tax laws to sanction anyone who attempts to evade or avoid the system. The Federal

Inland Revenue Service (FIRS) and the Lagos State Inland Revenue Service (LSIRS) have employed civil measures to enforce tax payment, criminal prosecution is rare and perhaps non-existent. All other states' revenue bodies must begin to take action, learn from Lagos state, start to exercise the law in relation to tax compliance. The FIRS must also go round states to ensure that they are doing everything within the legal framework to ensure that taxes are paid and are paid regularly.

There is a direct correlation between governance and tax compliance. For countries with highly transparent and accountable governments, the tax compliance rate is usually very high. However, for countries with endemic corruption especially in the public sector, the tax compliance rate is generally low. The tax compliance rate in corruption-ridden public sector is usually low majorly because the citizenry do not feel an obligation to pay tax when they have not seen or felt the positive impact of government in their lives. Also, the news media is overwhelmed with stories of scandals by public office holders who use public funds to finance their ostentatious lifestyles. These stories act as a huge disincentive to taxpayers, majority of whom are involuntarily paying the tax, to consider paying of tax as "emptying their stream into government's ocean of corruption." This unfortunate situation at the highest offices in the nation often leads to questions like "what are they doing with the tax that we have been paying? Or they want us to contribute to the next mansion they are building overseas or to provide the funds for the opening of another off-shore account?"

Another challenge that the scheme has faced, is the unsatisfactory and hugely lackadaisical record keeping culture in Nigeria. There is to a very large extent no records manual or records retention and disposition schedule; the personnel handling the records are not trained in records management, inadequate facilities for the preservation, storage and retrieval of records, no filing manual, inadequate computers to manage the volume of records generated and the attitude of administrators towards records and records management constitute the problems of many public institutions in Nigeria. In addition, financial institutions such as banks which are required to intimate the tax agencies with transactions within a defined time threshold fail or re late to do so. Similarly, there is a lack of information sharing between various government agencies giving rise to a disharmonized state of affairs where useful information on taxpayers and taxable activities are disparately lodged in various servers and databases. This has seriously undermined tax administration and enforcement in the country.

Here are some other statistics for you, so you can have a clearer view on how horrible and mind boggling he tax situation in this country is that brought about the introduction of the VAID scheme. At six (6) percent, Nigeria has one of the lowest tax revenues to GDP ratios. This can be compared with countries like France with 45%, Belgium 44.2%, Finland 44.1%, Norway 38%, Germany 27% and Mozambique with 26%. Another example not far-fetched would be our neighbours, Ghana with a tax to GDP ratio of 16%. Also, as revealed at a Chartered Institute of Taxation Forum, 80% of taxable adults in Nigeria, never pay tax. On the corporate front, on the corporate front 75% of companies are not registered with the FIRS for the mandatory Companies Income Taxand 65% of those registered are not up to date with tax filings. It has also been revealed that 214 individuals remit personal income taxes of 20 million or above annually. These statistics are alarming and quite worrisome and definitely made the need for the scheme expedient.

5.0 THE PROSPECTS

The VAIDs is not all gloom. A fantastic scheme as this that seeks to salvage our economy from the grasp of peril and an eventual collapse that is usually the end of a mono economy as ours definitely has to face obstacles at the beginning but there is definitely a way forward. Let us look at some of the ways the scheme can be successful in a tax defective nation as ours.

First, there should be massive and continuous sensitization campaigns directed at the respective categories of taxpayers, educating them on the extant tax laws and their tax obligations under the said laws. The campaigns would include symposium, publicity in print press including magazines and daily newspapers. Also, advertisements on radio stations and television channels in different languages about the scheme and the position of the law in relation to the scheme and why it is necessary that the number of taxpayers in the country cannot remain the way it is. There should also be a movement where tax administrators go from one business to another not minding the business scale or type to galvanize them to pay tax and in the process also intimate them with the extant laws on taxes. These laws should also be published as pamphlets and given to all categories of business owners across the country; this would make them lose the right to claim ignorance of the law when the situation of refusal to pay tax arises. The tax situation in Nigeria is terrible and if there is no aggressive push to ensure tax compliance, the citizens will continue ignoring and evading tax with or without the consequences of their actions on the state of the nation's economy.

Secondly, there should be a renewed drive in enforcing the provisions of tax laws. The unjustifiable reluctance of tax administrators in applying the criminal provisions of the law on erring taxpayers should be discarded. There are several tax laws that can be used in criminal prosecution of tax avoiders and evaders in Nigeria ranging from section 104 of the Personal Income Tax Act 2011, section 81 of the PIT Act CAP P8 Laws of Federation of Nigeria 2011, section 36(6) PIT Act, Value Added Tax Act 1993, Companies Income Tax Act. So the problem is not that there are no laws, it is about nobody being willing to enforce these laws. In 2015, Lagos State Inland Revenue Service (LSIRS) initiated proceedings against 12 companies who were defaulting in their payment of tax. The proceedings was commenced by virtue of s.104 of the PIT Act 2011 (as amended).

Also, corruption by public office holders should be decisively dealt with. This is a very serious problem. Public office holders have shown an attitude that corruption is no longer a crime in Nigeria. They have consistently displayed favourable disposition towards the embezzlement of public funds without giving a hoot about what the citizens have to say or what they feel about the situation. This has made a lot of potential taxpayers turn away from paying tax because they 'cannot be feeding these office holders fat.' The anti-graft agencies in Nigeria are increasingly becoming toothless bulldogs, need I say a tool in the hand of political leaders to fight political foes and have totally neglected the reason for which they were established. If there is to be any reasonable change in the attitude of Nigerians towards tax payment, the anti-graft agencies must return back to its duty and prosecute every political office holder that has embezzled public funds and return these monies to the coffers of the government. Also, there should be a prudent spending of tax revenues on infrastructural projects, and taxpayers should be provided with information on how their taxes are expended in a bid to enhance accountability and inspire confidence in governance. This period in our democracy has to be the point where the Nigerian populace have the lowest confidence in government. More often than not, astronomical prices have been declared for infrastructural projects that should cost much less; the people are well aware of all these irregularities. Therefore, if there is to be any meaningful change in the tax attitude of Nigerians, this has to stop. The government has to be more accountable to the people in their dealings. Gradually, if this spirit of accountability is carried on by subsequent administrations both at states and national level, the trust in government would increase and the citizens can start remitting their taxes with the assurance that their monies would be used for the purposes for which it was paid and not otherwise.

There should also be an improved system of data sharing and cooperation among various agencies of government. If possible, a centralized database where all records previously held by the various record collecting agencies are domiciled could be established. This would only happen when there is an intentional effort by government to invest in technology. Currently, we are backwards in terms of technology. So, if there is to be a database for record collecting agencies then we must make advancement technologically and the government must also make targeted investment in the technological growth of the tax sector. We could establish something like a local OECD where all the records of every state in relation to taxes would be kept. This would make for easy reference and ascertainment of tax defaulters.

6.0 CONCLUSION

These are sad times in the Nigerian tax domain and revenue generation as a whole. Nigeria has been plagued with bad leaders, bad tax administrators and citizens who are ever willing to evade and avoid tax. If we are to make any headway in economic growth and really put ourselves back as the giants of Africa, all the parties have very important roles to play. The government must play their part and the citizens must also be ready to remit their tax completely. We would all be shooting ourselves in the leg if we do not try. The future of Nigeria's economy is in our hands. The Voluntary Assets and Income Declaration scheme is a bright idea that could be killed prematurely if everyone refuses to play his or her part.

Nigeria's economy is begging to be saved, we could start with a better and improved tax culture and see how far we can go in moving forward

GOOD GOVERNANCE AND TAXATION: HOW ACCOUNTABILITY AND TRANSPARENCY PROMOTE AN EFFECTIVE TAX SYSTEM

By Naphtali Royal-Ukamwa*

ABSTRACT

An effective tax system is not an end in itself but must be consolidated by sustainable investment climate reforms. Notwithstanding the tax reforms by the Federal and Lagos State Governments since 2004 and 1999 respectively, there is still much room for improving taxation at both levels. An effective tax system possesses enhanced abilities to design and execute financial policies, in constructing effective policymaking institutions, and in refining public sector accountability. Taxation and governance are conjointly reinforcing. Governance moulds the contours of tax systems, while the manner by which taxes are raised influences the establishment of effective state institutions and the dynamics of the investment climate and economic growth. Thus, an effective tax system is that which emphasises state legitimacy and institutional efficiency, which in turn increase tax compliance by increasing taxpayer consent and diminishing the costs of tax coercion. In consequence, taxation stimulates good governance. In like manner, without good governance, efficient taxation turns out to be onerous. Also, not only are taxation and corruption interconnected, but that taxation itself is an avenue for ensuring a substantial increase in the degree of accountability and transparency which citizens demand from leaders.

1.0 INTRODUCTION

With the end of an age when governments have habitually relied on various avenues[1] for revenue generation for financing state projects and providing social and infrastructural amenities, together with the rapid advancement of modern state

* Contact:naphtaliukamwa@gmail.com, +2349095808805

[1] Government generate revenue from other sources such as fines, loans, grants, provision of services such PHCN, etc.

institutions and the arising needs of state, government administrators have relied on taxation as an alternative source of revenue generation[2]. In an effort to facilitate and consolidate the efficiency of the tax system –where more often than not citizens are unwilling to pay, evade or avoid tax– municipal governments adopted various tax policies[3], enacted tax legislations[4] and established tax administrative bodies[5]. The underpinning notion hinges on the fact that all citizens are affected directly or indirectly by the operation of tax systems and the efficiency and efficacy of the system and its administration will have consequences far beyond the direct effect of tax collection. Revenue generation, in terms of tax imposition and collection, hinges on efficient administration achievable through trust in government, a product of accountability, transparency and political stability[6]. Without these precursors, an effective, fair and efficient tax system continues to be a perpetual illusion. Thus, the quality of the tax system[7] is *ipso facto* an essential foundation for good governance and nation-building[8].

2.0 GOOD GOVERNANCE AND TAXATION: THE NEXUS

An effective tax system is not an end in itself but must be consolidated by an essential component of sustainable investment climate reform[9]. State legitimacy, taxpayers' willingness to pay (founded on their inherent "tax morale" and the transformation of taxes into public goods and services), and the efficiency of tax

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[2] Tax was judicially defined in the Australian case of Mathews v Chicory Marketing Board (1938) 60 CLR 263 as 'a compulsory exaction of money by a public authority for public purpose or raising money for the purpose of government by means of contributions from individual persons.'

[3] e.g. National Tax Policy 2012

[4] Examples of tax law in Nigeria include Federal Inland Revenue Service (Establishment) Act No. 13 of 2007; Personal Income Tax Act (PITA) CAP 8 LFN, 2004 (as amended); Petroleum Profits Tax Act (PPTA) CAP 13 LFN, 2004 (commencement 1st Jan, 1958); Value Added Tax Act (VATA) CAP D1 LFN, 2004 (commencement 1st Dec, 1993); Education Tax Act CAP E4 LFN, 2004 (commencement 1st Jan, 1993); Capital Gains Tax Act (CGT) CAP C1 LFN, 2004 (commencement 1st April, 1967); Stamp Duties Act CAP S8 LFN, 2004 (commencement 1st April, 1939); National Information Technology Development Agency Act (NITDA); Nigeria LNG (Fiscal Incentives, Guarantees & Assurances) Act, etc.

[5] The tax administrative bodies in Nigeria are Federal Inland Revenue Service, State Internal Revenue Service, and The Local Government Revenue Committee

[6] N. Gga ,Nigeria: Mainstreaming Good Governance into Nigeria Tax Reform''(20 September 2017)in Africa in Fact, A Journal of Good Governance Africa available at http://allafrica.com/stories/201709200932.html. (accessed 16 June 2018)

[7] Policy, law and administration

[8] Supra note 6

[9] Supra note 6

administrative bodies are fundamental to any tax system. Determinations to mobilize revenue and expand the tax net do not only hinge on tax reforms, but also on wider governance-related reforms that can positively impact citizens' attitudes to tax compliance and their opinion of value for tax paid[10]. Notwithstanding the tax reforms by the Nigerian and Lagos State governments since 2004 and 1999 respectively, there is still much room for improving taxation at both levels[11].

Taxation and governance are conjointly reinforcing[12]. Governance moulds the contours of tax systems, while the manner by which taxes are raised influences the establishment of effective state institutions and the dynamics of the investment climate and economic growth[13]. Thus, an effective tax system is that which emphasises state legitimacy and institutional efficiency, which in turn increase tax compliance by increasing taxpayer consent and diminishing the costs of tax coercion.[14] In the main, “tax-reliant governments are forced to bargain with citizens, buying quasi-voluntary tax compliance in return for democratic institutions or policy concessions.”[15] This governance prism facilitates the consideration of the nexus between taxation and principles such as transparency, responsiveness, accountability and political economy. Taxation and good governance are consequently equated to "two sides of a coin". The first side of the coin is the notion that while the imposition of tax can lead to difficulty for democratic accountability, the regime of quality tax governance can correspondingly boost a culture of voluntary compliance and increase income generation[16]. In consequence, taxation stimulates good governance. In like manner, without good governance, efficient taxation turns out to be onerous.

Whereas the second side of the coin is the idea that tax transparency and accountability are not only to be viewed as a concept exclusively required from the

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[10] Id.
[11] Id.
[12] D. Brautigam, Governance and Economy: A Review, (WPS 815, World Bank, December 1991); M. Moore, How Does Taxation Affect The Quality Of Governance?,IDS Working Paper p. 9.
[13] Ibid.
[14] OECD, Tax and Development.Aid Modalities for Strengthening Tax Systems, 2013.
[15] L. Martin, Taxation and Accountability: Experimental Evidence for Taxation’s Effect on Citizen Behaviour, (Yale University: 2013)
[16] Supra note 6

tax administrators –tax transparency is also required of the taxpayers either as individuals or corporations[17]. This notion is informed by the global economic depression that dazed the world in 2008, which was an enormous contributory factor behind the need for greater tax transparency. After this intense recession of the economy throughout the financial crisis of 2008, much of the confidence that was hitherto placed in the economic sector was lost. The loss of confidence propelled tax administrators to start compelling taxpayers to be more transparent[18]. In 2009 there was an enormous growth in the number of Tax Information Exchange Agreements all across the world[19]. This was primarily due to the global economy bearing the extreme consequences of the economic crisis at that time and governments were looking for additional tax revenues. Many countries also joined the Global Forum on Transparency and Exchange of Information for Tax Purposes to combat tax evasion following the financial crisis.

3.0 THE INDICIA OF EFFECTIVE TAX GOVERNANCE

3.0.1 Accountability

One way to promote the effective tax system is for government to be accountable and responsive to citizens by legislative enactments "with the motive to bargain over taxation, state financing and public policy".[20] Mick Moore opined that "the more government income is earned, the more likely are state-society relations to be characterised by accountability, responsiveness and democracy."[21] Nonetheless, the nexus between taxation and governance requires an expanded focus on relevant stakeholders and state institutions within and outside the revenue system[22]. These include National and State legislative chambers, the judiciary, and the position of

[17] Deloitte ''Your tax affairs in the public spotlight: the Australian tax transparency code'' available at https://www2.deloitte.com/content/dam/Deloitte/au/Documents/tax/au-tax-insights-Australian-tax-transparency-code-170616.pdf (accessed 18 June 2018)

[18] HM Revenues & Customs ''Large businesses: publish your tax strategy'' available at https://www.gov.uk/guidance/large-businesses-publish-your-tax-strategy (accessed 12 June 2018)

[19] S. Kuhn ''The Global Trend Towards Transparency in Tax'' available at http://taxinsights.ey.com/archive/archive-articles/the-global-trend-towards- transparency-in-tax.aspx (accessed 14 June 2018)

[20] M. Moore, Supra note 8 at p. 9.

[21] ibid at p.9

[22] W. Prichard, The Politics of Taxation and Implications for Accountability in Ghana 1981 – 2008, (IDS Working Paper 330, July 2009) p. 7.

taxpayers and other significant stakeholders. Healthy and fair national taxation systems foster good governance because generating tax efficiently demands the *consensus ad idem* of the tax-paying population[23]. The process of political negotiation between government forerunners and taxpayers legitimizes taxes and the state power to impose and collect taxes in the eyes of citizens, as well as increases the state's capability to manage taxes, and consolidates the accountability of government to its taxpayers.[24] The relationship between taxation and governance has been condemned by some scholars, who affirmed that all such conclusions are founded on oversimplification and unrealistic generalizations that may as such disregard the realities.[25]

Fiscal sociologists[26] promoted the argument that taxation is central to state-building[27]. The advancement of this theory receives a boost in the cornerstones of taxation[28]–revenue creation, redistribution of income and assets, restraining of socially unfavourable behaviour, for instance by means of tobacco and alcohol taxes, and the province of democratic State building (representation).[29] Ross argues that taxation does not always enhance representation; he ascertains that there is a close connection between taxation and government services in general[30]. He supposes that the rate of taxation is not challenged as long as it is proportionate to government services delivered to citizens.

Additionally, since the beginning of the last two decades, many findings have established the nexus between an effective tax system that promotes accountability

[23] Supra note 8. It is acknowledged that tax is an imposition and the idea is not to say that imposition and collection of tax is subject to the approval of the citizens. The idea here is simply similar to a social contract approach.
[24] Supra note 8
[25] Supra note at p. 9.
[26] Fiscal Sociology is the brainchild of the early 20th Century German and Austrian academics
[27] M. Ross, Does Taxation Lead to Representation? (B.J.Pol.S., Cambridge University Press: 2004) p. 230.
[28] A. Cobham, ''Tax Havens and Illicit Flows'' in Reuter P. (ed.) Draining development? Controlling flows of illicit funds from developing countries (Washington, D.C.: World Bank: 2012), pp. 337-371.
[29] W. Stubbs, The Constitutional History of England, (Vol. II Oxford: Clarendon Press:1896); M.L. Ross, ''Does Taxation Lead to Representation''(2004) B.J.Pol.S., Cambridge University Press, p. 231.
[30] Id.

and transparency, which in turn fosters the influence of taxation on decreasing corruption,[31]providing better public goods[32]or better institutional improvement.[33] Martin demonstrated that not only are taxation and corruption interconnected, but that taxation itself is an avenue for ensuring a substantial increase in the degree of accountability and transparency which citizens demand from leaders. According to him effective taxation system stimulates stiffer tax norms and ‘’pushes citizens into the realm of losses, increasing the expressive benefit that individuals receive from imposing sanctions on a non-accountable leader.”[34]

An effective tax system possesses enhanced abilities to design and execute financial policies, in constructing effective policymaking institutions, and in refining public sector accountability.[35] Mick Moore[36] recapitulated the consequences of taxation on the quality of governance. First, there is the notion that the more states are reliant on tax revenues, the more they are accountable and responsive to citizens.[37]Nevertheless, this may not occur if, in order to generate more revenues, they use coercive channels and thereby damage state-society relations. Therefore, taxation should be consensual (another way of ensuring transparency and accountability).

3.2 TRANSPARENCY

Transparency is a fundamental factor in the approaches that governments have

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31 Brollo Fernanda, TommasoNannicini, Roberto Perotti, and Guido Tabellini "The Political Resource Curse." (2013) American Economic Review, vol.103(5): 1759-96.

32 Lucie Gadenne, Tax Me, But Spend Wisely Public Finance and Government Accountability, (University College London & Institute for Fiscal Studies, November 2012). Timmons, Jeffrey F., ‘’The Fiscal Contract: States, Taxes and Public Services’’(July 2005) World Politics, Vol. 57, pp. 530-567. Available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1250982 (accessed 12 July 2018).

33 D. Berger, Taxes, Institutions and Local Governance: Evidence from a Natural Experiment in Colonial Nigeria, 9 Department of Politics: New York University: 2009). available online at https://files.nyu.edu/db1299/public/Nigeria.pdf (accessed 12 July 2018).

34 L. Martin, Taxation, Loss Aversion, and Accountability: Theory and Experimental Evidence for Taxation’s Effect on Citizen Behavior, (Yale University: September 18, 2014), p. 30.

35 The 1997 Guidance Note Good Governance-The IMF's Role’’ available online a http://www.imf.org/external/pubs/ft/exrp/govern/govindex.htm (accessed 16 June 2018)

36 Supra note 8

37 W. Prichard, The Politics of Taxation and Implications for Accountability in Ghana 1981-2008, (Institute of Development Studies: July 2009)

employed to foster openness and decrease corruption[38]. Taxation influences governance by shifting the expressive benefit citizens obtain from sanctioning corrupt officials, making those who pay taxes more likely to hold leaders accountable.[39] The absence of transparency can make corruption less dangerous and more attractive; instill and propagate control over resources; incentivize opportunism and undermine cooperation; preclude the use of public incentives to make public officials act dependably and in the public interest; create informational advantages to privileged groups; limit the ability to select for honesty and efficiency in public sector positions and contract partners; and hamper social trust, and therefore development.[40]

Tax compliance depends on the confidence of the taxpayer that tax incomes will be used legitimately[41]. Confidence is developed through transparency. The state also creates the atmosphere of willingness to pay tax by dispensing the services desired by its citizens. Tax defiance is high, and compliance low, in numerous developing countries where citizens neither believe governments act in their interest, nor trust the state to use revenues wisely[42]. In Latin America, for example, more than 25 per cent of the population believes taxes are not properly spent. Such absence of confidence propagates a vicious circle—low trust undermines the legitimacy of the state in the eyes of citizens, making tax imposition and collection less cost-

[38] J. C Bertot, P. T. Jaeger and J. M. Grimes, ''Promoting Transparency and Accountability Through ICTs, Social Media, And Collaborative E-Government, Transforming Government'', People, Process and Policy Vol. 6 No. 1, 2012 pp. 78-91

[39] L. Martin ''Taxation and Accountability: Experimental Evidence for Taxation's Effect on Citizen Behavior'' available at http://cega.berkeley.edu/assets/cega_events/55/Martin_WGAPE-WB.pdf. (accessed 20 June 2018)

[40] T. B Anderson "E-government as an anti-corruption strategy"(2009), Information Economics and Policy, Vol. 21, pp. 201-10; D. Cullier and S. J Piotrowski, "Internet information-seeking and its relation to support for access to government records" (2009), Government Information Quarterly, Vol. 26, pp. 441-9; S.S Dawes, "Stewardship and usefulness: policy principles for information-based transparency",(2010), Government Information Quarterly, Vol. 27, pp. 377-83; I. Kolstad and A. Wiig, "Is transparency the key to reducing corruption in resource-rich countries?", (2009) World Development, Vol. 37, pp. 521-32; I. Kolstad, A. Wiig and A. Williams "Mission improbable: does petroleum-related aid address the resource curse?" (2009) Energy Policy, Vol. 37, pp. 954-65.

[41] Id.

[42] S.S Dawes, "Stewardship and usefulness: policy principles for information-based transparency",(2010), Government Information Quarterly, Vol. 27, pp. 377-83; I. Kolstad and A. Wiig, "Is transparency the key to reducing corruption in resource-rich countries?", (2009) World Development, Vol. 37, pp. 521-32; I. Kolstad, A. Wiig and A. Williams "Mission improbable: does petroleum-related aid address the resource curse?" (2009) Energy Policy, Vol. 37, pp. 954-65.

effective, requiring more coercive tax collection that further weakens trust and decreases the likelihood of the effective provision of public goods and public services[43].

There exist three interconnected factors affecting the connection between taxation and accountability[44]. First, there is the internal accountability of the tax system i.e. an instance where the tax-reforms have developed into a system of taxation with larger reach, advanced level of effectiveness and transparency. Second, the tax reforms create the effective system where there are close relations between governments and their citizens and thereby increasing democratic accountability. Third, external accountability relationships between governments and international donors affects to a great extent domestic accountability. In sub-Saharan Africa, these factors have gained new necessity as numerous countries in the region are presently confronting two interconnected challenges.[45]First, some of these countries are under pressure from the international finance institutions (donors); many countries are now reforming their tax systems to obtain more income from their citizens as aid transfers are in swift debility[46]. Second, a majority of Africa's nations have in the early 1990s moved towards pluralist systems of rule[47]. Still, in democratizing atmospheres, it will be obligatory to construct the institutional facility and political legitimacy in order to engender revenues from citizens; confiscatory or coercive systems of revenue collection are deemed inconsistent with the lasting process of democratic consolidation[48].

3.3 PARTICIPATION

By and large, accountability relations seek to ensure that a person or an institution trusted with a particular undertaking (a) executes the specified (tax)mandate, and (b) does so in a manner that is in harmony with the standards and rules relevant to

[43] Id.
[44] infra note 41
[45] L. Rakner and S. Gloppen, ''Accountability through tax reforms? Reflections from sub-Saharan Africa'', in M. Moore and L. Rakner (eds.): The New Politics of Taxation and Accountability (July 2002.) IDS Bulletin 33 (3)
[46] Id.
[47] Id.
[48] Id.

this mandate. An effective tax system is considered to promote these abilities in public administrators and institutions since this is crucial in order to make the citizen undertake their tax duties. If governments are seen as accountable, more citizens will pay their taxes "voluntarily", which lowers the necessity for coercion and largely decreases the costs of tax collection. Contrariwise, if citizens do not see their governments as accountable, there is an increased possibility that state demands for (new or higher) taxes will encounter dissent and violence that is costly and might even endanger the position of those in authority. This conclusion is founded on European historical experiences where - in the past two centuries - taxation and disagreements over the use of revenues motivated the development of greater citizen claims with democratic institutions implementing greater transparency in expenditures.[49] Also, taxpayers are of the demand that if they are to contribute they should as well have an input in how the revenue is used, and an assurance from governments of the legitimacy of this claim - whether for practical purposes or on grounds of reasonableness.[50]

The nexus between an effective tax system, transparency and accountability are characteristically demonstrated by the battle cry from the American colonies' combat for independence from Britain - "no taxation without representation". Since taxpayers were consulted about the revenue generating system compliance in tax collection became quasi-voluntary[51] thus, decreasing the costs of collection.[52]

4.0 CONCLUSION

From the foregoing, it suffices to conclude that revenue generation, in terms of tax imposition and collection, hinges on efficient administration achievable through trust in government, a product of accountability, transparency and political

[49] Moore, Mick (1998): ''Death Without Taxes'', in Mark Robinson and Gordon White (eds.), The Democratic Developmental State. Political and Institutional Design, Oxford: Oxford University Press

[50] C. Tilly, Coercion, Capital and the European States, AD 990-1992 (Blackwell: Oxford); D. Brautigam, ''Governance and Economy: A Review"(1991), Policy Research Papers, No. WPS 815, The World Bank.

[51] M. Levi, Of Rule and Revenue, (University of California Press: Berkeley: 1988)

[52] S. Steinmo, Taxation and Democracy. Swedish, British and American Approaches to Financing the Modern State,(Yale University Press: New Haven: 1993); M. Moore and L. Rakner "Introduction: The New Politics of Taxation and Accountability(July 2002) IDS Bulletin 33 (3)

stability[53]. An effective tax system is not an end in itself but must be consolidated by an essential component of sustainable investment climate reform[54]. State legitimacy, taxpayers' willingness to pay, and the efficiency of tax administrative bodies are fundamental to an effective tax system. In the final analysis, an effective tax system promotes accountability and transparency from government and citizens.

[53] N. Gga ,Nigeria: Mainstreaming Good Governance into Nigeria Tax Reform''(20 September 2017) in Africa in Fact, A Journal of Good Governance Africa available at http://allafrica.com/stories/201709200932.html. (accessed 16 June 2018)
[54] Supra note 6

GETTING NIGERIA READY FOR THE OECD MULTILATERAL BEPS CONVENTION

By Emenike Omeye*

ABSTRACT

The countdown to the commencement of the Multilateral Convention to Implement Tax Related measures is presently ongoing. Given the profound effects the instrument is expected to have on the domestic taxation framework of many jurisdictions, it is crucial to proactively evaluate the provisions of the instrument and examine the exact character of the anticipated impacts on local taxation. This article provides an overview of the MLI and examines a few housekeeping issues that Nigerian tax authorities should consider ahead of the commencement of the MLI.

1.0 INTRODUCTION

The Organisation for Economic Cooperation and Development (OECD) on 7 June 2017 hosted a signing ceremony for the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS) under BEPS Action 15 (the Multilateral Instrument or MLI). During the 7 June ceremony held in Paris, 67 countries, covering 68 total jurisdictions, signed the MLI and an additional eight countries expressed a commitment to sign at a future date. The Nigerian Federal Executive Council on June 14, 2017 approved a memo seeking to make Nigeria a signatory tothe MLI. Following this approval and notwithstanding its non-membership of the OECD Nigeria[1] effectively became a signatory to the MLI on August 17 2017 -- becoming one of seventy-one (71) countries who are presently signatories to the multilateral instrument.

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* Emenike Omeye is an Associate in Banwo & Ighodalo where he advises on Taxation, Capital Markets, M&A and Restructuring.

[1] Although not a member of the OECD, Nigeria is however a member of the OECD Inclusive Framework on BEPS established in January, 2016 which allows non-OECD member countries to join on an equal footing in developing standards on BEPS-related issues and reviewing/monitoring its consistent implementation. To join the OECD Inclusive Framework on BEPS a country or jurisdiction needs to commit to the BEPS package and pay an annual membership fee of 20 000 EUR.

BEPS refers to tax avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations. The erosion of a national tax base and shifting of profit essentially operates in the form of a deliberate divorce between the location of profits and the location of the value creation by multinational enterprises. While no or low taxation is not *per se* a cause of concern, it becomes so when it is associated with practices that artificially segregate taxable income from the activities that generate it. Developing countries such as Nigeria's higher reliance on corporate income tax means they suffer from BEPS disproportionately.

2.0 THE MULTILATERAL INSTRUMENT AND BEPS

With the challenges of BEPS, nations are facing an evolving international tax landscape with long-term implication for tax compliance. To address BEPS issues in a coordinated and comprehensive manner, the BEPS Action Plan which contains 15 actions[2], was developed by the OECD Committee on Fiscal Affairs ("OECD CFA") and endorsed by the G20 leaders in September 2013. The BEPS Action Plan aims to tackle tax avoidance, improve the coherence of international tax rules and ensure a more transparent tax environment. Action 15 of the Action Plan specifically requires the analysis of tax and public international law issues related to the development of a multilateral instrument to enable jurisdictions that wish to do so to implement measures developed in the course of the work on BEPS and amend bilateral tax treaties accordingly. The MLI is essentially the fulfilment of Action 15 of the BEPS Action Plan.The MLI is designed to prevent base erosion and profit shifting (BEPS) by multinational enterprises (MNEs) and allows jurisdictions to transpose results from the OECD/G20 BEPS Project, including minimum standards to implement in tax treaties to prevent treaty abuse and "treaty

[2] Action 1 – Digital Economy, Action 2 – Hybrids, Action 3 – CFC Rules, Action 4 – Interest Deductions, Action 5 – Harmful Tax Practices, Action 6 – Treaty Abuse, Action 7 – Permanent Establishment Status, Action 8-10 – Transfer Pricing, Action 11 – BEPS Data Analysis, Action 12 – Disclosure of Aggressive Tax Planning, Action 13 – Transfer Pricing Documentation, Action 14 – Dispute Resolution, Action 15 – Multilateral Instrument.

shopping", into their existing networks of bilateral tax treaties in a quick and efficient manner.

Given the huge number of existing treaties and the considerable amount of resources and time it would take to individually amend the treaties[3], the MLI provides an alternative which will implement agreed treaty measures over a reasonably shorter period of time. Following the formulation of the MLI, each signatory country is required to submit a list of its bilateral treaties to be designated as Covered Tax Agreements (CTA). The designated CTAs will be modified by the MLI in a consistent manner to accommodate the tax-treaty related BEPS Action Plan. The OECD offers a five-step approach to taxpayers, tax authorities and tax courts to assess whether a given provision in a given existing tax treaty may be impacted by the MLI.[4] Once it is determined that a given tax treaty provision is impacted by the MLI, a further step will consist of interpreting the so impacted provision.

The MLI modifies CTAs in different ways. For each MLI provision, the method of modification is defined by means of a compatibility clause which sets out the relationship between that provision on the one hand and the CTAs on the other. The entry into force of the MLI for a given tax treaty (assuming it is a CTA) is subject to the signing of the MLI by both contracting countries to this tax treaty[5]. The MLI will however only modify a tax treaty if it has been specifically identified by both parties in a notification to the OECD. The MLI enters into effect with respect to a particular CTA as follows:

[3] There are reportedly more than 3000 tax treaties in force, a renegotiation of all treaties to implement BEPS measures could take decades.SeeAn introduction to tax treaties by Brian Arnoldhttp://www.un.org/esa/ffd/wp-content/uploads/2015/10/TT_Introduction_Eng.pdf\

[4] The OECD five-step approach is available at http://www.oecd.org/tax/ treaties/step-by-step-tool-on-the-application-of-the-MLI.pdf

[5] There are therefore two situations: (a) If both parties to a tax treaty sign the MLI, and the MLI is itself already in force (as explained in (1)), it shall enter into force with respect to a particular signatory on the first day of the month following the expiry of three calendar months beginning on the date such signatory deposits its instrument of ratification, acceptance or approval. (b) If one or both parties have not signed the MLI, the latter will not enter into force and will not affect the provisions of a given tax treaty. For instance, out of the G20 members, Brazil, Saudi Arabia and the United States did not sign the MLI.

- With respect to withholding taxes - on or after the first day of the next calendar year that begins on or after the latest of the dates on which the MLI enters into force for each of the parties to the CTA.
- With respect to all other taxes - for tax periods beginning on or after the expiration of a period of six calendar months (or a shorter period, if all parties to the CTA notify the OECD depositary that they intend to apply such shorter period) from the latest of the dates on which the MLI enters into force for each of the parties to the CTA.

One of the key attractions of the MLI is its flexibility. It is critical for its objectives that the instrument is capable of accommodating a variety of tax policies while ensuring that the tax treaty-related BEPS measures are effectively implemented. To this end, in addition to the distinction between minimum standard and non-minimum standard provisions[6], the MLI provides several mechanisms such as;reservations, optional provisions and alternative provisions. For non-minimum provisions, signatories may choose to reserve the right not to apply (i.e. to opt out through a reservation before the OECD) an MLI provision which otherwise applies by default. Items on which a reservation is allowed are listed in Article 28 of the MLI. The reservation may relate to an entire article, a paragraph contained in an article or part of a paragraph and a country is required to provide a list of reservations and notifications at the time of signature. Although opting out of minimum standard provisions is, in principle, not possible, there is an exception where a signatory CTA already meets that minimum standard. For instance, a signatory may reserve the right for the minimum standard contained in Article 6(1)

[6] The MLI includes both provisions reflecting the minimum BEPS standards and provisions that do not reflect the minimum BEPS standards. The provisions of the MLI related to the minimum BEPS standards have to be implemented by signatory countries of the MLI. The minimum standard requires that countries:

1. Include in their tax treaties an express statement that their common intention is to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance including through treaty-shopping arrangements; and
2. Address treaty shopping by, at a minimum, implementing (i) a Principal purpose test (PPT) alone, (ii) a PPT and a simplified or detailed limitation on benefits provision (LOB), or (iii) a detailed LOB, supplemented by a mechanism (treaty-based or otherwise) that would deal with conduit arrangements not already dealt with in the tax treaty.

not to apply to a given CTA that already contains preamble language describing the intention of the parties to the CTA to eliminate double taxation without creating opportunities for non-taxation or reduced taxation.

The MLI also allow signatories to apply optional provisions which otherwise do not apply, where they choose to do so. Optional provisions typically have no impact on a CTA unless both parties opt in. For instance, Part VI on Arbitration will only apply if both parties to a Covered Tax Agreement have opted in.[7] Other optional provisions are found in article 6(3), article 7(4), article 7(6) and article 9(4) of the MLI. As an exception, within the optional provisions contained in Part VI, article 23(5) relating to the confidentiality of the arbitration procedure will apply to a party to a CTA as soon as such party opts in (irrespective of whether the other party to the Covered Tax Agreement has also opted in).Alternative provisions may be made to address a specific issue, following the recommendation of Final Reports in any of the action plans. Specifically following the Final Report on Action 6, article 7 of the MLI contains three alternative solutions to address treaty abuse: (1) a Principal Purpose Test ("PPT"); (2) a PPT and a simplified limitation-on-benefits ("LOB") provision; or (3) a detailed LOB provision supplemented by a mechanism that deals with conduit arrangements not already dealt with in tax treaties.Under this mechanism, where alternative solutions are proposed, the general principle is that a given solution will apply to a Covered Tax Agreement only if both parties affirmatively choose to apply the same solution.[8]

[7] The MLI includes optional provisions for mandatory binding arbitration (MBA). Articles 18 to 26 of the MLI provide flexibility for countries to bilaterally agree on the mode of application of the MBA, including the form of arbitration. The MLI provides for "final offer" arbitration (also known as "baseball arbitration") as the default type of arbitration process. However, countries may make a reservation on the "final offer" type of arbitration proceedings and opt for the "independent opinion" process instead.

[8] Consistent with the Final Report on Action 7, article 13 of the MLI relating to permanent establishment-specific activity exemptions allows signatories to either: (1) explicitly state that each of the permanent establishment exemptions included in article 5(4) of the OECD Model is restricted to activities that are otherwise of a "preparatory or auxiliary" character (Option A); or (2) retain the existing wording of article 5(4) considering that the activities referred to in paragraph 4 are intrinsically preparatory or auxiliary (Option B).

3.0 KEY ISSUES FOR THE NIGERIAN TAX SPACE

As earlier indicated, Nigeria, although not a member of the OECD, is a member of the OECD Inclusive Framework on BEPS established in January, 2016 which allows non-OECD member countries to join on an equal footing in developing standards on BEPS-related issues, reviewing and monitoring its consistent implementation. Nigeria has indeed been keeping tab of developments in relevant OECD taxation instruments and the OECD model, for instance, has served as the basis on which most of the current double taxation treaties (DTTs) with other countries have been formulated.[9]Particularly, the signing of the MLI on August 17 2017 is very indicative of Nigeria's commitment to the implementation of OECD measures developed to tackle base erosion and profit shifting. This notwithstanding, we consider that a number of miscellaneous issues such as domestication requirement in Nigeria, and the possible impact of the Multilateral Instrument on the present framework for permanent establishment and on existing tax treaties between Nigeria and other countries, are deserving of more specific commentary.

3.1 DOMESTICATION

Section 12 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) provides that no treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly. Further, subsection (2) of the section empowers the National Assembly to make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty. Such bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) for the purpose of implementing a treaty does not need to be represented to the President for assent but is required to be ratified by a majority of all the House of Assembly in the Federation.

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[9] Also, the Federal Inland Revenue Service (FIRS) through its official twitter handle has communicated that the Income Tax (Country by Country Reporting) Regulations, 2018 (the Regulations) has now been signed by the Federal Government of Nigeria. This will give effect to the Country-by-Country Multilateral Competent Authority Agreement signed on 27 January 2016 and ratified on 3 August, 2016.

Given the foregoing requirement, it would be necessary to secure the domestication of the MLI in Nigeria. This will vest the provisions of the Instrument with the toga of enforceability as Nigerian law. Slightly different from the option of direct domestication under section 12(1) of the Constitution is the alternative under section 12(2), which allows the National Assembly, (without domesticating the exact instrument) to make a law(with respect to matters not ordinarily included in the Exclusive Legislative List) for the purpose of implementing the instrument. Coming under this latter provision, the National Assembly may with facilitative adjustments, reflect the provisions of the MLI as a domestic legislation.

3.2 THE CONCEPT OF PERMANENT ESTABLISHMENT

The provisions of article 12 could potentially affect the subsequent interpretation and impact of section 13 of the Nigerian Companies Income Tax Act relating to permanent establishment, where the treaty is domesticated in Nigeria. Articles 12 to 15 of Part IV deal with permanent establishment measures resulting from the Final Report on Action 7, which seeks to amend existing tax treaties to counter the artificial avoidance of permanent establishment status through: commissionaire arrangements and similar strategies.

Article 12 of the MLI expands the standard for when a dependent agent creates a permanent establishment of the principal to include situations in which the dependent agent "habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise." While existing dependent agent PE provisions typically cover only the conclusion of contracts that are "in the name of" or binding on the principal, article 12 also covers contracts for the transfer or use of property of the principal, or for the provision of services by the principal. Adoption of this change would create PEs for principals that distribute products and services through commissionaires and other dependent agent arrangements. In addition, article 12 provides that an agent is not independent if that agent works exclusively or almost exclusively on behalf of one or more closely related enterprises.

The foregoing provisions of the MLI are wider in scope than the existing framework for taxation of non-resident companies in Nigeria. The CTA by virtue of section 13(2) thereof provides that a non-resident company is only liable to corporate tax in Nigeria in the following circumstances:

1. If the non-resident company has a fixed base in Nigeria to the extent that profits are attributable to the fixed base.
2. If the non-resident company habitually operates in Nigeria through dependent agent authorised to conduct on its behalf or on behalf of some other companies controlled by it.
3. If that trade or business or activities involves a single contract for surveys, deliveries, or installations or construction, the profit from that contract.
4. If the transactions between associated members are artificial or fictitious.

In all of these circumstances, the non-resident company would be subject to the corporate tax on any investment (passive) income earned by it such as dividend, interest, royalty and rent by way of withholding tax being the final tax. It would appear that if the MLI takes effect, the interpretation of "permanent establishment" for the purpose of determining taxability of non-resident companies would witness significant modifications. Notably, the triggering activities of an agent would cover contracts for the transfer or use of property of the principal, or for the provision of services by the principal – a criterion which is presently inexistent in the Nigerian Companies Income Tax Act.

3.3 IMPACT ON EXISTING TAX TREATIES

As highlighted earlier, the commencement and effectiveness of the MLI is likely to profoundly impact on the nature and framework of existing (and even potential) tax treaties. There has been a proliferation of tax treaties in the last decades, creating a tax framework to mitigate the adverse impact of double taxation on cross-border operations and facilitating the build of global value chain infrastructures. In some cases, it became a tax treaty network where some jurisdictions negotiated access to more favourable source country/residence country tax rates compared with other jurisdictions. Many multinational corporations consider such potential treaty benefits as a factor when deciding on their platforms for foreign investments. The OECD has been trying to confirm that treaty benefits are claimed legitimately through the anti-BEPS framework. In response, many governments are increasingly inclined to implement recommendations to restrict access to treaties through the MLI.The most pronounced restriction of treaties under the MLI is the so-called principal purpose test (PPT), which essentially excludes an entity from treaty access if it is reasonable to conclude that obtaining access to the treaty was one of the principal purposes for establishing the transaction with that entity. Given that this conclusion may be inherently subjective, it would be critical for Nigerian tax authorities to adopt a policy stance prior to the effectiveness of the MLI, especially as to whether the test is for intent or for substance and when exactly the test should be undertaken – in the year that the arrangement is put in place or in the year the taxpayer is looking for treaty benefits?

Nigeria has entered into DTTs with 19 countries.[10]Benefits due to taxpayers under qualifying tax treaties (already discussed above) are very likely to witness modifications with the commencement of the MLI. It would be crucial for Nigerian tax authorities, preparatory to these changes, to initiate moves to adjust the local tax (legal and policy) framework in a manner to alleviate the sudden commercial burden the MLI treaty provisions may occasion.

4.0 CONCLUSION

The MLI is made to be subject to each jurisdiction's treaty procedures for ratification, acceptance, or approval.[11]Pursuant to its terms, the MLI will not enter into force until three months after at least five jurisdictions have deposited instruments of ratification with the OECD. Thereafter, the MLI generally enters into force with respect to a jurisdiction on the first day of the month following a period of three months after it deposits its instrument of ratification with the OECD. Already the Republic of Austria, Isle of Man and Slovenia have ratified and deposited their respective ratification instruments with the depository of the

[10] However, only 12 have been ratified.

[11] Section 12 of the 1999 Constitution outlines the procedure for ratification of a treaty in Nigeria.

OECD.[12] In view of the ratification by these three countries, only an additional ratification by two (2) countries is required to meet the threshold. This ratification is likely to happen in 2018 for many countries and in 2019 for most participating jurisdictions.

To gain domestic effect in Nigeria however, it is mandatory that regard be given to the constitutional provisions on domestication and the possible impacts of the MLI on the concept of permanent establishment. There is also no doubt that the MLI when effectively domesticated in Nigeria could have profound effects on qualifying tax treaties to which Nigeria is a party and could impact on benefits due to taxpayers under such treaties. It will be key for companies, especially multinationals who currently benefit from tax treaties to start reviewing investment structures into Nigeria especially the use of special purpose companies in treaty jurisdictions for investing into - or financing Nigerian operations. In the course of the next few years, States would face the task of demonstrating their commitments to the BEPS agenda by undertaking the respective domestication procedure. The changes to the allocation of taxing rights and the introduction of new anti-avoidance rules by the MLI mean that, once ratified, businesses and individuals may no longer qualify for double taxation relief on a range of cross-border transactions and activities. Taxable presences, compliance burdens, and tax liabilities could increase, and the uncertainty around application of the new standards may increase the instances of tax disputes. However, the alternative dispute resolution mechanism provided under the MLI may help resolve cross-border tax disputes more quickly.

[12]Slovenia ratified the MLI on February 23rd. The Republic of Austria submitted thirty eight (38) bilateral treaties to be covered by the MLI, with thirty four (34) reservations. Similarly, the Isle of Man, submitted eight (8) bilateral treaties and made thirty three (33) reservation

TAXATION AND DATA ANALYTICS: STAYING RELEVANT IN A CHANGING WORLD -NIGERIA AS A CASE STUDY

By Johnson Ayomide Michael*

A close look at the timeline of tax management over the centuries would reveal that at intervals, there has erupted the need for the introduction of effective methods to ease collection of taxes. This observation predates the industrial revolution in Europe; where of course, the taxation system was made more flexible to simply accommodate the 'financial needs of expanding government.'[1]
Subsequently, more defining changes have been effected; this time- technological, to cope with the nuances of tax collection. As industries emerge and economies develop over time, specialized methods have become necessary to evade the menaces of time lag and errors that could characterize bulk computing of tax figures. Asides the need for speed and elimination of errors, ostensibly important; there equally emanates the desire to ensure convenience for individuals and organizations during tax remittance.

Mind you, the desire for convenience is not a relatively modern or contemporary concept. As Adam Smith rightly indicated in *The Wealth of Nations,*[2] *"an ideal tax system comes about through a variety of 'canons', of which convenience is one."* Smith clearly emphasizes, that in order to foster for a good tax system, taxes 'ought to be levied at time or the manner in which it is most likely to be convenient for the contributor to pay it'. In this regard, the constant preoccupation of the tax authority and occasionally, the tax payer has been to devise more effective and convenient methods for the remittance of taxes.

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* 400 level, faculty of law, Obafemi Awolowo University, Ile-Ife, Nigeria. midejohnson1@live.com

[1] Ronald Max Hartwell; Taxation in England During the Industrial Revolution, p. 142.

[2] Smith, Adam, 1723-1790. The Wealth of Nations / Adam Smith; Introduction by Robert Reich; Edited, with Notes, Marginal Summary, and Enlarged Index by Edwin Cannan. New York: Modern Library, 2000.

Tax professionals have highlighted that the need to keep pace with globalization, as ever-changing regulation policies could pose a grave challenge to corporate tax departments.[3] This has pre-empted the need to create a mélange between technology and taxation through data analytics; where tax data can be effectively collected, processed and computed by corporate tax departments to determine tax incidence and tax burden. The bearing of this discourse will be centered on data analytics on a global scale while a close look shall be taken at the realities of the Nigerian situation.

What are Data Analytics?

In recent times, there has been the tendency to create a 'data tsunami' at companies and corporate offices.[4] This is due to the magnitude of data from clients, vendors or customers. When computing Value Added Taxes (VAT) - a consumption tax placed on a product whenever value is added at each stage of the supply chain, from production to the point of sale deducted at source[5]- companies are confronted with complications when computing data from plethora of customers to arrive at precise tax figures. The challenge of having too many data for computation heightens the possibility for human errors.

Usually, the tax functions derived from the array of clients and customers are the biggest consumer of storage data within organizations.[6] The situation is further heightened by the endless list of purposes; data derived from tax functions can be used to load process software, analyse accounts, track tax positions, review transactions as well as make tax influenced business decisions.

[3] Thomas Reuters One source; TAXOLOGIST p. 2

[4] Oracle Hyperion Tax Governance Data Sheet, p.1

[5] Value-Added Tax (VAT) –Investopedia

[6] PricewaterhouseCoopers, United Kingdom; Tax Function of the Future Series; Unlocking The Power of Data and Analytics; Redesign, redefine, and redeploy tax to be a strategic business asset; November 2015.

Tax function is not the only source of data available in data computing, as data can be derived from other operating systems. This underscores the perils of data gathering alone especially where it covers several geographies, clients and business units. The multiplicity of tax functions is non-negotiable. Since, usually, tax function covers interactions between different business departments of an enterprise (other than finance and accounting) which, as a consequence of actions they perform, have a final impact (direct or indirect) on taxes.[7]

According to a PwC series; a number of tax professionals reported that 'obtaining tax ready information is an impossible problem for them to address on their own because tax is just a downstream of user data'.[8]

In addition to this, and as regards tax computation, professionals spend more than an astonishing 50 percent of their time on gathering tax data alone.[9]

Technology has fostered a solution to these computing problems through data analytics.

The import of data analytics is to ensure that such magnitude of data can be effectively computed by tax departments to ensure that amount of tax deductible can be arrived at timely and more importantly, without errors. Typical data analytics tools cater for this need with the use of a specialised interface.

As a term, data analytics predominantly refers to an assortment of applications, from elementary Business Intelligence (BI), reporting and Online Analytical Processing (OLAP) to more advanced mode of analytics. Data analytics initiatives can help tax authorities actualise increased tax revenues through better compliance, improve operational efficiency, and optimise marketing campaigns and customer service efforts, responds more quickly to emerging market demands.[10]

[7] "Tax function effectiveness" available at http://enodoadvisors.com/index.php?page=tax-function-effectiveness (accessed July 11, 2018)

[8] PricewaterhouseCoopers; Tax technology: creating a strategic asset; 2013 joint PwC Manufacturers Alliance for productivity and Innovation survey.

[9] Ibid.

[10] Margaret Rouse, Craig Stedman; "Data analytics (DA)"; (accessed July 11, 2018)

In relation to tax management, the *2016 Annual Domestic Tax Conference* highlighted that data analytics enables a centralized data management, ensures that tax data is treated as an asset for value as well as the availability and use of such data for driven tax measurements and decisions.[11]

Prior to data analytics, tax management was subject to the inefficient and largely manual process of excel spreadsheets, manual calculators but to mention a few. However, the inception of data analytics has abated the obstacles of interpreting uncertain tax provisions, country-by-country reporting (in the case of transnational companies)[12], as well as the inability to reconcile customer data and of course, the preponderance of human errors through manual computing.

The Nigerian situation is now up for observation. In the wake of the recent announcement by the Nigerian Minister for Finance; Mrs. KemiAdeosun, as to the addition of about 5 million tax payers to the Nigerian tax net,the foregoing discussion becomes even more applicable. In expanding the Nigerian tax net,[13] there is no gainsaying that the obstacles attributed to the voluminous computation of increased tax payers will emerge.The newly added tax payers; mainly small scale entrepreneurs and members of the informal sector[14], probably large corporate

[11] The 11th Annual Domestic Tax Conference 28th April 2016; New York City.

[12] The Country-by-Country (CbC) Report ensures that multinational enterprises (MNEs) report annually and for each tax jurisdiction in which they do business, the information set out therein. According to The Organisation for Economic Co-operation and Development, The BEPS Action 13 report(Transfer Pricing Documentation and Country-by-Country Reporting) provides a template for **multinational enterprises (MNEs)** to make such report under three complex benchmarks; Multilateral Convention on Administrative Assistance in Tax Matters, bilateral tax conventions; and Tax Information Exchange Agreements (TIEAs).

[13]"Expanding Nigeria's Tax Base" available at http://reubenabati.com.ng/index.php/component/k2/item/8796-expanding-nigeria-s-tax-base-sun-editorial 16 May 2018.

[14] The Informal Sector single-handedly accounts for a major share of the Nigerian economy.
In the paper, The Informal Sector and Taxation in Nigeria, The Barcode by Stillwaters Law Firm Newsletter; Volume 02; Issue 02; 2017, the author; Genevieve Henshaw asserted that "the Nigerian informal sector constitutes as much as 64% of Gross Domestic Product (GDP)".

offices, are subject to a variety of taxes and of course, for future purposes; a workable situation has to be put in place to ensure proper tax remittance.

The need for data analytics in the Nigerian situation appears more like a *sine-qua-non* especially in the wake of reports highlighting that the Nigerian government does not or better still, cannot properly deduct or remit taxes from its employees.[15] Whether or not this is a product of inefficiency, an outright oversight or an innocent mistake, one may never actually know. However, one can easily posit that the introduction and use of data analytics in the Nigerian public service is one effective panacea to this menace.

In the wake of the last decade, foreign investment in Nigeria has skyrocketed.[16]This is a pointer to the complexities that foreign companies and trans-national companies would face in view of reconciling tax provisions from different jurisdictions, adopting transfer pricing, engaging in country-by-country reporting and other related matters. Unquestionably, trans-national retail superstores are the preferred customer choice in Nigeria.[17] This would imply that the VATs, deducted at source are to be remitted by these retail superstores at an immense rate. Take the for instance, the North American supply chain-Shoprite which is domiciled in cities across Nigeria. As earlier highlighted, it is a one-stop-shop preference for just a number of consumer goods. If VATs are to be deducted at source by Shoprite, that's a huge amount of data to compile.

Sadly, at present, with respect to VATs, the finance minister was quoted as saying the rate of compliance is at a disturbing 12%. In fact, this is just the ratio ofVAT for registered entities that are actually filing returns and remitting VAT. When computing all taxable entities (registered and unregistered), the compliance ratio will be much alarming.[18]

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[15] Taiwo Oyedele; PwC Tax watch; June 2016.

[16]Adaeze Okechukwu; Foreign investments rise 138.7% to $12bn; https://www.vanguardngr.com/2018/03/foreign-investments-rise-138-7-12bn/ (accessed July 11, 2018)

[17] Walmart, clean shopping and the coming death of the Nigerian retailer; http://www.brandish.com.ng/walmart-clean-shopping-and-the-coming-death-of-the-nigerian-retailer/ (accessed on July 11, 2018)

In a similar vein, the Nigerian reality evidences a not too rapid response to new technologies. But recent events as to expansion and world globalization mandate theadoption of data analytics tools in order to cope in a competitive world market. Companies domiciled in Nigeria as well as the Nigerian government would find it a more helpful framework for the computation, remittance of VATs as well as Personal Income taxes for workers respectively.

In a recent workshop organised by PwC Nigeria, themed *"Tax management in the digital age: Data analytics and tax intelligence"*,[19]the transnational companies represented, admitted to using antiquated and partly manual techniques for data computation in their subsidiaries domiciled in Nigeria. When taxes are not adequately remitted, tax compliance is at risk. That is the Nigerian situation, data analytics is the Nigerian solution.

[18] Supra, Note 15.

[19] PwC Tax Academy, May 2018.

AN EFFECTIVE TAX SYSTEM PROMOTES TRANSPARENCY AND ACCOUNTABILITY

By Olufolajimi Otitoola*

"…but in this world nothing can be said to be certain, except death and taxes".[1]This popular saying sums up the importance and prominence of taxation in modern societies. Taxation is an ancient concept that forms one of the central pillars around which, civilization has been built.[2] It is the indispensable and inevitable price for a civilized society, and without taxes, the government would be paralyzed.[3]The aim of taxation is the generation of revenue effectively, efficiently and fairly to fund governmental activities. Cicero pointed out, when he called it "the sinews of the state", that taxation is central to the existence and proper functioning of a nation, as well as to the functioning of its lower levels of government.[4]In a context where many governments have to cope with less revenue, increasing expenditures and resulting fiscal constraints, raising revenue remains the most important function of taxes, which serves as the primary means for financing public goods such as maintenance of law and order and public infrastructure. Indeed, if taxpayers willingly comply with their obligations to pay taxes, the process of taxation will be easier for the tax administration. However, the tax administration itself also faces challenges of weak administration structures, regulations and enforcement which put a clog in the wheel of progress

*Olufolajimi Otitoola is a 300 level law student of the Faculty of Law, University of Lagos who has interests in Arbitration, Tax and Energy Law.

[1] Franklin, Benjamin, 1706-1790. The Private Correspondence of Benjamin Franklin: ... Comprising a Series of Letters On Miscellaneous, Literary, And Political Subjects: Written Between the Years 1753 And 1790; Illustrating the Memoirs of His Public And Private Life, And Developing the Secret History of His Political Transactions And Negotiations. 2d ed., with additions. London: Printed for Henry Colburn, 1817.

[2] https://www.oup.com.au/data/assets/pdf_file/0026/90953/barkoczy_FTL9E_sample.pdf.

[3] Commissioner of Internal Revenue v. Algue, Inc., G.R. No.L-28896, 17 February 1988, 158 SCRA 9.

[4] Winer S.L., Hettich W. (2004) The Political Economy of Taxation: Positive and Normative Analysis When Collective Choice Matters. In: Rowley C.K., Schneider F. (eds) The Encyclopaedia of Public Choice. Springer, Boston, MA, pp. 173-191.

as regards achieving an effective tax system. There are also the issues of tax evasion, multiplicity of taxes, tax touting, etc.

Every tax system has three pillars (the tripod of taxation): policy, law and administration. The basis of every tax system should be transparency and accountability in fulfilling its purpose. However, no effective tax system can exist without transparency and accountability. Looking at this in relation to the existence of every government, it means that for every government to be able to achieve transparency and accountability, the easiest way will be to adopt an effective tax system which is transparent and accountable.

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 – including the process of how the taxpayers' money is spent. They are important in ensuring the competent functioning of a modern economy and promoting social well-being. Nowadays, in modern societies, governmental or administrative powers are delegated to public authorities. Once power is delegated, some guarantee must be given to the people that is, society at large that this power transfer is effective and is not abused. Transparency ensures that information about the tax system and how tax money is used is available, which can be used to measure the authorities' performance and to guard against any possible misuse of powers. With a transparent tax system, we know who is being taxed, how tax is paid, and what is done with the money.[5] We also can find out who (in broad terms) pays the tax and who benefits from tax exemptions, deductions, and credits.[6]Therefore, transparency helps to achieve accountability, meaning authorities can be held liable for their actions. Simply, without transparency and accountability, trust will be lacking between the government and the governed, and the consequence is social instability and an in-conducive environment for economic growth.

[5]https://okpolicy.org/resources/online-budget-guide/revenues/an-overview-of-our-tax-system/characteristics-of-an-effective-tax-system/. (accessed 14 August 2018)
[6]Ibid.

Tax plays a key role in sustainable development and governance all over the world. The funds provided by taxation are used by the state to support obligations like education, healthcare, public transportation and other social benefits. The basic objective of taxation is to generate maximum potential revenue with desirable effects on the economy. It is a strong economic and political tool of governance and an effective tax system can be used for fiscal management and redistribution of wealth to reduce inequality in the society. There is a nexus between an effective tax system and good governance (which involves accountability and transparency). An effective tax system has also been shown to have a linear relationship with good governance, and this relationship is inherently political.[7]

Logically, governments that are dependent upon earned revenues such as taxes (as opposed to unearned revenues such as aid or mineral wealth) are more likely to be receptive to their citizens for various reasons.[8] The flipside of the argument suggests that citizens who pay taxes will demand more responsive governments. An effective tax system is characterized by certainty, efficiency, and full compliance with the rule of law, equity and fairness to all, all-inclusiveness and reciprocity in the use of tax revenue.[9] The principle of inclusivism ensures no one is left out of the tax bracket while reciprocity connotes transparency, accountability and judicious use of tax revenue. This is very important if tax is not to be perceived as an unwanted imposition on the citizens by the leadership but rather seen as a civic responsibility of citizenship for the common good of all. The citizens should be able to voluntarily pay taxes in anticipation of the social benefits from the State. Hence, a state that depends on taxes depends on the prosperity and the enterprising spirit of her citizens and the government that depends on this for the delivery of public goods and services will be quicker to respond to the growth and development of business enterprises and the economy in general. The citizens that pay tax will

[7] John Graham and Jodi Bruhn, 'In Praise of Taxes: The Link Between Taxation and Good Governance in a First Nations Context' [2013] 10(3) Aboriginal Policy Research 1.

[8] Pius Okoye and others, 'Promoting Sustainable Tax Compliance in the Informal Sector in Nigeria' [2012]1(1) An International Journal of Arts and Humanities Bahir Dar, Ethiopia 44.

[9] Ibid.

in turn hold the government accountable in the use of tax revenue and thus ensuring good governance. In most developed countries of the world, the ratio of tax to GDP is in the region of 40% - 50%.[10]

The quality of a tax system (policy and administration) is itself a central pillar for good governance and nation-building. There is a strong correlation between government accountability, tax administration, and transparency in the use of taxpayers' money. Efforts to mobilize revenue and widen the tax net does not only depend on tax reforms, but also on broader governance-related reforms that can positively influence citizens' attitudes to tax compliance and their perception of value for tax paid. Insufficient information available to taxpayers on tax compliance requirements creates uncertainty and room for leakages. The objective of an effective tax system is not just to raise revenues but also to establish a tax system that is fair, equitable and efficient as well as ensuring the judicious use of the tax revenue.

Perhaps most fundamental is the need to promote the virtuous circle by which increased trust between both taxpayers (in the use to which revenue is put and in the behaviour of tax officials) and the tax administration (in the willingness of taxpayers to meet their obligations) reinforces voluntary compliance and good governance. To this end, combining improvements in revenue administration with supportive - efficient, fair, effective - tax policies is essential. While it may be too much to assert, as the maxim has it, that in developing countries, "tax administration is tax policy" - tax policy sets the framework within which the revenue administration must operate - in practice, the distinction between administration and policy is especially hard to make in developing countries. But there is no doubt that weak and often corrupt tax administrations, inadequately paid officials, extensive non-compliance and informality, weak organisational structures and political interference remain a fundamental barrier to effective and fair taxation, and to building wider trust between government and citizens.

[10] Revenue Statistics 2017 –Organisation for Economic Co-operation and Development (OECD) https://www.oecd.org/tax/tax-policy/revenue-statistics-highlights-brochure.pdf.

Generally, in developing countries, there is a large, informal economy and tax evasion is a significant concern.[11] As a result, tax revenue remains low, even though rates are as high as those in developed economies.[12] Also, unconventional methods to collect revenue have been implemented, including bank debit taxes, state ownership of firms, and implicit taxes on individuals in the informal sector.[13] All these reveal the lack of transparency and accountability in the tax system.[14] Hence, just recently, proposals to raise middle-class taxes toppled the Bolivian government, and plans to extend or increase the value-added tax caused political unrest in Ecuador and Mexico.[15]In addition, despite Nigeria's large population, revenue from taxation is not reflective of the population size of the country.[16]
These issues reveal the need for the careful consideration of the interconnection between taxation and good governance – accountability and transparency. Taxation and good governance are therefore likened to "two sides of a coin". As imposition of tax can create pressure for democratic accountability, quality tax governance can similarly encourage a culture of voluntary compliance and increase revenue generation. In effect, taxation engenders good governance. In the same way, without good governance, effective taxation becomes onerous. A symbiotic relationship between effective taxation and good governance helps to maximize the benefits to society.

'No relationship between two parties, with the possible exception of that between client and psychiatrist, is more fraught with love and hate than that between citizen and elected government.'[17]Also, there is no worse tyranny than to force a man to pay for what he does not want (taxes) merely because you think it would be good

[11] Roger H. Gordon, Taxation in Developing Countries: Six Case Studies and Policy Implications (1 edn, Columbia University Press 2010) 1-352.
[12] Ibid.
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] According to the UN Department of Economic and Social Affairs, 'World Population Prospects: The 2017 Revision' report, 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 according to the FIRS Tax Revenue Statistics, there has been a substantial decline in the target revenue from taxation since 2013.
[17]Gillespie, W. I.1991. Tax, Borrow and Spend: Financing Federal Spending in Canada, 1867–1990. Ottawa: Carleton University Press.

for him.[18] The only way a country can succeed in bridging the relationship gap between its citizens and the government – enriching the quality of its democracy and reducing apathy – is through the institution of efficient and fair tax systems. Developing countries, in particular, can easily solve its problem of bad governance characterized by lack of transparency and accountability, by firstly restructuring its tax system to promote transparency and accountability in the tripod of taxation nationally, leading to peoples' participation in not just policy, administration and law, but also proper responsiveness of the government to the people in those areas. Doing this under tax administration will lead to public acceptance of taxation and encourage transparency and accountability on the part of the government itself and the people.

[18] Heinlein, R. A. (1968). The moon is a harsh mistress. New York, N.Y., G.P Putnam's Sons.

THE BATTLE OVER TAXATION OF SPORTS BETTING INNIGERIA

By Ojo Stephen*

1.0 INTRODUCTION

Taxation can simply be defined as the levying of tax in which the tax itself is a mandatory financial charge or some other type of levy imposed upon a taxpayer (an individual or other legal entity) by a governmental organization in order to fund various public expenditures[1] while sports betting on the other hand is the activity of predicting sports results and placing a wager on the outcome.[2]

The rapid expansion of the subject matter sports betting was not specifically envisaged by the constitution in the allocation of taxing powers and the rapid expansion and commercialization process in the industry makes it susceptible to taxation disputes and it is against this backdrop that this article shall be divided into five parts.

Part I: Background of sports betting in Nigeria;

Part II: Definition and scope of taxing powers in Nigeria;

Part III: Taxing Issues relating to sports betting;

Part IV: way forward/Recommendations;

Part V: Conclusion

2.0 BACKGROUND OF SPORTS BETTING IN NIGERIA

The nature of sports betting varies in different countries. In Nigeria Sports betting involves placing bets on football, car racing and non-athletic games such as horse racing and dog fighting. Football betting pools are a product of the British influence in Nigeria, brought in the 1920s but sports betting officially started in Nigeria in the year 2007 with the first registered betting company being the Nairabet Company. In Nigeria, football is one of the most widely followed sports and hence

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* Ojo Stephen is currently a 400l student of the faculty of law, University of Lagos and can be reached at stephenojo077@gmail.com or on 08174012655

[1] "Tax" available at https://en.m.wikipedia.org/wiki/tax (accessed 12 July 2018)

[2] "Sports Betting available at https://en.m.wikipedia.org/wiki/sportsbetting (accessed 12 July 2018)

the subject matter of most sports betting. However in recent times the growth of sports betting brought about fantasy sports betting and this type of sports betting involves fans picking players from different teams for a weekly round to form their own fantasy team.

The current economic situation of Nigeria has pushed a lot of unemployed youths to indulge in sports betting and the influx of money has seen the industry grow rapidly as about 60million Nigerians between the ages of 18-40years spend up to #1.8billion on sports betting daily with an average investment of #3,000 daily.[3]

3.0 DEFINITION AND SCOPE OF TAXING POWERS IN NIGERIA

In the case of *Nichols* v.*Ames*,[4] Justice Lantham of the United States Supreme Court said taxing power is

> *the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as the air he breathes to the natural man. It is not only the power to destroy; it is also the power to keep alive.*

The above statement goes far to say the importance of taxing powers to the development and existence of a nation. Taxing powers imposes a constraint on a level of government to impose taxes on subject matters allocated to them by the constitution and also imposing such taxes within its recognized jurisdiction. The taxing powers in Nigeria are shared between the federation and the component states in which it is stipulated in the 1999 constitution of Nigeria as amended (herein referred to as CFRN).Section 4(1) & (2) of the CFRN gives the National Assembly which is the federal legislative house, the powers to make laws for the peace and good governance of the federation and regarding any matter included in the exclusive legislature list as set out in part I of the second schedule to the CFRN. The constitution also gives the National Assembly powers to make laws regarding the concurrent legislative list set out in the first column of part II of the second schedule but can do so only to the extent prescribed by the second column to the concurrent list. Section 4 (6) & (7) of CFRN vests legislative powers of a state in

[3] Betting-Nigeria available at https://answersafrica.com/betting-nigeria.html (accessed 15 June 2018)

[4] 173 U.S 509

the house of Assembly of the state and it gives them powers to make laws for the peace, order and good government of the state and in respect to matters included in the concurrent legislative list set out in the first column of part II of the second schedule to the CFRN to the extent prescribed in the second column opposite thereto and any other matter empowered to make laws in accordance with the provisions of the constitution.

4.0 TAXING ISSUES RELATING TO SPORTS BETTING

As published in the vanguard news on July 13, 2016 operators of sports betting companies in the country lamented the issue of double taxation by the federal government and states[5]:

> *Each state says they are in charge of gaming and betting and the national lottery regulatory commission says they are the ones in charge. So who do we pay to? Do we pay twice? That is not even talking about the company taxes that we pay. So it's strangling our business coupled with forex issues. So we need to be sure who we pay to.*

This above statement was made by Akin Alabi, the founder of Nairabet.com and this was made at a summit organized by the association of Nigerian Bookmakers in 2016.

The statement shows that the operators frown against the current system of double taxation and it comes from the fact that sports betting was not expressly contemplated by the constitution either in the exclusive or concurrent list. It is due to this fact that both the National Assembly and the state house of Assembly have assumed taxing powers in relation to sports betting with each having arguments to back their positions.

4.1 ARGUMENTS FOR FEDERAL AND STATES GOVERNMENT

The Federal Government enacted the National Lottery Act in 2005 and the Federal High Court in the case of *National Lottery Regulatory Commission v. A.G Lagos*[6]

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[5] Sports Betting FG, States proffer Solution for Double Taxation available at www.vanguardngr.com/2016/07/sports-betting-fg-states-proffer-solution-double-taxation (accessed 16 June 2018)

[6] FHC/L/CS/1258/2012

said that it is well established that National Lottery is an interstate commerce and as such have authority to legislate on interstate trade and commerce pursuant to Item 62(a) of the exclusive list of the CFRN.

This argument was gotten from the case of *A.G. Ogun State v. Aberuagaba&7Ors*[7]in which at the court of appeal Omo J.C.A in his leading judgment said that sale of products within the state or into the state are matters incidental to trade and commerce and the word "in particular" was just for emphasis reason and hence the imposition of tax in relation to such subject matter is within the exclusive purview of the Federal Government.

However on appeal to the Supreme Court per Justice Bello J.S.C had to interpret the provisions of the now item 62 of the exclusive list with much consideration on the word "in particular" in other to determine whether it is a word of limitation or not.

He eventually concluded by saying it is a word of limitation and as such limits the powers of Federal government to interstate trade and commerce.

The argument of the state government is that since it was left out in the exclusive and concurrent list then such matter falls under the residual legislative competence of the state and hence gives them the power to legislate on sports betting. This was what prompted Lagos state government to challenge the national sports lottery act in the case *ofEdet v Chagoon*[8]and here the court of appeal held that pools betting and casino are matters not listed on the exclusive and concurrent list hence falls under the residual competence of the states.

This battle between the Federal and state government has brought about a plethora of cases into the courts in relation to taxation of sports betting and there are presently 5 separate cases on the matter in the courts in Nigeria. The most recent is the Supreme Court case *between A.G. Lagos v. A.G Federation*.[9] It is to this fact that the recent amendment to the Federal law on Lottery and sports betting in Nigeria [National Lottery Act (Amendment) Bill 2017] was not assented to by the Acting President YemiOsinbajo in April 2017 as there was no certainty on the subject matter yet.

[9] Suit no: 01/2008

5.0 WAY FORWARD/RECOMMENDATIONS

The sports betting industry as seen above is one that generates a whole lot of revenue and it will be one that either level of government will be seeking to secure in part or in whole.

Firstly, should sports betting be considered residual matter or a matter incidental to trade and commerce in which the limitation word of "in particular" will be used to limit the Federal powers to interstate sports betting.

trade means buying and selling of goods and services in return for money or money's worth while commerce includes all the activities that help in facilitating the exchange of goods and services from the manufacturer or the producer to the ultimate consumers and they are acts that aide the successful completion of the exchange.

In my opinion, the states could argue that sports betting includes placing of money on the back of prediction of the outcome of a sports event and as such there is no assumption of placing money to get money as such money could go away if such predictions are wrong and this element of uncertainty hereby makes it partly inconsistent with the above definition of trade and commerce. This argument can be backed by having recourse to the *State List of the Constitution of India* in which betting was stipulated as a separate subject matter in item 34 while trade and commerce was listed as a separate matter in item 26. In the case of *The State Of Bombay v. R.M.D*[10] which is an Indian case on the separation between sports betting and trade, it was stated that gambling activities are in their very nature and essence extra-commercial although they might appear in the trappings of trade, they were considered to be a sinful and pernicious vice by the ancient seers and law-givers of India and have been disapproved by the laws of England, Scotland, United States of America and Australia. So it can be said that India and other developed and developing countries recognize the fact that sports betting is a subject matter which ought to stand on its own due to some complexities which does not wholly make it incidental to trade and commerce.

On the other hand, the Federal Government's argument which is most likely the outcome to be reached by the Court is that sports betting should be seen as a matter incidental to trade and commerce and hence limits the legislative competence of the National Assembly to interstate sports betting, i.e., where a person in Lagos places a bet in Ogun state, then such will be covered by the National Assembly and this reasoning may be inferred from the decision of the supreme court in the *Aberuagba's* case as discussed above.

In practice, the argument of the Federal Government might be difficult to operate as most states require companies to pay for licenses to operate as Lagos state require companies to pay a license fee of 50million naira for the first year and 10 million naira for subsequent years and this coupled with the license fee and taxes of the National lottery regulatory commission can discourage such operators.

6.0 CONCLUSION

Sports betting industry is one that has since injected a substantial amount of money to the Nigerian economy and hence the need for the legislative stability. The issue of double taxation is one that can cripple the industry and as such both federal and states representatives should collaborate to recommend a solution that will be pre-emptive and this will be to sign a double taxation agreement between the federal and states government in which the taxes relating to sports betting shall be kept in a single account pending the time a court of competent jurisdiction makes a decision on the scope of both level of government's taxing powers in relation to sports betting as this is currently the subject matter of the suit in the case of *AG Lagos v. AG Federation.*[11]

[11] Ibid

EXPLORING THE TAX OPTIONS IN THE DIGITAL ECONOMY

By Ihenacho Nelson*

ABSTRACT

"The world's largest taxi firm, Uber, owns no cars. The world's most popular media company, Facebook, creates no content. The world's most valuable retailer, Alibaba, carries no stock. The world's largest accommodation provider, Airbnb, owns no property. Something big is going on."[1] *This statement strengthens an assertion that the most evident feature of human existence is the ability to grow and invent. Traditional methods for the implementation of all human actions are rapidly being abandoned as the world is settling with a new option to ease implementation of the most difficult tasks. This development, though accepted to encompass positive effects, has negative consequences. One major consequence is that the world, especially third world countries, have failed to prepare other social or legal areas which are affected by this technological explosion, to accept this reality. Thus the world, through technology, is creating problems it finds difficult to solve.*

1.0 INTRODUCTION

Economic activities are largely important to any nation, as the derivation of revenue is based on the smooth and properly regulated running of these activities. Businesses have strived in the past by first creating a physical presence, in most cases via registration[2], and then the continuous operation, involving a certainty in the location of their operational markets. The consequent effect was the ease, to an extent, of the government to levy taxes on such businesses and the businesses having a level of certainty on what authority to pay taxes to.

Residence is the basis of tax collection in various nations, especially the UK[3]. The potency of this system however, has been tested by the trend of digitalization of

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* 300 level student, Faculty of Law, University of Lagos.

[1] Tom Godwin, available at https://techcrunch.com/2015/03/03/in-the-age-of-disintemediation-the-battle-is-all-for-the-customer-interface/amp/ (accessed 3 June, 2018).

[2] Section 544, Company and Allied Matters Act CAP. C20. L.F.N. 2004.

[3] This, in its ordinary meaning means where the taxpayer resides for fiscal purpose, per the court in Lysaght v. CIR [1928] 13TC 511.

businesses which portray the picture of businesses going off the grid or not having any form of physical presence in operational areas, but still generate revenue. The difficulty here, is that the governments all over the world have not discovered a perfect mechanism to first identify the complexities of these business, and secondly to propose and enforce a lasting solution on taxing them. Nigeria is one of such countries. The purpose of this article will be to chart a course by proposing solutions to the issue which would be worth emulating. Thus, the article is divided into a clarification of the terms of taxation and the digital economy, an examination of the approach by various jurisdictional approach to the issue, an examination of the international and regional steps taken to address the issue, a look at the existing Nigerian tax framework to cover the taxation of digital businesses, the loopholes and recommendations based on the steps taken internationally.

2.0 CLARIFICATION OF CONCEPTS

The first task will be to clarify the concepts which will appear recurrently in this article. The terms are a bit abstract and have several complexities surrounding them which the reader must have a grasp of in order to have a fruitful assimilation of the discuss. The concepts to be clarified are taxation and that of the digital economy.

2.1 TAXATION

Taxation is a concept with diverse definitions. One of such is that it's a charge by the government on the income of an individual, corporation or trust, as well as the value of an estate or gist with an objective to generate revenue to be used for public needs.[4] Another definition given was that taxation is an annual compensation paid to government for annual protection and for current support of the government.[5] This author simply sees taxation as a consideration by the citizens in the social contract theory. As rightly noted by Benjamin Franklin, in this world, nothing can be said to be certain, except death and taxes. The basic principles of taxation are nearly as old as human society as it stretches thousands of years into the past.

[4] H.C. Black and others, Black's Law Dictionary, 6thedn, 1990.
[5] Alabama Power Co. v. Federal Power Commission, C.C.A.5, 134 F.2d 602, 608.

The Greeks and Romans and several ancient civilizations levied taxes on their citizens to pay for military expenses and other public services, though this was in an over-burdening form.[6] Taxation evolved significantly as empires expanded and civilizations become more structured.[7]The earliest form of taxation was kept to a minimum, except during periods of conflict or hardship.[8] Taxation was not limited to European and Mediterranean civilizations, as it was embraced by ancient Chinese societies in the 600BC[9] and then spread through the Middle East, the Mediterranean and Africa. In all, taxation became a global phenomenon.

Taxes payable include; income taxes[10], negative taxes[11], capital gains tax[12], corporate taxes[13], property taxes[14], Value added taxes[15], sales tax[16] and others.[17]

2.2 THE DIGITAL ECONOMY

Simply put, this concept means the movement of markets from the traditional physical space to the internet space. This is popularly called e-commerce as it encompasses app stores, online advertising, online payment services, cloud computing, participative network platforms and a lot of platforms. The elements of a digital economy include digitalization and intensive use of information and communication technologies (ICT), codification of knowledge, transformation of

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6 The Cato Journal, Volume 14 Number 2: "How Excessive Government Killed Ancient Rome." Bruce Bartlett. Fall 1994. available at http://www.cato.org/pubs/journal/cjv14n2-7.html (accessed 29 May, 2018).

7 "History of Taxation" available at http://www.worldtaxation.com/uncategorized/history-of-taxation.html (accessed at 29May, 2018)

8 Association of Municipal Assessors of New Jersey: "A Brief History of Property Tax." Richard Henry Carlson. September 2004 available at http://www.amanj.org/files/Carlson.pdf (accessed 29May, 2018).

9Authorama: "Ancient China Simplified, Chapter XVI – Land and People." Edward Harper Parker available at http://www.authorama.com/ancient-china-simplified-17.html (accessed 29 May, 2018.)

10 The tax is imposed on net profits from business, net gains, and other income of individuals, business entities and corporations.

11 A progressive income tax system where people earn below a certain amount receive supplemental pay from the government instead of paying taxes to the government.

12 Capital gain is generally a gain on sale of capital assets—that is, those assets not held for sale in the ordinary course of business.

13 Corporate tax refers to income, capital, net worth, or other taxes imposed on corporations.

14 Levy according to the value of property that the owner of the property is required to pay to a government in which the property is situated.

15 This applies as the equivalent of a sales tax to every operation that creates value.

16 Sales taxes are levied when a commodity is sold to its final consumer.

17 Environmental taxes, Consumption taxes, Poll taxes, Excises, tariffs and others as obtainable in different jurisdictions.

information into commodities and new ways of organizing work and production.[18] They offer tangible goods which can be provided by traditional businesses and intangible goods such as software which cannot be measured in terms of value. These businesses generate significant figures in foreign countries without the need to put up offices or have many employees there. This is one of the major reasons tax authorities worry about the digital economy. Due to their virtual nature of these businesses, lacunas are created in the operation of existing tax laws and the authorities are unable to collect taxes from these companies.[19] Traditional businesses are taxed based on value creation, but due to the electronically based operations of these companies, it's challenging to capture what value is created, where it's created and how to measure it.

3.0 TAXING THE DIGITAL ECONOMY

The digital economy is made up of an almost invisible market which is hardly monitored or registered, making taxation of the components of such market, an almost impossible task. Tax laws have been unable to capture the growth of online enterprises and the structure of their profits. Also present is obtainable is their nature of non-country specific operations and aggressive tax planning to shift their profits to jurisdictions with low tax rates or simply, tax havens. Several jurisdictions experience this same challenge. In other to fashion out a model which Nigeria can emulate, it is important to review some thriving jurisdictions. Thus, the approaches of the United Kingdom, the United States of America, Regional and international bodies will be examined.

3.1 THE UNITED KINGDOM

The British, during the colonial era, introduced taxation to a number of civilizations. The United Kingdom has a robust tax structure to assimilate changes where necessary. Taxation in the United Kingdom is based on the existent Finance

[18] Taking Digital Economy Nigeria available at http://www.businessdailyonline.com/taxing-digital-economy-nigeria. (accessed 30 May, 2018).
[19] Taxing the digital economy- it's complicated, Edison Jakurti. Brookings.edu. (accessed, 28th May, 2018).

Acts following the budget each year.[20] Due to tax law rewrite projects, the Finance Acts and other tax statutes are periodically consolidated.[21] This has resulted in laws like the Income Tax (Earning and Pensions) Act 2003, the Income Tax (Trading and Other Income) Act 2005, Income Tax Act 2007, Corporation Tax Act 2009, Corporation Tax Act 2010 and the Taxation (International and Others Provisions) Act 2010.

Notable, is that the tax liability is based on residence, even though the income maybe derived from a foreign source[22], a similar position to Nigeria. This is a post 2008 position. Where such a person is however non-domiciled, such a person must choose either to pay UK taxes on foreign income over £2,000, or claim the remittance basis. If choosing the remittance basis, they would only pay income tax on income brought into the UK but they must pay an annual charge of £30,000 if they have been a UK resident for at least seven out of the previous nine years[23]. For an individual 'residence' means to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place.[24] A company will be treated as resident in the UK for the purposes of taxation if either it is incorporated in the UK, or if its central management and control is effected in the UK. There is no statutory definition of central management and control. This has been held by the court to be the highest form of management of the company's affairs and not just the day-to-day running of the company. In *De Beers Consolidated Mines Ltd v. Howe*[25], a South African company was held as resident in the UK as the Directors lived in the UK and controlled the business from London, though board meetings were held in South Africa. Also, a non-resident UK company will be liable for taxes on income generated from the UK as a source, if a double taxation agreement does not override or prohibit this.

The United Kingdom jurisdiction, like others, lacks a sustaining solution in relation to taxing the digital economy, this situation exists due to the fact that the digital

[20] Paul Lambert, "The Laws of the internet", 4thedn, 2015. Bloomsburry Publishing Co. pg 490,491.
[21] Ibid.
[22] This applies where the income hasnot been remitted to the UK.
[23] Supra n.20.
[24] Levene v. IRC [1928] AC 217, HL.
[25] [1906] AC 455, 5 TC 198, HL.

market provides both tangible and intangible goods and services. The most explored option for the United Kingdom is the Value Added Tax (VAT). Flowing from the EU Directive 2006/112 of 28 November, 2006 which places a VAT rate of 15% to 25% for member states and urges member states to make legislations to implement the Directive, the United Kingdom continues to develop its VAT laws[26]. This tax is imposed where there is a transaction which involves the payment of consideration (money). While the laws may not have been designed for the special digital purposes, they apply to the digital market. An example of this is that free downloads on digital platforms will not be charged based on this form of tax. Another situation where the VAT rules apply is in the area of exemption of suppliers not bearing the cost of VAT, save for where they are exempt, as they are able to recover VAT which they have themselves been charged on any goods or services they have used to make their own supplies[27]. Though VAT is borne by a customer, they supplier is liable to account for it and it's deemed to have been included in the price of goods. Pursuant to the Value Added Tax Act 1994 and other regulations[28], the rate for VAT in the UK is at 20% and it's administered by the HM Revenue and Customs (HMRC).

The major issue in relation to internet goods and services remains the jurisdictional method of charging VAT, that is, the UK only charges goods supplied to the UK. The exception to this is that for the internet, VAT rules will apply based on the following; where the supplier belongs, where the consumer belongs, whether the supply is to a VAT registered person (business to business) and whether the supply is to a non VAT registered person (business to customer). Thus the UK has devised several jurisdictional rules in VAT collection on the basis of business to business supply and business to customer supply.[29]

In relation to intangible goods, the extent of application of existing rules to tangible goods does not seem to apply with ease. The position of the UK Government as set

[26] Supra n. 20.
[27] In times of VAT accounting, they only account for the difference in the input tax or VAT paid for services they used to make supplies and output tax in respect of VAT accruing from supplies made.
[28] Finance Acts according to the budget and the VAT Regulation of 1995.
[29] Supra n. 20.

out in the Autumn Budget 2017[30] is that the Government supports the established principle that profits should be taxed where value-generating activities are undertaken. The Government considers that the existing framework does not take into account user-generated-value when allocating taxable profits. User participation in creating value for digital businesses[31] and not just the simple role a customer plays in a traditional market is seen as vital in accessing the value created and the UK, while interested in this, considers that jurisdictions should be given the right to tax their proportionate share of the profits generated by a business from user participation by giving jurisdictions in which active users are located the right to tax a percentage share of the residual profit realized by principal companies in the group.[32] The face of these complexities prompts the Government to agree that newer frameworks are required and this can be delivered by the OECD's[33] Model Tax Convention. However the government's interim measures include; defining the characteristics through which users create value and then taxing businesses where such characteristics are most relevant[34]; defining the categories of business which derive most value from user participation[35]; defining revenue streams commonly generated from user participation in such businesses, such as online advertising revenues.[36]

3.2 THE UNITED STATES OF AMERICA

The American position on the issue differs as the United States is of the view that it is not appropriate to single out such a digital economy for a special regime or treatment. Reacting to the digital permanent establishment plan of the OECD and several other plans which show an agreement with the idea of new tax regimes for

[30] EY Global Tax Alert, UK 2017 Autumn Budget: Key business tax announcements, dated 22 November 2017.
[31] These Roles include: Generation of content by users that supports a business' ability to attract and retain users and generate revenue; Deep engagement with the platform allowing tailoring of platform and content and collection of valuable behavioral data; Development of networks through engagement and actions that create connections between users; Contribution to a business' brand through provision of content, goods or services and through moderation and the rating of content.
[32] i.e. A share of profits after an arm's-length return has been given for routine functions.
[33] Organisation for Economic Co-operation and Development.
[34] Example generation of content, deep engagement with platform, among others.
[35] Example social media platforms, search engines and online marketplaces.
[36] "UK issues Position Paper Update on Corporate Tax and the Digital Economy" https://www.ey.com/gl/en/services/tax/international-tax/alert--uk-issues-position-paper-update-on-corporate-tax-and-the-digital-economy (accessed 29 May 2018).

the digitalized economy, Kevin Nichols, a senior counsel to the International Tax Counsel at the U.S. Treasury Department, described digital permanent establishment as “very concerning for the U.S.,” in part because it “depends on this notion of ring-fencing the digital economy or finding a way to delineate what the digital economy is versus what everything else is.”[37] The major concern expressed here is that though today’s economy is digital, current definitions separate a digital economy versus the rest of the economy. Thus the United States believes that there are no sufficient unique aspects of the digital economy to warrant special treatment. The proposal here is for a revision of the existing rules as they have done[38].

Most of the firms who operate in the digital space or who operate in larger number of jurisdictions are American.[39] The effect of this, are the proactive steps by the United States to unilaterally put them in check by enacting several legislations. Despite the fears of the OECD on the negative impact unilateral actions by different states will have on the issue, especially clashes and even double taxation, the United States has several laws enacted to tackle the issue. The United States has embarked on tax reforms linked to taxation of intangibles which has produced measures such as the Global Intangible Low-Taxed Income (GILTI), Foreign-Derived Intangible Income (FDII), Base Erosion and Anti-Abuse Tax (BEAT). Currently, Foreign subsidiaries of United States’ companies are taxed on historic earnings 8% to 151/6% rate and an ongoing basis of 131/8% or higher. To the US, the tax reforms have put the concerns about the US digital tax Companies to rest.

An interesting argument that arises here is, on what basis should taxes on the digital economy be? This is based on the accepted notion that the internet is boundless. To the US, the basis should be one of residency and not source. This is not in line with OECD approach. Where the value creation is determined, the source of such

[37] https://www.vertexinc.com/resources/blog/digital-economy-taxation-measures-very-concerning-us (accessed 29 May, 2018).

[38] Italy enacted a 2018 budget law “Tax on Digital Transactions” or “Web Tax” which charges 3% rate on the value of each digital transaction due by resident and non-resident enterprises concluding more than 3,000 digital business to business transactions in a calendar year and who will not be creditable from the Italian Income tax.

[39] available at https://www.lexology.com/library/detail.aspx?g=4f03f100-987b-46f3-b7f1-ff153cc8428d (accessed 29 May, 2018).

creation should be entitled to collect the taxes. The American position in total, though unilateral, is taking a huge approach towards addressing the problem.

3.3 INTERNATIONAL AND REGIONAL ACTION

This area will focus on two major organizations who are taking steps towards addressing the issue of having both short and long term plans in taxing the digital economy. The organizations are the OECD and the European Union.

The Organisation for Economic Cooperation and Development (OECD) has been in the forefront of ensuring that the issue of taxing the digital economy is solved, but its indecisive nature, the unilateral beliefs and acts of member states forms an opposition to a final conclusion of plans. Identified here are two fundamental pillars of international tax law at stake, they are; nexus[40] and profit allocation.[41] In 2013, OECD and G20 Countries released an Action Plan on Base Erosion Profit (BEPS) as a result of international efforts in taxing the digital economy. [42] The aim of the act was to ensure that profit is taxed at the source of economic activities and value creation.[43]This also came up as a result of the need for companies to have predictability and certainty as to where to pay taxes.

The action plan had fifteen (15) key areas including the digital economy. The BEPS report to address the tax challenges in the digital economy 2014 called "*ACTION PLAN 1*"[44] raised the issues on this subject. The recommendation was based on “a no separate digital tax regime” and a conclusion that the OECD work undertaken in other areas, including transfer pricing and permanent establishment, would address the existing concerns. An issue raised by the report is the difficulty in attributing value created from the generation of data through the provision of digital services and the question of how to characterize it under tax rules.

The OECD released a follow up report in February, 2018 report which highlights three prevalent features of largely digitalized businesses, this includes the ability to have a significant economic presence in a country without a major physical

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[40] What is the threshold for becoming subject to tax?
[41] Once taxable in principle, how much profit is to be charged
[42] OECD (2013),Action Plan on Base Erosion and Profit Shifting, OECD publishing http://DX.doi.org/10.1787/9789264202719-en (accessed 29 May, 2018).
[43] Supra n. 20.
[44] www.oecd.order/beos-2014-deliverables.htm (accessed 29 May, 2018)

presence or a “scale without mass”, a particularly heavy reliance on intangible assets, including intellectual property and a business model based on data, user participation, network effects and user-generated content. [45] The OECD highlighted a lot of interim and long term measures towards neutralizing hybrid mismatch where companies exploit the difference in tax rules in different jurisdiction to avoid or reduce tax through new provisions, addressing treaty shopping, ensuring transfer pricing reflect value creation by revising rules on intangibles, countering harmful tax practices particularly in areas of intellectual property regimes and tax rulings.

The issue with the OECD and acting on its plans is the divergent views which result in a non-conclusive approach. Amongst the 113 Inclusive Framework members, there are countries firmly of the opinion that the BEPS project has addressed the key problems in the field of international taxation and reject further reforms are at this point. Some Countries, an example being the US, accept that some issues remain post-BEPS, but are of the opinion that these problems are not specific to digital companies and the reforms should be of general application. A third set, including many EU Member States, believe that digitalisation and globalisation are putting intense pressure on existing taxation regimes, meaning targeted solutions are needed to correct a state of current inequity.[46]

At the regional level, the most pro-active steps are being taken by the European Union. The EU believes that the OECD plans are too stretched and do not produce any result and support a new equalization tax levy as an interim measure in relation to rates, tax base and who to tax. The EU is proposing a brand new interim tax tagged as the “digital services tax” (DST, which is of 3% levied on the gross revenues of companies attributable to the supply of certain digital services.[47]To be taxable, a company must belong to a group with worldwide revenues above €750

[45] Freshfields Bruckhaus Deringer LLP,”Tax Reform in the Digital Economy: Recent OECD and Commission Activity” March 21, 2018 available at https://www.lexology.com/library/detail.aspx?g=4f03f100-987b-46f3-b7f1-ff153cc8428d. (accessed 29 May, 2018).

[46] Ibid.

[47] Digital tax policy description; EY Global Tax Policy and Controversy Briefing issue. 11 Feb, 2018.

million and "taxable revenues"[48] within the EU above €50 million.[49] In the long run, the EU is planning to move toward an integrated digital single market, where rules regarding digital economy are harmonized amongst member states through policies such as the "Common Consolidated Corporate Tax Base". This would create "a single set of rules to calculate companies' taxable profits in the EU. Unlike the OECD, the EU parliament is making this come into fruition despite divergent views among member states.

4.0 NIGERIAN TAX SYSTEM AND THE DIGITAL ECONOMY

Recently, the President of the World Bank Group, Dr. Jim Yong Kim, stated that "policy makers in Nigeria and other African countries are ill-prepared to compete in the digital technology space".[50] This statement is evident because the movement by Nigeria into the digital space has been slow and almost non-existent as a result of lack of laws and policies to guide this movement. The intersection between the tax system and the digital economy is the need to regulate the growing area of the economy. The Digital economy is prospectively impactful on the Nigeria as it has the capacity to generate over 88 billion to the Nigerian Economy and 3 million jobs in the next 10 years. [51]

4.1 EXISTING STRUCTURE

The Nigerian tax system dates back to 1904 when the personal income tax was introduced in northern Nigeria before the unification of the country by the colonial masters which was later implemented through the Native Revenue Ordinances to the Western and Eastern regions in 1917 and 1928, respectively. It was later

[48] Taxable revenues are defined as revenues resulting from the provision of the following services: placing on a digital interface advertising targeted at the users of that interface; making a multi-sided digital interface available which allows users to find and interact with other users and which may also facilitate the provision of goods or services between the users directly (unless the sole or main purpose of doing so is to supply digital content, communication services or payment services to users); and transmitting data collected about users and generated from user activities on digital interfaces. Supra n. 44.
[49] Supra n. 44.
[50] "World Bank Nigeria, Others not Prepared for Digital Economy" https://www.thisdaylive.com/index.php/2018/04/20/world-bank-nigeria-others-not-prepared-for-digital-economy/ (accessed 31 May, 2018)
[51] "Digital Economy to Generate Three Million Jobs in 10 Years" available at https://www.thisdaylive.com/index.php/2017/04/27/digital-economy-to-generate-88-bn-three-million-jobs-in-10yrs/ (accessed 31 May, 2018).

incorporated into Direct Taxation Ordinance No. 4 of 1940.[52]The years after have seen the development of the tax legislation, either through enactments inspired by the laws in other jurisdictions or a legislative innovation of the National and State Parliaments[53].

The revenue profile of Nigeria in the 1970s was dominated by tax revenue[54]. Such impressive contribution then has witnessed diminishing returns from 81.6 per cent in 1970, to 72 percent, 53.5 percent, 42.8 percent and 42.3 percent in 1980, 1990, 2000 and 2007 respectively. During this period, the contribution of tax revenue to GDP was never above 24 percent in any year, with the lowest being 7.1 percent in 1996 and the highest of 24 percent in 1982. The dwindling resources resulting from a fall in oil prices has necessitated the call for diversification of the economy and taxation is the most resourceful call to make for the Government.[55]

Harnessing the tax prospects in the digital economy is largely dependent by proper regulation by the income tax regime in existence. The two legislations in this regime are the Personal Income Tax Act 2011 (hereinafter referred to as "PITA") and the Companies Income Tax Act 2007(hereinafter referred to as "CITA"). PITA applies to individual resident in Nigeria collected by the respective state authorities.[56] This is chargeable on gain and profit from trade activities or sale of property, dividends, interest, discount, annuity, charges, salary or wages accrued from being employed in Nigeria.[57] Such an income can also be one derived from outside Nigeria and is chargeable by tax not exceeding the proportion of his total tax for the year of assessment which that income derived from outside and brought into Nigeria bears on his aggregate income chargeable to tax in Nigeria.[58] According to PITA**,** the accessible income is that of the year immediately preceding

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[52] A. Odusola "Tax Reforms in Nigeria", January 2006. http://www.eldis.org/document/A22652 (accessed 31 May, 2018).
[53] Companies Income Tax Act CAP. C21 L.F.N. 2004; Value Added Tax Act CAP. V1 L.F.N. 2004; Personal Income Tax Act CAP. P8 L.F.N. 2004; Petroleum Profit Tax Act CAP. P13 L.F.N 2004.
[54] Supra n. 53.
[55] Supra n. 53
[56] Section 2, Personal Income Tax Act CAP. P8 L.F.N. 2004. This involves the state in which one is found in a year (sub-section 3).
[57] Section 3(1) (a)-(f), Personal Income Tax Act Personal Income Tax Act CAP. P8 L.F.N. 2004 .
[58] Section 11, Personal Income Tax Act Personal Income Tax Act CAP. P8 L.F.N. 2004.

the year of assessment from each source, notwithstanding that he may have ceased to possess the source or that it has ceased to produce income. [59]

Companies seen as artificial persons under the law are also liable to the payment of tax in Nigeria. A company is defined by CITA as "any company or corporation (other than corporation sole) established by or under any law in force in Nigeria or elsewhere".[60] According to the provisions of the Companies and Allied Matters Act 1990 (hereinafter referred to as "CAMA"), a company is one duly registered in accordance with the provision of CAMA or any enactment replaced by it is what the Act recognizes as a company in Nigeria**.**[61]While the later Act prohibits foreign companies who are unregistered in Nigeria from doing business in Nigeria, the former has a broad definition which covers companies incorporated abroad.

The Nigerian tax system is largely on a residence basis. With regards to personal income tax, the definition of residence is taken to be the ordinary definition, meaning where the tax payer resides for fiscal purpose.[62] This can also mean to dwell permanently or temporary residence. [63] In relation to companies, the UK courts have pronounced the residency criteria to be companies based in the UK.[64] For multi-nationals, the law taxes a company based on incorporation or where its central management and control is based.[65] Nigerian law of residency is clear and based on incorporation[66] or source of profit.[67] Most digital companies are foreign, or as rightly noted American[68], who can be subject to this innovation by the income tax regime in Nigeria. The big question is, why are foreign companies operating in the digital space not taxed?

Where the income tax regime fails, the taxation of the goods themselves can be exploited. The existent structure in relation to taxation of goods is the Value Added Tax Act 1993 (hereinafter referred to as "VATA"). The tax is on all goods and

[59] Section 25, Personal Income Tax Act Personal Income Tax Act CAP. P8 L.F.N. 2004.
[60] Section 105, Companies Income Tax Act CAP. C21 L.F.N. 2004.
[61] Section 54, CAMA CAP. 20L.F.N. 2004.
[62] Supra n. 3.
[63]Levene v. IRC (1928) AC 217, HL.
[64] Ibid.
[65] De Beers Consolidated Mines Ltd v. Howe [1906] AC 455, 5TC 198, HL.
[66] Supra n. 57 and58.
[67] Section 13(2), CITA CAP. C21 L.F.N. 2004. permits the existence of foreign companies and charge their profits derived from Nigeria to tax.
[68] Supra n. 39.

services whether produced or rendered in Nigeria or not.[69] Exemptions however, were granted in respect of medical and pharmaceutical products, basic food items, fertilizers, agricultural and veterinary medicine, books and educational items, farming and transport equipment.[70] The Act levies a 5 percent tax on such goods.[71] The effect of this is that where the operations of entities in the digital space deals with tangible goods with Nigeria as a source of profit, the tax will apply.

The Federal Inland Revenue Service has recently adopted the Integrated Tax Administration System (ITAS) to strengthen its commitment to implement the developments clearly expressed in the National Tax Policy (NTP) regarding the automation of the tax system.[72] The NTP recommends that all processes starting from registration of taxpayers, filing of returns, audits and investigations, payment of taxes including correspondence with taxpayers will become automated.[73]

4.2 DIFFICULTY IN APPLYING THE EXISTING STRUCTURE

At the first glance of the existing structure, the conclusion which may be reached is that the digital economy can be taxed effectively under the Nigerian tax regimes. However, there are several considerations which make the existing structure seem ineffective. These constraints may be grouped into the internal and external constraints.

The internal constraints are the non-expansive nature of our laws to handle the situation[74], the slow rate in adapting to an automated system, Governmental indifference towards the digital economy.[75] The statement that "The inability to adequately capture the quantum of attendant direct and indirect taxes payable on e-

[69] Section 2, Value Added Tax Act CAP. V1. L.F.N. 2004.
[70] Section 3, Value Added Tax Act CAP. V1. L.F.N. 2004; First Schedule, Value Added Tax Act CAP. V1. L.F.N. 2004.
[71] Sections 4, 5 and 6, Value Added Tax Act CAP. V1. L.F.N. 2004.
[72] Taxing Digital Economy in Nigeria" available at http://www.businessdayonline.com/taxing-digital-economy-nigeria/ (accessed 1 May, 2018).
[73] Ibid.
[74] The tax law may provide for the taxation of digital economy, but the provision is not all encompassing. Section 13, Companies Income Tax Act, 1979 provides for the intricacies of taxing a Nigerian company but same is not comprehensive in relation to foreign companies.
[75] Laws in the area of the digital economy are not being enacted in Nigeria to support different aspects of this development.

commerce transaction has left leakages in the tax system"[76], explains the internal issues raised by the expansion of the digital economy on an unchecked tax status. The External problems revolve around those raised with respect to other jurisdiction. A summary of these issues are as follows; the virtual nature of such businesses, the difficulty in determining where value is created, the argument on whether digital companies should be taxed based on source or residence, the fear of double taxation implications which may arise from unilateral efforts and the slow international response to the problem.

5.0 RECOMMENDATIONS

If men can develop weapons that are so terrifying to create problems, you would think that man's intelligence and his comprehension would include also his ability to find a peaceful solution."[77]

The following recommendations are thus made towards combating the problem;

A. Interim Measures:

iii. The enactment of laws specifically for taxing digital businesses is recommended taking a cue from the United Kingdom and Italy. This will be based on the Income and Value Added Taxes to cover all aspects, using the rates in existing laws.

iv. Where the enactment of new laws face opposition as a result of the strenuous process of enactment in Nigeria[78], the automation of the system of administering the current laws is recommended. The manual administration subsisting after the introduction of Integrated Tax Administration System (ITAS), should be abandoned as the administrators must adapt to the system.

v. The focus should be placed on discovering the method of creation of value or an adoption of the UK user participation approach[79] which focuses on the value

[76]Why Should Tax be on Digital Flight from Nigeria available at https://www2.deloitte.com/ng/en/pages/tax/articles/inside-tax-articles/why-should-tax-be-on-digital-flight-from-nigeria.html (accessed 3 June, 2018).

[77] Dwight D. Eisenhower, https://www.brainyquote.com/topics/solution (accessed 3 June, 2018).

[78] Section 9, Constitution of the Federal Republic of Nigeria (Promulgation Act) CAP. C23 L.F.N. 2004.

[79] Supra n. 30.

which the users create as a role which generates income for the digital companies.

vi. A review of the business residency operation is recommended. The operation of foreign companies or those in the online space should be considered as existent even with no registration.[80] Thus the presence of the digital businesses must be established.

vii. Identification of suppliers of currier services who distribute the digitally transacted tangible goods for the purpose of collecting the Value Added Tax.

B. Support for OECD Measures: Nigeria should present itself to participate in the global discuss towards the development of the BEPS and its application. This is to ensure that peculiarities of the Nation, is considered in the formulation of such plans.

It is believed that the due consideration of these and other measures by stakeholders' in the tax system will breed an active dialogue towards resolving the tax issues raised by the digital economy and exploring the tax options in the digital economy.

6.0 CONCLUSION

"New technology is not good or evil in and of itself. It's all about how people choose to use it".[81]The advent and continuous development of technology and the transfer of every activity to the digital space breeds problems. Man must not fight technology, but continuously exercise resilience, skill and cooperation towards owning and harnessing the issues raised by technology, the tax questions in the digital economy is not an exception to this notion. While Nigeria and several jurisdictions which fear that unilateral measures will bring about double taxation and price hiking consequences on consumers, wait for the OECD and other international organizations to act, these unilateral efforts should be made for interim

[80] The non-recognition of these companies as operating makes them invincible and they can easily avoid taxes.
[81] David Wong available at https://www.brainyquote.com/topics/technology (accessed 3 June, 2018).

purposes, else the digital economy will become an economic exploitation mechanism bigger than the State.

THE PIONEER STATUS

By Ayodele Kadiri Ashiata and Akuegbu Adaeze

ABSTRACT

Every country seeks to drive investment within its borders. A well thought out tax incentive is a very attractive investments drive. Nigeria has, among others, the pioneer status which has been underutilized as a result of the confusion surrounding its ambit.

This paper aims to examine the extant laws – including subsidiary legislations – governing the pioneer status in order to highlight the problematic areas and ways through which this incentive can be made more effective.

1.0 INTRODUCTION

The lift of the suspension on the Pioneer status and the introduction of the latest Pioneer List have serious implications for investment, whether foreign or local, in the country. The Pioneer status, prior to the suspension, was fraught with uncertainties in scope and administration, and hardship in the application process. Unfortunately, the pioneer status has not generated more conversation on its relevance and continued existence as it ordinarily should considering its pivotal nature. Subsequent paragraphs will examine the existing legal framework for the Pioneer status incentive with the aim of highlighting certain issues that, if properly addressed, would make the incentive more effective.

2.0 THE LEGAL FRAMEWORK

2.1 Industrial Development (Income Tax Relief) Act

The pioneer status is a tax incentive created under the Industrial Development (Income Tax Relief) Act, 1970 (IDITRA). A company is eligible for this incentive if it is issued a pioneer certificate, which is only issued to companies in relation to any pioneer industry or pioneer product listed[1]. According to the law, while any

[1] The Industrial Development (Income Tax Relief) Act, s. 1(1)

Nigerian company may apply for an industry or a product to be designated a pioneer industry or product,[2]the application should only be granted where the President is satisfied that such industry is either not being carried on in Nigeria or is not carried on in such a scale that is suitable to Nigeria's economic requirements. It also suffices if the President is satisfied that there are favourable prospects of further development in Nigeria of such an industry or that it is in the interest of the public for such industry or product to be conferred with the pioneer status[3]. These industries and/or products so designated are required to be published in the *Gazette*[4] and subsequently referred to as the 'list of pioneer industries and products'.

A company wishing to be granted the pioneer certificate is required to be one whose estimated cost of qualifying expenditure on or before production day is not lower than ₦50,000 if indigenously controlled and ₦150,000, if it is 'any other company'[5]. It is required to address its application to the Minister of Industry, Trade and Investment in the prescribed manner, who then forwards the application to the President for his approval or disapproval, the applications costs 100[6].

The pioneer certificate is subject to terms and conditions and the beneficiary company may, while the incentive subsists, apply to add any additional pioneer product to the already existing products in the certificate[7]. One very important aspect of the pioneer status incentive is the 'production day' because this is the day the applicant company is deemed to have commenced business, in respect of the pioneer industry or products, for assessment purposes[8]. The designation of the production day is the mandate of the Industrial Inspectorate Division of the Federal Ministry of Industry, Trade and Investment (IID)[9]. Furthermore, it is, at least, one month after the designation of the production date that the amount of qualifying expenditure incurred by the applicant company is certified. The Director of the IID

[2] Ibid, s. 1(2) and (3)
[3] Ibid, see generally s. 1(1)
[4] The Gazette is a publication of the Federal Government of Nigeria
[5] Ibid, s. 1(4). This has been amended by the Pioneer Status Incentive Regulation, 2014 which is discussed below.
[6] Ibid, s. 2
[7] Ibid s.4
[8] Ibid. s. 25
[9] Ibid. s. 6.

is required to notify the Minister of the designated production day and amount of qualifying capital expenditure. Where the incurred qualifying capital expenditure falls below that permitted by the IDITRA, the President is mandated to cancel the pioneer certificate of the company in question[10].

Although the pioneer certificate may operate retrospectively, where there is a space of more than a year between the company's probable production day in its application and the production date as certified by the IID, IDITRA compels the President to cancel the pioneer certificate of that company unless the delay is due to sufficient and good cause or extenuating circumstances[11]. The IDITRA further requires the publication of the issuance and cancellation of pioneer certificates in the *Gazette*.

One can immediately gather from the provisions of the IDITRA that the spirit of the law looks to improve the economy of Nigeria. The major attraction for companies in applying for the grant of pioneer status is the income tax relief[12] as well as other incentives. The tax relief period of a pioneer company commences on the date of the production day of the company and shall continue for three (3) years. This may be extended upon application to the board for a period of two (2) years at once or twice after the expiration of the initial period, if certain conditions are satisfied[13]. This allowance by the law makes the pioneer status irresistible to investors hence the need for clarity.

2.2 Pioneer Status Incentive Regulation, 2014

Some twenty five (25) years after the IDITRA, the Nigerian Investment Promotion Commission (NIPC) Act was enacted[14]. By virtue of the Act, the NIPC is saddled with the function of encouraging, promoting and coordinating the investment in the Nigerian economy[15]. One of the functions of the NIPC is to initiate and support

[10]Ibids. 6(11)
[11] Ibid s. 6(10)
[12] Ibid s. 10
[13] Ibid s.10(1) and (2)
[14] The Nigerian Investment Promotion Commission, 1995 Cap N117, Laws of the Federation, 2004
[15] Ibid s. 4

measures which would enhance the investment climate in Nigeria for both Nigerian and non-Nigerian investors[16] .

The Pioneer Status Incentive Regulation 2014, (the "Regulation") was expressed to be issued in exercise of the powers granted by section 30 of the NIPC Act[17]. The Regulation discards the distinction between an indigenous controlled company and 'any other company' and reviewed the expenditure requirement. Consequently, an applicant-company is required to be incorporated in Nigeria and must have incurred a capital expenditure of not less than Ten Million Naira (₦10,000,000)[18]. This effectively removes the function of the IID to ascertain the qualifying capital expenditure. It also means that a company cannot apply with the intention of incurring the requisite capital expenditure before the application is completed. Furthermore, under the IDITRA, a company which was yet to be incorporated could apply for the pioneer status[19]; the necessary implication is that this has ceased to exist under the Regulations[20]. The Regulation also introduces a two (2) *per cent* service charge of estimated savings on the applicant company[21]. Interestingly, the service charge is still applicable where the applicant company records negative pre-tax earnings. Such company is required to pay the higher of 0.5% of its net asset or 0.25% of its turnover as its service charge[22].

Interestingly, by the Regulations, an application for the pioneer status is to be made by a company to the NIPC. The Regulations makes it compulsory for the application for the pioneer status to be made within the first year of the applicant's commencement of commercial production – the IDITRA is silent on this. The application fee was also increased to Two Hundred Thousand Naira (₦200,000)[23].

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[16] Ibid s. 4(b)
[17] The Explanatory Note to the Regulations.
[18] The Pioneer Status Incentive Regulation, 2014, regulation 3. It is interesting to note that the term here is 'capital expenditure' and not 'qualifying capital expenditure'.
[19] n. 1, s. 3(3) and (4)
[20] Which is issued to a tax payer who has been paying his taxes for three (3) preceding its issuance
[21] Ibid. Regulation 5. This has also been increased to ₦100,000,000 following the re-introduction of the scheme in August 7, 2017. See Deloitte's Newsletter, Tax and Regulatory Services, August 9, 2017 available at http://blog.deloitte.com.ng/wpcontent/uploads/2017/08/The-revised-pioneerstatusincentiveschemeinNigeriaWidercoveragewithweightierconditions.pdf?utm_source=Mondaq&utm_medium=sydication&utm_campaign=inter-article-link (accessed, April 10 2018).
[22] Supra note 18, Regulations 6
[23] Ibid Regulation 3(3)(i)

Although the mandate of the IID to issue the production day certificate is still intact, NIPC continues as the body to issue the pioneer certificate.

NIPC, under the Regulations, has certain oversight functions. It has the power to carry periodic impact assessment[24] to 'measure the effectiveness of the incentives' and to 'ensure that savings accruing from the incentives are utilized for the intended purpose'. It is not clear what 'intended purpose' means. The necessary implication, however, is that a company enjoying the pioneer status incentive is expected to utilize that part of its income which should ordinarily have been paid as tax to further economic activities in that pioneer industry, or increased commercial production, where it is a pioneer product. This is in addition to the power of NIPC to revoke the pioneer certificate in certain circumstances[25]. A notable circumstance is when 'the company reneges on its commitment on the utilization of its savings accruing from the incentive without justifiable cause'. As earlier stated, there is no clear definition of what 'savings' is, neither is there a mention of how it should be utilized.

The Regulations recognize a situation where due to certain 'extenuating circumstances' such as natural disasters and insurgency, it is impossible for the pioneer company to enjoy the incentive, and it enjoins the NIPC to act in liaison with the Federal Inland Revenue Service (FIRS) to suspend the tenure of that company's pioneer status after the NIPC must have verified such a claim[26].

It is important to note that the IDITRA made no mention of the NIPC and this is understandably so since the NIPC Act came some twenty five (25) after the IDITRA. Therefore the expectation was that either the NIPC Act or the Regulation made pursuant to the Act would make reference to the IDITRA which first made mention of the pioneer certificate. However, this is conspicuously lacking. Furthermore, the Regulations were made under the hands of the Chairman of the Governing Council of the NIPC, while section 30, the purported enabling section, named the Vice President as the appropriate person to issue such Regulations without evidence of the ability to delegate such powers. Certain provisions of the

[24] Ibid. Regulation 11
[25] Ibid. Regulation 13
[26] Ibid regulation 12

Regulations purport to not only modify but override and/or out rightly repeal the provisions of the IDITRA. This certainly creates confusion as to the ability of the provisions of a regulation to override that of an enacted law especially one that it makes no reference to. In the Supreme Court decision in ***Governor of Oyo State & Ors v. Oba Ololade Folayan***[27], the Apex court stated that *"pronouncements at a press conference by the executive simpliciter are not enough to change or repeal any existing legislation"*. Applying the same analogy to this case, the Regulation can be seen as a mere pronouncement seeing that it did not properly originate from the extant body in charge of the pioneer status. Also, there being no link to the law apart from the similarity in words and phrases and the fact that the Regulation is a mere regulation it cannot alter, override or set aside any provision of an existing law, in this case the IDITRA.

2.3 APPLICATION GUIDELINE FOR PIONEER STATUS INCENTIVE 2017

As is expected of any scheme that is void of clarity, by 2015, the pioneer status was suspended following allegations of abuse of the pioneer status. The administration of the IDITRA alongside the Regulations gave rise to corrupt practices such that NIPC had been granting companies the pioneer status for up to 5 years, when it should have been three years, and a further renewal of one or two years. The explanation proffered for this anomaly was administrative convenience[28]. The NIPC's service charge was made on a five-year financial projection. The NIPC, consequently, advised the companies who had been granted the five-year holiday, that it should have been three years. The FIRS then went ahead to raise assessments on the companies for the last two years of the pioneer status. At this stage, the entire situation surrounding the pioneer status not only deprived the government of substantial revenue but it also plunged the tax payers into the difficulty of having to pay taxes retrospectively. This situation and more gave rise to the administrative suspension of the incentive.

[27] (1995) 8 NWLR Pt. 413 pg. 292 @ 310-311, paras. H-A
[28] PwC Tax Bite March 2015, Ugochukwu Dibia and Chukwuemeka Chime, available https://www.pwc.com/ng/en/assets/pdf/tax-bite-march-2015.pdf (accessed April 13, 2018)

In August 2017, the Minister of Industry, Trade and Investment issued the Application Guidelines for the Pioneer Status Incentive 2017 (the Guidelines) following the lift of the administrative suspension on the pioneer status. This ushered in the addition of twenty seven (27) items to the pioneer list. The Guidelines seek to clarify the confusion surrounding the tax holidays when it restated that the holiday period was for an initial period of three years, which is extendable for an additional one or two years. The Guidelines also sought to bring clarity with regard to the administrative agencies and departments involved in the administration of the pioneer status scheme by naming – the Federal Ministry of Industry Trade and Investment (FMITI), the Federal Executive Council (FEC), IID, FIRS and the NIPC as the extant administrative bodies. The Guidelines also takes away the confusion that was brought about by the Regulations as to who had the powers to handle applications by delegation from the Minister and President to the NIPC. Application forms and related documents including the pioneer list as approved by the Federal Executive Council (FEC) (on the delegation of the President) would be published on NIPC's site.

The Guidelines were expressed to be made pursuant to the powers granted to the Minister of Trade and Industry under the IDITRA[29] which is the extant law on the subject of the pioneer status. To this end, it is important that the Guidelines and the IDITRA be read *in tandem* such that the provisions of the extant laws prevail over the Guidelines in the case of any ambiguities or inconsistencies. The authority for this conclusion is seen in the case of ***Governor of Oyo State & Ors v. Oba Ololade Folayan*** *(Supra)* where the Supreme Court stated that a subsidiary legislation derives its authority and validity from a substantive law and it does not have the capacity to extend such authority. The first port of call in combined reading of the IDITRA and the Guidelines would seem to be with regard to the list of pioneer industries. One would see from the provisions of the IDITRA that the list of pioneer industries and products ought to be published in the *Gazette.* Consequently, in the absence of the repeal of the IDITRA, it is expected that the most recent 27-item pioneer list would still be published in the *Gazette.* As the law is that where

[29] See s. 2(1) of the IDITRA

provisions have been made as to how a certain act ought to be done, failure to adhere to that provision will amount to the act being null and void. The Guidelines clarify that the FMITI is charged with the handling applications for the incentive and that they have the power to specify the modes for applying for same. The Guidelines equally provide that the pioneer list is to be reviewed by the FEC after a period not exceeding two years. While additions made to the list become effective immediately, deletions become effective after three years.

Presently, an applicant company is required to have a 'current non-tangible asset of over One Hundred Million Naira (₦100,000,000)[30]. Applications for the incentive is to be made in the first year of production and application for extension is to be made after within one month from the expiration of the initial tax relief of three years or a previous extension of a year. Unlike the Regulations where the NIPC could carry out impact assessments, it is the applicant company that is required to submit annual performance report in the format specified by the Guidelines to NIPC for monitoring and evaluation purposes. The applicant is also expected to demonstrate the tangible impact of its business on the Nigeria's economic diversity and growth, industrial and sector transfer, export development and import substitution[31].

In addition, the Guidelines painstakingly outlines the application process such that the length of time for applying is clear, that is, that it would take twenty-three weeks to complete a new application and fifteen weeks to complete and extension application. NIPC and IID are further required to carry out "due diligence" visits in respect of the applicant's company's application and also carry out periodic PSI impact assessment and publish their assessment reports on their website[32]. Interestingly, the function of the FIRS to issue qualifying capital expenditure certificate is only applicable in an application for renewal, since the One Hundred Million Naira (₦100,000,000) non-current tangible assets requirement has become a pre-requisite for application contrary to the provisions of the IDITRA under which it sufficed for application that the applicant company had an estimated

[30] Paragraph 3.1.3 of the Guidelines
[31] Paragraph 3.1.5 Guidelines
[32] See paragraph 3.6 generally

qualifying capital expenditure which would be confirmed by FIRS during application.

3.0 DEVELOPMENT IN THE PIONEER STATUS: PARALLEL LINES

It is clear that there has been no coherence in the 'development' of the legal framework governing the Pioneer Status. The Regulation of 2014 which gave rise to the administration of the Scheme by the NIPC has confounded tax practitioners and other stakeholders alike. From the provisions of the NIPC Act, it is clear that the mandate of the NIPC is clearly the regulation of foreign direct investment in Nigeria, and pioneer status is not a prerogative for foreign controlled Nigerian companies alone. Irrespective of the Guidelines, the issuance of the Regulations by the NIPC and the Regulations themselves raise serious legal issues[33].For the aforementioned reasons, in spite of the clarifications in the Guidelines, the reason for the continued administration of the pioneer status scheme by the NIPC remains obscure. We say this because the parent legislation, IDITRA, made no mention of the NIPC hence it is absurd that its subsidiary legislation would do so without a consequently amendment to the principal act.

It is indeed worrisome that the reforms of a statute with significant economic and fiscal impact such as the IDITRA have been left to the whims and caprices of a ministry and agency of the federal government. The administrative suspension of the incentive without more is sufficient notice to the legislature to give the statute the overhaul that it is dire need of. It is also remarkable that FIRS still has very little role to play in the administration of this incentive notwithstanding the fact that it is the extant body in charge of tax administration at the federal level in Nigeria. Prior to the issuance of the Guidelines, FIRS was responsible for issuing a certificate of qualifying certificate. With the issuance of the Guidelines, an applicant company has to show evidence of non-current tangible asset of over One Hundred Million

[33] Pioneer Status In Nigeria: Finding a Balance Between Enabling Business and Stimulating Economic Growth Kingsley Opia-Enwemuche available at http://www.jacksonettiandedu.com/lawfirm/wpcontent/uploads/2017/03/PIONEER-STATUSIN-NIGERIA-FINDING-A-BALANCEBETWEEN-ENABLING-BUSINESS-AND-STIMULATING-ECONOMICGROWTH%20-(160317).pdf (accessed April 15, 2018) – In this article, the author examined the issues raised by the Regulations.

Naira (₦100,000,000) prior to application. Consequently, the FIRS have no role to play in the initial application process. The Guidelines, however, require FIRS to issue a qualifying capital expenditure certificate during an application for extension.

Finally, this requirement for 'non-current tangible asset' in the Guidelines leaves one pondering as to what may have necessitated the change in the choice of words. Under the IDITRA, the definition of qualifying capital expenditure from the Companies Income Tax Act (CITA) was imported. Could this be a strategy to make this apply to oil and gas upstream companies whose profits are not taxed under CITA?[34]Or could it be a compromise between options of increasing the qualifying capital expenditure, on the one hand, and widening the application prerequisites to include companies with significant capital expenditure which are not currently recognized as qualifying capital expenditure under CITA? If this is indeed the case, it reiterates the authors concerns that such a significant introduction should be by way of an administrative guidelines and not by statutory intervention.

3.1 THE INCENTIVE[35]

The incentive confers a maximum of five years tax holiday from the profit of a company. A successful applicant company is entitled to a three-year tax holiday from its production date, which may be renewed for two consecutive single years or one period of two years.

Under the IDITRA, a pioneer company is enjoined to only undertake trade or business in the pioneer industry or pioneer products during the pioneer period. However, where such pioneer company earns profits from operations or activities in non-pioneer products or industry activities, such profits would be subject to tax under CITA[36].

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[34] If this had been the position under the Regulations, it would have made a lot more sense. See n. 12 above. It is arguable that this, indeed, is the effect of the omission of 'qualifying' from Regulation 3(b) of the Regulations. However, this argument would not have held water under the Guidelines because as at the time of the its introduction, mineral oil prospecting and cement manufacturing were also removed from the already existing lists.

[35] (n. 1) ss 10 to 20

[36] Ibid. Section12

The tax holiday is actually not the only incentive under the IDITRA. First, assets acquired during the tax holiday and used after the holiday period enjoy the qualifying capital expenditure as if the assets have been acquired after the tax holiday[37]. A pioneer company is, after the end of the tax holiday, deemed to have commenced a new trade or business while the its activities during its status as a pioneer company is considered as the old trade or business[38]. Qualifying capital expenditure due upon the permitted assets acquired during the pioneer status would be deemed to have arisen post-pioneer period to the extent that the asset is in use after the company's pioneer status has lapsed.

Secondly, where a pioneer company incurs loss during the holiday, the IDITRA also allows that company to take the loss into the post-pioneer status period in order to set it off against the taxable profits earned.[39]

The third incentive is that the dividends payable to the shareholders of the company during the pioneer status period are tax-exempt under CITA and the Personal Income Tax Act (as amended) 2011[40]. The pioneer company is expected to open an account for the purposes of depositing all tax-exempts profits of the company. It is from this account that the dividends payable to its shareholders is to be paid. IDITRA enjoins FIRS to exercise its discretion in determining whether the dividends in the hands of the shareholders should be tax-exempt. If FIRS is satisfied with the account, then the shareholders would indeed be exempt.[41] To ensure fairness, a pioneer company is prevented from distributing dividends which exceed the amount in the aforementioned account. A pioneer company may also grant loans only with the consent of the Minister, which consent is only to be given where there is adequate security and reasonable interest rate.[42]

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[37] Ibid. section 14 (2)

[38] Ibid. section 11 – This explanation is important as it clarifies the continuous reference in the IDITRA to "old trade or business" and "new trade or business"

[39] Ibid s. 14(3) – the wordings of the IDITRA may bee a little confusing – 'computing total profits (but not profit)'. See also n. 17 for the interpretation of this incentive.

[40] Ibid s. 17

[41] Ibid s. 17(3) By way of explanation, IDITRA refers to the Board which represents the Federal Board of Internal Revenue. The Board was re-christened FIRS after amendments to CITA and the FIRS (Establishment) Act.

[42] Ibid section 18

Lastly, for a pioneer company in the plantation industry, its pioneer status shall be deemed to commence when planting first reaches maturity. Additionally, expenditure incurred on the maintenance of the planting area shall be deemed as qualifying capital expenditure for the purposes of CITA.

4.0 RED FLAGS IN THE SCHEME

4.1 Administrative Red Flags

The IDITRA clearly empowers the Minister and the President to receive applications and grant the pioneer certificate respectively. It is also clear that the other aspects of the incentive are better administered by FIRS which is the taxing arm of the Federal Government. The Guidelines and the Regulations have not taken the FIRS and the administration of the other aspects of the incentive into consideration. This is seen from the extra focus placed on the application and renewal processes. This necessarily points to the fact that there has been very little emphasis on the other benefits of the incentive and the magnifying of the tax holiday.

We advise that there be a further explanatory memorandum showing clearly the roles and the functions of each of the regulatory agencies and ministry in the administration of the incentive. The pioneer company should also know from the memorandum what each administrative agency requires for its own aspect of the application.

4.1 List and/or Products Red Flags

There are currently five lists in respect of the pioneer status incentive - Aid to Pioneer Industries (No. 1) Order, 1958; Aid to Pioneer Industries (No. 2) Order, 1958; the Industrial Development (List of Pioneer Industries) Notice, 1982; the Industrial Development (Additional List of Pioneer Industries) Notice, 2008; and recently, the List of 44 Pioneer Industries/Products Approved by the National Council of Ministers in 1989 S.I. No. 61, 2015 made on 27th May, 2015. The 2017 Pioneer List lists additional twenty seven (27) items as part of the pioneer status. However, the way and manner in which this new list was birthed give rise to serious legal concerns which could render the 2017 Pioneer List null and void by reason of the failure to have it published in the *Gazette* as clearly provided for by the IDITRA.

One other question one might raise is that as to whether there is really a need to specify the products where an industry is included. Does the mention of an industry not ultimately limit the applicability of the incentive to the industry? For instance, under the Industrial Development (Additional List of Pioneer Industries) Notice, 2008, while Real Estate Development is added as a pioneer industry, the pioneer products are 'rental income from residential and commercial premises' and 'capital gains on any real estate product disposed of within a specified period'. Apart from the fact that this is suspicious – how can it be said that rent collection and disposal of land is not being carried on in Nigeria or is not being carried on in such a scale that is suitable to Nigeria's economic requirements as to be accorded the pioneer status? – What this means, arguably, is that the actual construction of buildings or housing projects is not captured by the list. Again under the List of 44 Pioneer Industries/Products Approved by the National Council of Ministers in 1989 S.I. No. 61, 2015, large scale mechanized farming is added as an industry but the recognised products are – wheat, maize, rice and sorghum. The necessary implication here is that other agricultural products being cultivated on a large mechanized scale would not qualify for the pioneer status. This in the opinion of the authors defeats the purpose of the pioneer status granted to the large scale mechanized farming industry in the first place. On the other hand, the List of 44 Pioneer Industries/Products Approved by the National Council of Ministers in 1989 S.I. No. 61, 2015 largely replicates the industry column and the products column. The authors are of the view that the 2017 List is a preferable approach. We hold this view because we believe that it is better to, instead of producing a blanket industry list, list specific products/processes like processing of cocoa, waste treatment, disposal and material recovery, and mining and processing of coal. However, there are two worrying items on this 2017 list which give rise to some ambiguity and they are 'business process outsourcing' and 'e-commerce services'. The only consolation in this respect is the One Hundred Million Naira (₦100,000,000) non-current tangible assets hurdle for an applicant company to cross.

We are of the view that efforts should be made to have a consolidated list published in the *Gazette.* That way, it will be easy to see at a glance what products and /or industries enjoy the pioneer status. We also advise that the list be products/processes based rather than the industry listings and limiting of applicable products in the industry we currently have. We acknowledge the supporting argument that any industry is home to several products and processes, some of which may be more developed than the others but we are of the view that it is tidier that the undeveloped processes or products should enjoy the pioneer status and not the industry as a whole.

4.2 Scope Red Flag

It seems that pioneer companies are not exempt from other taxes on a company's profits such as the Education Tax[43] and the Technology Tax[44]. One of the cardinal principles of taxation is certainty. The National Tax Policy document 2017 makes mention of this. To this end, every tax payer ought to know what his tax liability is at every point in time. Thus, tax laws or tax exemption instruments ought to be clear and explicit in their provisions. On this ground we opine that the scope of the pioneer status incentive be clarified. Although, it is arguable that since IDITRA specifically mentions CITA, the pioneer status would not apply to these other taxes. However, this argument does not clear the air surrounding this issue because prior to suspension of the administration of the incentive, pioneer certificates were issued to oil and gas companies in the upstream sector even though they were taxed under the Petroleum Profits Tax Act 2004 (as amended).It would therefore save the stakeholders the trouble conjectures and guessing brings if the scope of the pioneer status incentive is clarified in order to foster certainty.

[43] This is charged under the Tertiary Education Trust Fund(Establishment, etc) Act, 2011
[44]Charged under the National Information Technology Development Agency Act, 2017 (as amended)

4.3 The Service Charge[45] Red Flag

One other problematic area in the 2017 Guidelines is the introduction of the service charge which is also hard to explain. It is even more incredulous that the service charge is payable under the Regulations where the company records negative pre-tax earnings. Ordinarily, a pioneer company's loss during the holiday is supposed to be set off from profits earned after the tax holiday. Why should it incur more loss in the name of 'service charge'? This is one aspect of the incentive that needs to be reformed without much delay as it has the potential to work more harm than good. This provision clearly does not take into consideration the commercial realities of doing business in the Nigeria of today. This practice in our opinion amounts to taking with one hand, the rights and benefits conferred with the other.

5.0 CONCLUSION

Undoubtedly, the policy consideration behind the introduction and re-introduction of the pioneer status incentive is laudable. If properly harnessed, the incentive will encourage economic activities in industries which have great prospects for the economic and fiscal developments of Nigeria. Nevertheless, present day realities have shown a slight disconnect between the provisions of the statute and the spirit of the policy considerations behind the pioneer status. It is our fear that the good for which the pioneer status incentive is known will be truncated if the ministries and government agencies continue to make regulations and issue guidelines haphazardly. There must indeed be some coherence in both the legislation and administration of the incentive.

As a popular saying goes, our tax legislation and any other legislation for that matter ought to be set out as if someone planned it intentionally. The government must as a matter of urgency either step up to its responsibilities under the pioneer status incentive scheme or get rid of the incentive in its entirety. This is because of one painful truth – if there was indeed an enabling environment in the country for businesses generally, no industry or product would need special concessions to

[45] See text n. 34.

thrive. We advocate that the IDITRA be amended and the pioneer status incentive list consolidated in line with the recommendations in this paper.

THE YOUTH TAX SUMMIT PROJECT INNOVATE

By Team Tax Club Unilag[*]

1.0 INTRODUCTION

The best time to fish is at night and when a fisherman goes to the sea, he does not call the fishes to him; rather he casts a net and draws them in. It is pertinent, now more than ever, for the Nigerian Tax Service to quit waiting for tax to come to it, but to cast a net and begin to reel income in.

The situation in Nigeria is dire regarding taxation, with a large percentage of the population including those in government, not just failing to realize the low level of tax compliance, but not understanding the enormous benefits associated with an effective taxation system and a high level of tax compliance.

To encourage and increase tax compliance and tax generation, we propose the NET plan to bring more taxable income into the tax net. NET stands for - The NEED Theory, Public ENLIGHTENMENT and Tax Collection, and TECHNOLOGICAL Convenience.

We believe that a combination of these three sustainable, convenient and equitable ideas/approaches would not just catch taxable income but increase tax compliance.

2.0 THE NET THEORY

2.1 N – The Needs Theory

2.1.1 The Focus

The idea behind this is tying the payment of taxes to the enjoyment of some benefit offered by the governance structure in the country. Thus a tax clearance certificate will be required as a document to access some of these benefits or services. It must be noted that these services will be those which the Government has either minimal or maximum control over. Sectors which have been pinpointed are electricity,

[*] As represented by Oladapo Busayo (Team Leader), Fasanya Wuraola, Opara Great, Beluonwu – Ogbo Ogechukwu, Akinbode Ayomide, Ade-Ademilua Ipinnu, Olakanye Oluwatobi, Omotosho Dolapo, Rufai Amirah, Aduloju Isaac, Iheanacho Nelson, Ogunfijitimi Olamide, Adedeji Ibukunoluwa and Abdulwahab Habeeb.

education, health, banking and telecommunication. Also this is a short term plan for getting people into the tax net and making them visible to tax collection and subsequently proper tracking and assessment.

Questions to be addressed:

1) What taxes are to be paid under this?
2) What needs do this apply to?
3) What is the attitude of tax payers and how does it relate to this?
4) How will such a process be implemented?
5) How will states effectively adapt to this?

2.1.2 Taxes to which this Applies: (Income):

(a) Personal Income tax: Individuals whose incomes are taxed or is to be taxed directly or indirectly should be made access necessities fully or partly provided by government through a possession of the electronic tax clearance certificate.

***(b) Companies Income Tax*:** Companies require this to access a whole lot of business related services due to their nature of operation and the fact that they are not easily invisible being that the incorporation process is largely governed by the structure of the State. Such services may involve government contracts, import and export, dealings with the corporate affairs commission, warehouse regulation, factories regulation, and access to account and dealings with other companies. The neglect of the process by any company incorporated or not will stifle its operations. The process here will not be to lock up such companies but ensure that the nature and steps of their operations will have to be successful through taxes. When they attempt the payment of these taxes in time of need, they pay the accumulated taxes as specified by the relevant laws, get into the tax net and this payment must be accompanied with a registration with the corporate affairs commission to enable the tax authorities track them in subsequent enforcement.

2.1.3 Attitude of Tax Payers:

The attitude of tax payers in Nigeria is one which prompts this idea. Issues related to regulation of finances in Nigeria are usually regarded with levity until measures which will stifle such finances are introduced. This fire-brigade approach of

Nigerians means that when the finance is stifled or threatened to be stifled, they will take the appropriate measures to correct their defects. An example of this is the Bank Verification Number (BVN) scheme introduced by the Central Bank of Nigeria (CBN). A lot of Nigerians today have a BVN not because of the deadline, but because the government created a need for them to have the BVN. All that was needed was to tie the need to acquire a BVN to a process which a lot of Nigerians could not do without -Financial Dealing.

For this purpose, the following sectors highlighted are some of those in which the government has either maximum or minimum control and could possibly create a ***NEED*** for all Nigerians to be Tax compliant.

1) ***Electricity*****:** The operations which this method will cover here are payment and reconnection of damaged power system. As regards payment, the sum being owe[d is to be tendered and periodically this should be accompanied by the tax clearance certificate. Though this payment is now electronically done, the proposed tax clearance certificate and method of filing proposed for this idea are also to be done electronically. This idea is then more effective due to the current distribution of electronic meters for reading electricity usage by the Government. Thus to get this benefit, the tendering of the tax clearance certificates showing no outstanding taxes should be the basis of acquiring this.

2) ***Education:*** This area covers public and, if well implemented, private educational institutions. The application by wards of tax payers into Public and private institution should be strictly through the Joint Admissions and Matriculation Board which receives over 1.7 million registrations per year. The idea behind this is that the evidence of tax payment will be needed by such a ward in applying for the process. Also the scholarships regulated by the Government should have the evidence of payment of taxes as a document to be presented during application process.

3) ***Health:*** This needs system will be a proper basis for being eligible to receive the benefits of the National Health Insurance scheme. The scheme allows for citizens registered under it to access medical care for free. Health is an essential part of human life and to access this scheme which greatly helps the project to be successful.

4) ***Banking*****:** The banking sector at this point is highly electronic. The sector is highly privatized, but it should be noted at this point that the NEEDS system is to be functional with a lot of private agents at some places where the Government has minimal control such as the banking sector. Thus financial transactions including payment, withdrawals, cheque clearance will be successful when the electronic number to be tied to this reads positive to paid taxes. The tax app will ensure that the electronic system which accompanies this related to bank database. Thus at the point of deposit in a bank, when all account information pops up, the tax liability should also reflect and when it reads negative the transaction will not be done until the proper taxes are paid. The use of Automated teller machines will also be of great assistance to this as the electronic tax clearance certificate and unique number will also relate to that process. Companies run corporate accounts which they collect lump sums in and this makes it easier to track.

5) ***Telecommunications*****:** due to the control which government has on this sector and the registration and regulation by the National Communications Commission, we will have access to these taxable individuals. This measure is not an access restrictive on but a form of reminder system for users to pay their taxes and the penalties. This reminder system will be ran by the Communications company and this links to what has been earlier stated that the NEEDS system will greatly depend on Public Private Partnership.

2.2 The Informal Sector and Licenses

In Nigeria, a good number of the states have relatively strong formal sectors with growth potential. However, majority of the people live in informal settlements or densely populated areas and work in the informal sector. Taxing the informal sector has proven to be difficult, especially because Nigeria is a cash-based economy, and many of the citizens lack sufficient education. Strategies employed by the government to tax the informal sector include levying a fixed sum for members of trade associations and imposing sanctions, which ultimately results in a standoff between the market people and the government, and also tax evasion by street hawkers.

However, in England, Wales and even South Africa,[1] legislation requires that businesses be in possession of a valid business or trade license, before business establishments can be made in specific areas, and this license requirement also covers hawking or street trading. In other words, all persons involved in trading activities of specific kinds are required by law to obtain licenses before they can carry out their business activities, even where they are done on private lands or public roads. It is submitted that Nigeria makes use of this approach to ensure tax compliance in the informal sector. That is, policies should be put in place to make the issuance of trading licenses a pre-requirement for carrying out trading activities in every part of Nigeria. This makes it easier to make the tax clearance certificate a pre-condition for obtaining such licenses which must be renewed and inspected regularly.

2.3 Tax Clearance Certificate

How**:** The tax clearance certificate has to be made, like the National identity, a document that is incorporated into the daily dealings of Nigerians. This will be in order to ensure that the document is used to facilitate this idea of NEEDS. It is only when the document becomes one of a regulatory nature that its value will prompt citizens to comply with taxes to present it in cases where it is requested for.

Problem: The country is one fraught with a lot of fraudulent activities. Cases such as forgery of this certificate to get access to those services may arise due to the fact that this idea may bring about desperation in the mind of citizens. This may even reduce the value of the document and make it common practice forge it in times of

[1] See; www.nsi.org.uk, www.westerncape.gov.za, (accessed July 212018).

need. Another issue that may arise is the fact that these people who may act desperate due to the fact that they may have to attend to these NEEDS may liaise with unscrupulous elements to pay a waived sum rather than the amount that has actually accrued as the rightly assessed sum. The only way around this is to properly regulate the validity of the certificate as well as the NEEDS system and this largely leaves the option of making the system an electronically administered one.

Electronic Tax Clearance Certificate: An electronic tax clearance certificate is one which to a large extent addresses the problems highlighted above. This ensures that the system is not really manipulated as any electronic mishap will leave traces. Thus, this is to be administered by the tax app and everyone can create and operate an account but the tax authorities regulate this by monitoring the unique number given to the tax payers. This number is to be used for banking transactions and telecommunication, while the paper work for those who are not electronically inclined will be presented but an online database will exist to back that up. This does not mean that hard copy filing would not be explored. The idea here is that such people who are not technologically inclined, can file through documents and have tax authorities file them online on their behalf.

2.4 States Comparative

1) States who have sound systems on ground: There are states which have systems to facilitate this. These states have a high taxation income and contribute greatly to the Internally Generated Revenue. States including Lagos and Kwara have these structures and the idea for state governments is to identify the NEEDS which they could tie this method to. Thus in this situation, we have an almost clear cut system.

2) ***States still building such system:*** A lot of states are still in the process of adapting to the idea of exploiting taxation to boost their Internally Generated Revenue. This idea may not be a clear cut one for them because they are still in the process of building a structure for tax collection and even a database. However, this may aid them in building this structure by also identifying an area to tie NEEDS to. An example is that in farming states, the access to fertilizers regulated by the government may make these people in such areas have a tax paying culture to access the fertilizer.

2.5 The Way Forward:

To test run this idea, it's advised that the Federal Inland Revenue Service applies this to federal taxes in relation to areas where the Federal Government has maximum or minimum control. This will help a lot of states who do not have the structure to slowly but effectively adopt this model.

3.0 E–(PUBLIC) ENLIGHTENMENT AND TAX EDUCATION AS A SOLUTION TO NIGERIA'S TAX COMPLIANCE ISSUE

It is not far-fetched that one of the grass root problems of Nigeria's tax compliance issue is the lack of public enlightenment and the inefficiency of tax education or the absence of tax education. A good number of Nigerians do not know that the payment of taxes is a civic responsibility mandated by the Constitution of the Federal Republic of Nigeria. Furthermore, they are ignorant of how their taxes interface with the smooth operation of a government. This is where corruption stems from. When an ignorant Nigerian would rather choose to bribe the tax collector with the same amount he would have paid for his taxes. This is why the importance of public enlightenment and consistent tax education cannot be overemphasized.

Thus the suggested method in achieving a well enlightened and educated citizenry is what can be termed *'Institutionalization of Tax Culture'*.

3.1 Tax Education and Enlightenment

This involves the incorporation of tax education into our educational systems, from a basic level up to the tertiary level. This ensures that basic fundamental knowledge of taxation and our tax policy to be inculcated in students - *"cradle to grave approach."* Thus, the Federal Ministries of Education and Information are expected to provide support to the Federal Ministry of Finance, especially in the areas of taxpayer education and public enlightenment. The Federal Ministry of Education is expected to incorporate tax education in the curricula of institutions in the Nigerian educational system, using the *"cradle to grave"* concept of taxpayer education, thus entrenching a tax culture in the psyche of every Nigerian at an early age. On its part, the Federal Ministry of Information is charged by the National Tax Policy to regularly implement public enlightenment campaigns on issues revolving around tax and government revenue and expenditure. States Ministries of Information and Education are enjoined to replicate at the State level the role envisaged for their federal counterparts. Also during the national youth service, sensitization of all service members during that service year would go a long way to ensure we have an informed population. This also creates an opportunity for them to be captured into the tax net and help educate their local community of service.

3.2 Tax Collection: Residency and the Law

A foremost problem flowing from lack of enlightenment is the issue of the actual collection of these taxes, especially at the informal sector. The education of the relevant parties on the need and civic requirement to pay tax is incomplete where the government cannot reap the untold revenue fruits, again particularly in the informal sector. Governmental emphasis on taxation is set to double and even triple over the next three years, such that fusion of certain functions may need to be undertaken in order to maximize revenue generation potential across all the states of the federation. In that regard, the idea/issue of giving tax collection a face in the informal sector might just be that bold move needed to shake the country out of its tax inertia.

Humans are more prone to engage in an activity where the person in charge is known to them, if not on a personal level, then from a third party point of view. Nigeria specifically boasts of its richness in culture and said richness relates to our observance of religion and religious practices and our 'everyone is my neighbour' way of life. It is quite possible to harmonize these social traits into a system of tax collection that will truly, finally maximize the revenue generation potential of the informal sector in particular, and the tax structure at all levels in general.

3.2.1 How will this work?

It is proposed that the FIRS and other revenue authorities, working with the full manpower of the federal government, begin to deploy human resources to these particular areas for the purpose of tax education and collection. This can be done in a number of ways. First, Nigeria is already divided up into Local Government Council Areas; these LGAs can be split further into smaller units for tax collection purposes to the effect that each tax unit has an FIRS liaison attached to it. Each unit is strictly responsible for the tax collection of those within its defined location. Already, critical surveys must have taken place to put a number to the expected revenue to be generated from each and every unit/LGA. This can be done in line or at the same time as a national census so as not to repeat the same function and to save costs. Once the expected tax revenue of any particular locality has been ascertained by determination of the taxable persons within it, the revenue authorities must then take the next step and put in place viable structures that will ensure these taxes are collected accordingly. Whether we fully understand it or not, Nigeria already has in place a particular hierarchy structure in place in the informal sector. The basis of this structure is the importance of an individual, and all the FIRS needs to do is tap into this structure and either replace its key figures with its own members, or empower the key figures already in place to do the job that the revenue authorities need done.

For example, a highly placed religious leader and his church/mosque within the community, the local *baalé,* chief or traditional ruler, elected heads of particular estates/communities/areas etc. These people, through their relationship with their respective communities have, over time, built a structure of trust and dependence. In areas where the informal sector is a thriving market, the people of these communities often turn to their leaders for help and consultation. Nigerian politicians have been known to effectively apply this system ever since our independence, particularly in the Northern part of the country. It is no news that to get the vote of the community leader is to get the vote of the entire community, thus politicians have been known to go all out during electioneering season, focusing on the particular community leader and literally spoiling him or her with the right 'incentives' to ensure the vote of the entire area.

The FIRS can adopt this age old political man oeuvre and adapt it to suit its peculiar needs in the areas of tax education and collection. A workable system, for instance, is that the same way employers are required to hold onto the tax of their employees for eventual remittal to the government, is the same way these community leaders can be charged to ensure the collection of taxes from all taxable individuals within their community and then remit the tax collected to the FIRS liaison office located within that particular unit. Continuing to use the people already in place, rather than an outright replacement by the FIRS will save the government numerous costs as well as remove the possibility of facing the disenchantment of the inhabitants of the specific community. It is then left to the revenue authority to work with the particular community on the particular pattern or structure to be employed within said community. As earlier mentioned, each Tax unit has a standing FIRS liaison office attached to it and this ensures sufficient legal backup for the community leader. This is a basic system that has the potential of reaping huge economic advantages for all involved.

4.0 T – TECHNOLOGY A TAXATION APP

The Taxation app is an attempt to use technological development to infuse in our tax system the most important cannons of taxation i.e. the canon of certainty, the canon of equity, the canon of convenience and the canon of economy.

The Taxation app would be used for the administration of the following taxes all within the jurisdiction of the FIRS.

4.1 Why a Mobile Taxation Application?

The influence of technology on other sectors of the Nigerian economy most especially the influence of mobile banking on the activities of the banking industry in Nigeria is so enormous any attempt to do without it would lead to various economic hardship. If implemented well and used by most taxpayers, will benefit both tax authorities and the taxpayers as it lightens workloads and reduces operational costs.

4.2 Features of the Taxation App

(i) Information (news, dictionary, customer care hotline Alerts, notification and reminders, Link to all social media platforms of FIRS and closest tax office)

(ii) Documentation (record of payment, clearance certificate)

(iii) Calculation (E-filling of taxes, Refund of excess taxes)

(iv) Payment (online payment, card payment, direct debit)

(v) Incentives (ads for SMEs and Credit Rating / Tax compliance status.)

(vi) This is a proposed advancement to curb the actions of people who are not tax compliant. A tax payer's tax compliance status is as a result of his action or in action towards tax payment over a period of time. Banks, Government institutions and agencies are to imbibe the habits of demanding for the tax compliance status at all necessary times.[2]

4.3 How It Would Work

For yet to be registered companies their TIN should be given to such companies upon registration with the CAC, The TIN should be programmed in a way that it contains the details of all the Taxes they are liable to pay. For already registered companies their TIN should also be programmed in a way that it contains the details of all the Taxes they are liable to pay.

Also for private persons and the informal sector, inspiration should be taken from the strategic position of local bet shops around us. The relevant tax authority could have a small and if possible movable outlet in major markets and informal communities that would be in charge of assessment and collection of taxes. These outlets would be equipped with the needed facilities to first register and get members of that informal community into the database, conduct an assessment of their tax liability (presumptive taxation) and give out a TIN which would be used

[2] This application would be available on desktops to meet up with the standard of big companies and organisations.

to pay their taxes at these various outlets at subsequent times. Over time, just as everyone is moving with the technological trend and making bets on their phones, banking on their phones they would be paying taxes on their phones.

4.4 The Benefits of the Taxation Application

(i) It helps battle corruption by reducing human input in the tax collection process.

(ii) It reduces the cost of tax payment and collection

(iii) It would prevent Double Taxation.

(iv) It would help in tax refund.

(v) It improves our Tax morale.

(vi) It would ease tax filing and create an avenue for easy payment.

(vii) Its proper implementation would provide a data base for the FIRS and also make Tax auditing easier.

(viii) It would create social interaction and relationship between tax payers the FIRS.

5.0 CONCLUSION

The NET Theory: tying taxation to the needs of the people, providing stimuli for tax payment, compliance and generation, whilst progressing with the tides in relations to technological advancement and innovation.

For a nation which is out of recession only on paper and is at a crossroad as to revenue generation, taxation is the only tool that covers the entire field. Hence, tax compliance has to be at a high level for the wheels of the Nigerian economy, as a whole, to keep grinding, and for development of the lives of its people and for the life of the nation.

MICROFINANCE BANKS AND THE VAT LEGISLATION: IS THERE A CASE FOR EXEMPTION?

By Taiwo S. Okunade*

ABSTRACT

The primary aim of new National Tax Policy is to introduce new strategies that will enable government achieve its objectives of creating an enabling environment for businesses to thrive while simplifying the tax system. This underlying principle is expected to be applied in the purposive interpretation of ambiguous provisions of the tax laws.a

1.0 INTRODUCTION

Nigeria's banking sector has few controversies resulting from ambiguity in the tax laws. One of the most prominent of these controversies is the applicability of value added tax (VAT) to financial services rendered by microfinance banks. Federal Inland Revenue Service (FIRS) typically expects microfinance banks to charge VAT on services rendered to their customers based on relevant provisions of the Value Added Tax Act, Cap V1, LFN 2007, as amended (VATA or the Act). However, many microfinance banks have challenged FIRS' position on the grounds of alternate interpretation of VATA that supports exempting VAT on services rendered by these institutions.

This paper examines the current legislative provisions guiding the applicability of VAT on services of banks and other financial institutions and arguments against the imposition of VAT on services rendered by microfinance banks in Nigeria.

2.0 HISTORY OF MICROFINANCE BANKS

Microfinance banks metamorphosed from three types of financial institutions - Universal Banks, Community Banks and Non-Governmental Microfinance Banks.

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* Senior Manager, Tax & Regulatory Services, Delliotte Nigeria

The erstwhile community banks were introduced in the 1990s under the Community Banking Decree of 1992 to bridge the gap in credit capacity between high-income earners and low-income earners in Nigeria. The community banks were small-scale and non-discriminatory in their dealings with customers. They were established to assist the Federal Government in improving the ability of grass root customers in the informal sector to access credit facilities.

In December 2005, the Central Bank of Nigeria (CBN) released a microfinance policy known as Microfinance Policy, Regulatory and Supervisory Framework ("CBN Policy"), "which serves as the framework for the establishment of microfinance banking in Nigeria**."** According to the CBN, the formal financial system only provided financial services to about 35% of the economy, while the remaining 65% were excluded. This 65% were serviced by the informal financial sector such as non-governmental organization microfinance institutions, money lenders, credit unions, etc.

The CBN Policy provides for two categories of microfinance banks; namely, microfinance banks licensed to operate as a "unit banks3" and microfinance banks licensed to operate in a State4. All existing licensed community banks at the time were required to transform to microfinance banks within 24 months from the effective date of the CBN Policy, subject to meeting the specified capital and other conversion requirements.

3.0 VAT AND MICROFINANCE BANKS

The VAT Act (VATA), being the primary legislation governing the imposition and administration of VAT in Nigeria, provides for the imposition of VAT at 5% on all supply of taxable goods and services except those specifically exempted in the First Schedule to the Act.

Generally, VAT is applicable to fees and commissions charged by banks and other financial institutions for services rendered. However, it was clarified in FIRS Information Circular5 that rewards for activities of these institutions that constitute returns on investment are not liable to VAT. These rewards include interest on loans/advances, overdraft facilities, savings accounts, bank deposits and interbank placements, dividends, profit on disposal of securities, etc.

Considering that there is no specific VAT exemption for microfinance services in VATA, the above may therefore suggest that VAT would apply to microfinance services. This supports the current practice by FIRS of requesting microfinance banks to charge VAT on fees earned from services rendered to their customers, provided the rewards do not constitute returns on investment. However, this FIRS' practice may not be consistent with the tax laws for the following reasons:

(i) Part II of First Schedule to VATA specifically exempts services rendered by Community Banks, People's Banks and Mortgage Institutions from VAT. However, VATA does not define what constitute a "community bank" for VAT purposes. A working definition in Paragraph 6.0 of the CBN Policy refers to community banks as microfinance banks licensed to operate as unit banks. Given that operations of unit banks are required to be community based, it could be argued that the provisions of VATA relating to community banks are also applicable to microfinance banks licensed to operate as unit banks.

(ii) From the legislative sequence of events, one may argue to a large degree of conviction that services provided by microfinance banks (or at least, those licensed to operate as "unit banks") should be clearly exempt from VAT.VAT became part of Nigerian tax regime in 1993. The original legislation, VAT Decree No. 102 of 1993 includes services rendered by Community Banks, People's Bank and Mortgage Institutions as exempt services. At the time this legislation was promulgated, Nigeria used to have community banks and People's Bank but not microfinance banks. These categories of financial institutions have now been replaced by microfinance banks following the CBN's directive in December 2005.Although, there have been amendments to VATA post-2005, failure to replace community banks and People's Bank with microfinance banks on the list of exempt services was a clear oversight. As the successor in title to erstwhile community banks, with the transition necessitated by legislation (i.e. the CBN Policy), microfinance banks should naturally enjoy the VAT exemptions that community banks and People's Bank enjoyed.

(iii) The CBN Policy provided a framework for certain fiscal and regulatory incentives to be granted to microfinance banks that emerged as a consequence of CBN's directive of December 2005, including exemption from VAT. Paragraph 12.1 of the CBN Policy states that "CBN shall collaborate with appropriate fiscal authorities in providing favorable tax treatment of microfinance banks' financial transactions including exemption from VAT on lending and tax on interest income and revenue". There is no evidence that CBN and FIRS have collaborated in implementing this policy. Though, the CBN Policy is not a law in itself; it however provides a guide as to the intentions of the CBN when issuing the directive for the establishment of microfinance banks in Nigeria, one of which was to exempt financial transactions of the banks from VAT, in consonance with the provision of VATA as it relates to services provided by the defunct community banks.

4.0 CONCLUSION

There is no doubt that the erstwhile community banks are similar, if not the same, as microfinance banks, given the nature of their operations and the strategic intent behind their establishment. Hence, the provision of VATA which exempts services rendered by community banks from VAT is also applicable to microfinance services.

Further, in order to support the Federal Government in actualizing its objective of promoting Nigeria's economic development through microfinance banking, the FIRS must suspend its current practice of subjecting financial services rendered by microfinance banks to VAT. The FIRS may consider issuing a circular or guideline to provide clarity to stakeholders in this regard. Also, there may be need to update the list of exempt services in Part II of First Schedule to VATA by replacing the term "Community Banks" with "Microfinance Banks".

The foregoing will go a long way towards resolving the existing controversy. It would also ensure fair treatment of microfinance banks and promote compliance with extant VAT legislation in Nigeria.

FF's:

1. National Tax Policy issued by the Federal Ministry of Finance and approved in February 2017.
2. Microfinance Policy, Regulatory and Supervisory Framework.
3. Unit Banks operate within the same State.
4. State Microfinance Banks operate in more than one State.
5. FIRS Information Circular 9503 (1 December 1995)

THE MANAGEMENT SERVICE FEES –TRANSFER PRICING AND REGULATORY CONSIDERATIONS

By Joseph Alatishe*

1.0 INTRODUCTION

Profits impact income taxes; therefore deduction of any recognised expense (ranging from interest on loans to management service fees) from income impacts negatively on income taxes.

Profit withdrawal, which could be a form of expense deduction, raises concerns particularly in respect of transactions occurring between related parties. While laws do not seek to prohibit valid transactions resulting in deduction from income, related parties control each other or may be under common control, thus, such entities may enter into arrangements (through aggressive tax planning) seeking to benefit the overall group from a tax perspective. If left unchecked, such transactions may result in remunerations that are not in alignment with economic activities performed.

One method of profit extraction that appears extremely susceptible to abuse is management services, in view of its flexibility and modality of implementation. In this regard, Nigerian government seeks to prevent any adverse tax implication arising there from with general anti-avoidance provisions and express restriction on deduction of management services from taxable profit (subject to some approvals) among others.

Other methods of combating the ills include prescriptive transfer pricing (TP) and regulatory regimes which seek to claw back any tax/economic benefits realised from "mispricing".

The implications of these are set out below.

* Senior Consultant Tax & Regulatory Services, Deloitte Nigeria Contact: email: jalatishe@deloitte.com.ng

2.0 TRANSFER PRICING

Transfer pricing seeks to ensure proper allocation of taxing rights and revenue between companies and ultimately jurisdictions on cross border transactions. This enhances countries' ability to protect their tax base and prevent profit shifting/withdrawal on related party transactions; ensuring equitable returns on economic activities as if transactions were executed with independent parties.

Thus, in view of Government's scepticism towards management service, the first aspect of ensuring management service fees pass the litmus test is ascertaining its existence. As noted by Paragraph 7.18 of the Organisation for Economic Cooperation and Development (OECD) Transfer Pricing Guidelines (which applies in Nigeria), description of payment as fees does not presuppose the actual provision of a service. Additionally, relevant income tax laws in Nigeria empower the relevant tax authority (RTA) to disregard any transaction appearing to be a sham.

To ascertain provision of actual management service, OECD TP Guidelines prescribes the "benefits test" – covering the economic or commercial value to the recipient. In essence, whether in comparable circumstances, the recipient be willing to pay a third party for such service or perform the activity in-house by itself.

Therefore, upon determination of provision of management service, it becomes instructive to determine the right compensation for such services in order to prevent tax clawback. For this purpose, OECD TP Guidelines accepts the use of the direct and indirect charge methods in determining the cost base of such remunerations. It also sets out prescriptive rules on how arm's length costs can be ascertained.

In applying TP rules for price ascertainment, it is imperative to consider the nature of functions performed – including a determination of whether the service is low value-adding. The OECD TP Guidelines recommends a simplified approach to determine prices for low value-adding services.

3.0 REGULATORY/EXCHANGE CONTROL CONSIDERATION

The Nigerian TP Regulations, taking cognizance of activities which require simplified approach, included the "safe harbour" provisions in determining arm's length remuneration. The safe harbour rules specify that full TP report/mechanism may not be required where the RTA is satisfied that remuneration threshold is at arm's length following:

a. determination in accordance with the requirement of Nigerian statutory provisions; or

b. approval by other Government regulatory agencies or authorities established under Nigerian law

The safe harbour rules become important to cross border agreements on transfer of technology involving management services into Nigeria. Based on Section 4(d) of National Office for Technology Acquisition and Promotion (NOTAP) Act, such agreements require NOTAP approval. NOTAP approval entails setting a threshold on the amount that are payable in respect of such agreements over a period of time (1-5% of PBT).

Such registration qualifies for safe harbour exemption; albeit, subject to the satisfaction of the RTA that it is at arm's length. Therefore, NOTAP's approval of a management service agreement is prima facie evidence that the remuneration is at arm's length; but not conclusive.

In practice, it is doubtful if RTAs rely on NOTAP certification as a safe harbour. This is on the basis that while RTAs look out for arm's length nature of transactions to protect tax base and enhance tax revenues, NOTAP is focused on preventing capital flight out of Nigeria and protection of foreign exchange (Forex) base.

It is on the premise of tax and forex base protection that the Central Bank of Nigeria in its Forex Manual requires NOTAP approval and evidence of tax payment before allowing official sourcing of foreign currency from its authorised players.

The regulatory oversight on management services in Nigeria became more interesting in the last 2 years with the rules issued by the Financial Reporting Council of Nigeria (FRCN) on recognition of expenses requiring regulatory approval. FRCN, the body overseeing financial reporting of public entities in Nigeria, prohibits without relevant approval, recognition of expenses which require regulatory approval (e.g. NOTAP approval for management service embedded in technology transfer agreements).

Thus, without such approval, public entities are unable to book the relevant expense, giving rise to more taxable income and making the concept of transfer pricing superfluous. This gets more intricate with NOTAP's circumspect stance on management service approvals. NOTAP not only conducts the "benefit test" as described above; it also examines "locality test" – capacity of Nigerians to carry out these activities.

4.0 CONCLUSION

The above notwithstanding, profit withdrawal has not been and cannot be eliminated in Nigeria. However, there needs to be a balance between faithful implementation of the TP and regulatory regimes considering the need for foreign investment and ease of doing business in Nigeria as both play important roles in providing additional resources that can be galvanised towards Nigeria's economic growth and development.

THE NIGERIAN LEGISLATION AND ITS SHADES OF GRAY –SERVICE RENDERED BY NON-RESIDENTS AND VALUE ADDED TAX (1)

By Asiata Atinuke Agboluaje *

In the last two years and within seven months apart, two divisions of the Tax Appeal Tribunal (TAT), in Abuja and Lagos, gave conflicting decisions on two cases with similar facts. The underlying issue for consideration was the applicability of Value Added Tax (VAT) is applicable on services rendered by a non-resident to a Nigerian company.

In *Gazprom Oil & Gas Nig. Ltd. v Federal Inland Revenue Service (FIRS)*[1], Abuja TAT held that a non-resident company (NRC), which rendered service to a Nigerian company exclusively outside Nigeria, was not obliged to register for VAT pursuant to Section 10 of the Value Added Tax Act (VATA). The NRC was therefore under no obligation to charge VAT on its invoice. Consequently, Abuja TAT held that since VAT was not charged, the Nigerian company had no obligation to deduct VAT as the provision of Section 10(2) of VATA, which mandates deduction of VAT (from payment to a non-resident service provider), was not triggered.

Conversely, in *Vodacom Business Nig. Ltd (Vodacom) v FIRS*[2], TAT sitting in Lagos relied on Section 2, the charging provision that imposes VAT on supply of goods and services, in reaching its conclusion. Lagos TAT held that VAT applied to supply of bandwidth by an offshore entity with no presence in Nigeria. Thus, the Nigerian recipient of the service was obliged to deduct and remit VAT to the tax authorities in the currency of the transaction.

The representatives of Vodacom drew Lagos TAT's attention to the decision in *Gazprom* to persuade the Tribunal to reach the same conclusion. Lagos TAT however stated that the *Gazprom* case was held in error (*per incuriam*) as Section

* Senior Manager, Tax & Regulatory Services email: aagboluaje@deloitte.com.ng

[1] (2015) 19 TLRN

[2] Appeal No. TAT/LZ/VAT/016/2015

10 (which formed the basis of *Gazprom's* decision) is an administrative provision which does not impose VAT.

These conflicting decisions show the inadequacies and ambiguities in VATA regarding the taxation of "imported service". In this regard, it becomes imperative to examine the legislative provisions critically.

Generally, substantive tax laws have three major ingredients:

(1) Charging provisions – these are provisions that impose tax;
(2) Ambit – this relates to eligible persons and transactions;
(3) Administrative provisions – these are provisions relating to collection and dispute resolution procedures.

VATA, which imposes a consumption tax on end user, is not any different from most tax laws in this respect. The relevant ingredients of VATA are further assessed below:

i. ***Charging provisions (is there a tax?):*** VATA, via its charging provision (Section 1) imposes VAT.

ii. ***Ambit (on whom/what does the tax apply?):*** Sections 2 to 5 of VATA impose the tax on "supply of all goods and service" except those set out its Third Schedule. The exemptions are quite restrictive, listing out specific goods and services.

iii. ***Administrative provisions (how is the tax collected?):*** The administrative provisions of VATA set out the modalities for giving effect to the "charging provisions" and the "ambit". Essentially, the administrative provisions will only be triggered if the person/transaction falls within the ambit of the law. Where the person or underlying transaction does not fall within the ambit of the law, the administrative requirements are superfluous.

The administrative provisions cover registration, invoicing, collection and remittance requirements etc. Sections under this head in VATA include Section 10.

The wide charging provision/ambit and restrictive nature of the exceptions under VATA connote that Nigerian VAT, if interpreted strictly, applies to sale of all goods and services. If given this strict interpretation, Nigerian VAT will apply regardless of whether the sale is carried out within or outside Nigeria or between Nigerians and non-Nigerians, provided they do not fall within the listed exceptions in the Third Schedule.

This strict interpretation appears absurd and would most likely be impracticable in view of the territorial nature of tax laws. The most likely interpretation would be that VAT applies on supply of goods and services which falls under territorial powers of the Nigerian tax authority. This would include transactions with Nigerian supplier or recipient (subject to relevant exceptions). Considering that tax is levied on the end user, it is arguable that Nigerian VAT applies where the person that enjoys the service (obliged to bear the responsibility) is resident in Nigeria.

In technical terms, this principle could be subsumed under the 'destination principle', which stipulates that VAT should be charged where the person enjoying the benefit resides. Although, not expressly stated in our laws, the destination principle is one of the globally acceptable bases of charging VAT.

The above principle therefore, raises the underpinning issue of whether Nigerians are bound to pay VAT on services rendered to them by non-Nigerians, outside Nigeria. This question becomes more pertinent because by implication (based on the provisions of Sections 5 and 6, which describe how to ascertain underlying value of goods), VAT applies to imported goods. On the other hand, ''imported services'' are not expressly listed as falling within the ambit of VATA. This is because other than the definition of "imported service" ("service rendered in Nigeria by a non-resident person to a person inside Nigeria"), there is no other reference to the term within the entire legislation. In effect, it is arguable that the definition is inconsequential and does not serve any purpose in VATA.

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NIGERIAN LEGISLATION AND ITS SHADES OF GRAY – SERVICE RENDERED BY NON-RESIDENTS AND VALUE ADDED TAX (2)

By Asiata Atinuke Agboluaje

1.0 ANALYSIS OF THE *GAZPROM* CASE

As earlier indicated, the conclusion reached in *Gazprom*'s case was premised on the provision of Section 10 of VATA regarding registration by a non-resident. Understandably, Section 10(2) of VATA mandates a non-resident that "carries on business in Nigeria" to register for VAT. However, this requirement falls under the administrative provision of VATA. This section, by no stretch of the imagination, imposes VAT on transactions.

The fact that Section 31 of VATA makes it an offence for an unregistered person to issue a VAT invoice does not change this analysis. This is more so as Section 31 goes further to empower "any one authorized" to issue a VAT invoice. Thus, where a non-resident does not "carry on business in Nigeria" and consequently not obliged to register for VAT, such non-resident is still obliged to charge VAT in line with Section 15 of VATA, where the person enters into transactions subject to Nigerian VAT.

Under Section 15 of VATA, VAT invoice may be issued by a "taxable person" (any person) that has made a "supply" (any transaction for a consideration). Therefore, it is arguable that a non-resident is "authorized" to issue a VAT invoice irrespective of the registration requirement, provided it satisfies the other condition for imposition of VAT.

Another consideration of the Abuja TAT in reaching its decision in Gazprom was that VAT is not due unless and until it is charged, based on Section 10(2). While this appears to be valid argument, it is not fool proof in view of the provision of Section 5(1)(a) of VATA. According to Section 5(1)(a), the value of taxable goods (on which VAT is charged), shall be "deemed to be the amount which with the addition of the tax chargeable is equal to the consideration". In essence, where VAT is not included separately, it is presumed that the contract sum is inclusive of VAT.

Therefore, irrespective of the issuance of VAT invoice, the Nigerian party is obliged to deduct VAT and remit appropriately.

2.0 ANALYSIS OF THE *VODACOM* CASE

Lagos TAT, in Vodacom case on the other hand, relied on the charging provision, which imposes VAT on the underlying transaction. It distinguished (in my opinion, rightly so) Section 10 (an administrative provision) from Section 2 (a charging provision) and concluded that supply of bandwidth by a company outside Nigeria (to a Nigerian company) falls within the ambit of VATA. The Tribunal held that the destination principle supported the provision of the VATA.

While the decision addressed transactions chargeable to VAT, it failed to address a critical issue raised in *Gazprom's* case on whether non-issuance of a VAT invoice is a condition precedent to payment/remittance of VAT.

Overall, until a court of higher jurisdiction affirms either decision, both are unfortunately valid under our jurisdiction. It thus leaves taxpayers in a dilemma on the path to take. However, this situation could have been avoided if our law was unambiguous.

Nonetheless, tax authorities may rely on some practical approaches to resolve attendant issues. These includes, generating a generic Tax Identification Number (TIN), where TIN is considered absolutely necessary for the issuance of a valid VAT invoice. FIRS could allocate a generic TIN to NRCs that do not have tax presence, warranting tax registration, in Nigeria. This will enable such NRCs quote the generic TIN when issuing a VAT invoice which in turn mandates remittance. This would be similar to generic

TIN created to ensure bulk remittance of withholding tax (by the payer to avoid sanctions) where the recipient has no TIN.

In the long run, an amendment to VATA is required, covering amongst others, inclusion of "imported service" within its ambit. The conclusion in the cases might have been different if "imported service" were included in Section 2-5 of VATA.

This is because the definition envisaged that services will only be considered "imported" with attendant taxes where a non-resident renders the service in Nigeria. In the same vein, the link between the administrative and charging provisions of VATA may be clearly set out to determine the import of each provision.

The above and many others should be given due consideration when implementing (with attendant amendments to the laws) the National Tax Policy which identifies the promotion of indirect tax as one of its core focus.

STAMP DUTIES ON BANK DEPOSITS AND TRANSFERS: ARE THERE UNRESOLVED ISSUES?

By Taiwo S. Okunade[*] and Karen Falade[**]

1.0 INTRODUCTION

The Stamp Duties Act[1] (SDA) provides the legal basis for the imposition and collection of stamp duties in Nigeria. Stamp duties are chargeable on all instruments relating to matters executed between a company and individual, group or body of individuals and those executed between persons or individuals. The instruments upon which stamp duties are chargeable include bond, bill of exchange, promissory note, covenant, conveyance on sale, lease, mortgage, etc. The duty rates vary depending on the types of instruments or nature of transactions and these may be flat charge or ad valorem charge (i.e. percentage of the value of the transaction).

The Federal Government is the only competent authority empowered to impose, charge and collect duties on eligible instruments if such instruments relate to matters executed between a company and an individual, group or body of individuals. State Governments are however permitted to collect duties in respect of eligible instruments executed between persons or individuals.

In a bid to increase enforcement of the provisions of the SDA, especially with respect to transactions consummated in the informal sector, the Federal Government, through the Central Bank of Nigeria (CBN), issued a circular on 15 January 2016 mandating all Deposit Money Banks (DMBs) and other financial institutions to enforce collection of N50 stamp duty on eligible transactions.

CBN issued this circular in the wake of Federal High Court (FHC)'s decision in *Kasmal International Services Limited v. CBN*[2] The court held that CBN was duty

[*] Senior Manager, Tax & Regulatory Services Contact: Email: tokunade@deloitte.com.ngTel: 0805 6598 421

[**]Assistant Manager, Tax & Regulatory Services Email: kfalade@deloitte.com.ngTel: 0805 6598 434

[1] Chapter S8, Laws of the Federation of Nigeria (LFN) 2004

[2] Suit No: FHC/L/CS/1710/2013.

bound to ensure that all financial institutions, under its regulation, deduct stamp duty of N50 on all receipts given by any person in acknowledgement of goods purchased or services rendered (including electronic transfers or teller deposits) of monies from N1,000 and above.

The circular specifically listed, as eligible transactions, all receipts issued by banks and other financial institutions for services rendered in respect of electronic transfer and teller deposits from N1,000 and above for stamp duties purposes. This general rule is subject to some exceptions – such as receipts for transfer to self, transfers from savings accounts and receipts in respect of salaries and wages, further to a statement issued by CBN on 21 January 2016.

Most banks immediately commenced implementation of CBN's directive by charging their customers a N50 stamp duty for each eligible transaction consummated through their accounts. CBN further mandated banks to periodically account for the stamp duties collected and subsequently debited same to the banks' accounts with the CBN. This practice has continued since the issuance of the circular till date; albeit, it has been saddled with controversies due to challenges from some stakeholders.

In April 2016, in a case between *Standard Chartered Bank Nigeria Limited and Kasmal International Services Ltd &Ors*[3] on the powers of the Nigeria Postal Services (NIPOST) to collect stamp duties on receipts issued for payments above N1,000, the Court of Appeal (CoA) ruled, for academic purposes, that receipts given by banks for money received by them on behalf of their customers are exempt from stamp duties. The court supported its position by citing the provision of the Schedule to the SDA which exempts from stamp duties, "receipts given for money deposited in any bank or with any banker, to be accounted for and expressed to be received of the person to whom the same is to be accounted for or for money withdrawn from a savings bank account".

[3] Suit No: CA/L/437A/2014

Further, on 13 March 2017, in the case of *Retail Supermarkets Nigeria Limited (AKA Shoprite) v. Citibank Nigeria Limited & CBN*[4], the FHC ruled that the CBN circular is inconsistent with the provisions of the SDA and as such is null and void. The judgment of the FHC aligned with the decision of CoA in the aforementioned case between ***Standard Chartered Bank Nigeria Limited v. Kasmal International Services Limited & Ors***[5].

The major decision in the last two mentioned cases is that receipts given for money deposited in any bank are exempt from stamp duties. Also, banks and other financial institutions do not have any obligation to charge, collect and remit stamp duty on receipts given for deposits or transfers as there is no provision or amendment in the SDA conferring such powers upon them.

2.0 CONCLUSION

It is worth noting that the decision of CoA could still be challenged. However, until a higher court overrules the decision or the SDA is amended, banks are not under obligation to charge stamp duties on receipts given for monies received on behalf of their customers and remit same to CBN or the tax authorities.

Despite the established judicial precedents with respect to the legality of CBN's directive to banks to act as collection agents for stamp duties purposes, some banks are yet to stop implementing the provisions of the CBN circular. This is in view of the significant influence CBN has on banks and the reluctance of CBN to withdraw its circular. The dilemma of banks has been heightened by recent attempts by Lagos State Government to enforce banks to collect stamp duties on receipts made by banks for transfers and deposits between individuals within the territory of Lagos State. It is however doubtful that Lagos State Government has been successful in making banks to comply with this directive in view of the challenge around its constitutionality.

[4] Suit No: FHC/L/CS/126/2016
[5] Suit No: CA/L/437A/2014

If the practice of deducting stamp duties from customers' bank accounts is not suspended, it is expected that other stakeholders would challenge the banks on a case by case basis. Thus, the impending legal suits that would emanate as a result are likely to disrupt the activities of banks and result to additional legal costs.

Recently, a Bill was introduced to amend certain provisions of the existing SDA. One of the proposed changes is the expansion of scope of the SDA to cover receipts for bank deposits and transfers. The Bill is currently going through legislative process and until it is passed, stamp duties should not apply to receipts for bank deposits and transfers. The CBN should therefore consider the plight of banks by withdrawing its circular to enable the banks suspend the practice of collecting stamp duties on receipts for deposits and transfers by customers.

TAXATION OF COMMISSIONS PAYABLE TO INSURANCE BROKERS/AGENTS: AN OBLIGATION OR NIGHTMARE

By Oyindamola Agu*

1.0 INTRODUCTION

The insurance industry is one of the specialised businesses having a peculiar business model and corresponding distinct tax consideration in Nigeria. The core business of insurers/insurance companies, simply put, is to provide cover to another party (insured), against possible financial loss within a specified period. In return, the insured pays an insurance premium at the inception of the cover period, which forms part of the income reported in the books of the insurer.

A critical aspect of the business expansion mechanism in the insurance industry revolves round brokers and agents. Insurance brokers/agents act as middle men; bridging the gap and linking insurers with potential insured parties seeking to hedge against risks. Insurance companies incur costs in sourcing the services of brokers/agents (commissions). Commissions are often calculated as a percentage of the insurance premium, depending on a number of factors such as coverage, the insurer and marketing methods, etc.

Although the commission is "paid" to the broker/agent, in practice, the cash does not usually flow from the insurance companies; brokers/agents collect the full premium and deduct appropriate commission upfront. The peculiarity of this deduction mechanism has far-reaching implications on the tax compliance obligations and exposure of insurance companies as described below:

2.0 WITHHOLDING TAX (WHT):

As a general rule in Nigeria, companies are required to withhold as tax, a percentage (5 or 10) of payments to service providers, vendors and suppliers in respect of qualifying transactions and remit same to relevant tax authorities.

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* Manager, Tax & Regulatory Services Contact - Email: oagu@deloitte.com.ng, Tel: +234 (0) 805 319 6619

One of the "qualifying transactions" include commissions, thus implying that the insurer (payer) is obliged to act as a collecting agent for government. However, in view of the peculiarities of the manner of making "payment" to broker/agents, deduction of WHT due on the relevant commission in the insurance sector becomes impracticable.

In practice, insurance companies often argue impracticability of deduction during tax reviews/audits. Conversely, the tax authorities invoke the provisions of **Section 16(11) of the Companies Income Tax Act**, which states

> *"an insurance company that engages the services of an insurance agent, ... and an insurance broker shall include in its annual tax returns, a schedule showing the name and address of that agent, and insurance broker, the date their services were employed and terminated, as applicable, and payments made to each such agent, ...and insurance broker for the period covered by the tax returns".*

This information would enable tax authorities' deal with the agent/broker directly without insisting on the WHT requirement from the insurer. While this ordinarily appears to be a welcome solution, insurance companies are faced with a dilemma, based on their reliance on brokers/agents for business development.

Insurers in Nigeria are practically at the mercy of brokers/agents, since brokers originate a large portion of insurance business. The brokers/agents are not exclusive to any insurance company and typically decide the insurance company to transact with. A typical and often subtle negotiating strategy used by brokers/agents is urging insurers to minimise information shared with government agencies. Where an insurer is perceived to divulge "too much" information about a broker, there is a high likelihood of the broker taking his business to another insurance company. This commercial consideration weighs a lot on insurance companies' decision to file the returns prescribed above.

3.0 VALUE ADDED TAX (VAT)

While insurers seek solutions to manage the above imposed WHT obligation, they also carry an additional burden to account for VAT, a consumption tax paid on the supply of goods and services (including insurance brokerage/agency). Based on the VAT Act, insurance companies are meant to pay VAT over and above the commissions "paid" to brokers/agents who remits to tax authorities.

Similar to the WHT requirement, the VAT treatment does not follow the normal cycle. Insurance companies are not expected to pay VAT to the brokers/agents; rather, they are obliged to apply the reverse charge mechanism and remit the VAT directly to tax authorities, in line with FIRS Information Circular No. 2006/02 and 9503.

As noted above, this is based on Circular as the law on deduction of VAT at source or reverse charge mechanism is inapplicable to insurance companies. Thus this treatment may be different for established brokers/agents who may demand payment of VAT to them for onward remittance to tax authorities (to avoid penalties).

Other VAT intricacies on payment to broker/agent include issuance of VAT invoice. A supplier is obliged to issue an invoice with specific information for VAT purposes. Considering that commission is usually deducted upfront, the broker/agent may consider it superfluous to issue any invoice with the relevant details. This exposes such insurance companies to penalties for non-issuance of a valid invoice, on the strict interpretation of the law.

4.0 CONCLUSION

Despite these challenges, capturing brokers/agents in the tax net is essential to ensure they pay their fair share of taxes. In the same vein, it is important that government assists this industry in every possible way to deal with its operational nightmares.

Therefore, rather than seeking to impose WHT on insurance companies that incur these commissions, Tax Authorities could explore other means of ensuring compliance such as collaborating with other regulators within the insurance industry to ensure tax compliance by brokers.

On 7 December 2017, the National Insurance Commission (NAICOM) released a circular mandating all insurance companies to confirm the status of the operational license of brokers/loss adjusters prior to engaging the services of brokers. This could be a stepping stone for Tax Authorities to leverage in order to obtain relevant information about brokers/loss adjusters for ease of tracking. In this regard, Tax Authorities' collaboration with NAICOM could include making tax clearance a condition precedent to obtaining relevant operational licences.

PERSONAL INCOME TAX AND THE MYSTERY OF IMPOSING TAX ON THE INFORMAL SECTOR

By Grace Uduma-Olugu

ABSTRACT

The informal sector is an untapped wealth source. In order to recognize the informal sector as a vital aspect of our economy and to generate revenue for the government there must be an imposition of personal income tax. This paper examines how developed and developing countries have been able to tackle the issue of taxing the informal sector.

1.0 INTRODUCTION

Personal Income Tax is a tax on income base levied on persons, which could be an individual, sole proprietorship (non-juristic person), communities and families, and on executors and trustees (of an undivided estate) on earned or unearned income. If one is to go by this definition, persons in the informal sector are within the ambit of persons to be taxed. The International Labour Organization (ILO) defines the informal sector as one characterized by ease of entry, reliance on indigenous resources, family ownership of enterprises, small scale of operation, labour intensive and adapted technology, skills acquired outside the formal school system, and unregulated and competitive markets.

The World Bank acknowledges that there are numerous reasons to care for informal activities, and that as such they should not be ignored and left on their own.[1] Nigeria has the highest population figure among the informal sector operators with about 57.9%contributing to the GDP of the country. The population of informal sector of the economy is larger than the formal sector with children and women forming a greater percentage of the total population (Nigerian Population Census 1991 as updated in 2011)[2]. This paper would examine the approach of developing and

[1] Abubakar Yusuf, Assignment on the Informal Sector of Nigerian Economy
[2] Joseph E. Udoh, The Informal Economy in Nigeria: Issues, Challenges and Opportunities

developed countries to taxing the informal sector in Section 2.0 and the Technicalities of Taxing the Informal sector in Section 3.0.

2.0 THE APPROACH OF DEVELOPING AND DEVELOPED COUNTRIES TO TAXING THE INFORMAL SECTOR

There are various approaches to the taxation of the informal sector however this paper would only examine Tanzania, Ghana, Cameroun and Ethiopia, Nigeria, Uganda.

Tanzania has introduced a Block Management System (BMS) aimed at promoting compliance and registering all eligible traders within particular sectors or geographic areas. The BMS is set up so that trading areas are mapped and divided into blocks on the basis of geography, administrative boundaries or a few streets. Uganda auctions the rights of the collection of tax from the informal sector. Cameroun and Ethiopia cedes the right to tax collection to the local government as they are seen to need it in order to carry out their functions and provide services.

The approach of Ghana is Associational Taxation where the focus is to facilitate bargaining and cooperation with the informal sector through channels.[3] In Nigeria, the means of tax collection is prescriptive tax as seen in Section 6 of the Personal Income Tax Act (2011as amended) and presumptive tax in the National Tax Policy. Income under this tax regime is derived from the following factors[4]:

- A standard assessment i.e. apportioning an aggregate sum to tax payers doing the same kind of business(this is general and may not take into consideration the tax payers specific condition
- An estimated assessment of the tax payers' income based on indicators specific to a given business;

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[3]Anuradha Joshi, Wilson Prichard and Christopher Heady, Taxing the Informal Economy: Challenges, Possibilities and Remaining Questions available at http://www.ictd.ac/publication/taxing-the-informal-economy/ (accessed 12 August 2018)

[4] Embokaanna, Presumptive Tax: Equalizing the Distribution of Tax Burden available at https://www.vanguardngr.com/2015/06/presumptive-tax-equalizing-the-distribution-of-tax-burden-11/ (accessed 12 August 2018)

- Net worth and assets of the tax payer (this does not take into intangible assets).

2.0 THE TECHNICALITY OF TAXING THE INFORMAL SECTOR

The technicalities of taxing the informal sector are enumerated below:

The major problem as regards the taxation of this informal sector is the lack of tax identification number ("TIN") of all the Taxable persons' resident within the area. This has hampered identification assessment and collection. **Section 8 (1)(q) of the Federal Board of Inland Revenue (FIRS) Act 2007** enjoins FIRS to issue tax identification number to company, enterprise and individuals in collaboration with the State Boards of Internal Revenue (SBIR) and other Local Government Revenue Bodies. This is a bold statutory attempt to tract down tax defaulters. The mandatory implementation of TIN commenced on 1st February 2008 to improve taxation and FIBR is required to issue 14 digits TIN as part of the process of registration of tax payers. This is in form of electronic card which an individual is required to obtain from any bank to facilitate on-line payments of taxes by logging-on to the website www firs.gov.ng. This has been implemented in the formal sector but it is very difficult in the informal sector.[5]

The second prevailing issue is the informal sector deals with cash and refuse to use cheques and other alike financial instruments which are traceable. Another prevailing issue is that the data provided by those in the informal sector is unreliable as a result their assessment may be inaccurate.

3.0 CONCLUSION

I would humbly suggest that in order to tackle this prevailing issue that there should be a proper structure for tax collection and administration. There should be policies that provide that a certain percentile of tax paid by the informal sector is geared towards the advancement of that residential area. There should be sensitization of

[5] Ohaka John & Zukbee, John D, Taxation and Sustainable Development in Nigeria: Informal Sector Challenges, Research Journal of Finance and Accounting, Vol.6 (2015) p. 249.

the informal sector for the need for tax collection. The provision for tax collection and assessment should be tailored to make tax collection convenient as the informal sector has its peculiar characteristics.

TRANSFER PRICING AND INTERNATIONAL TAXATION: A CONTROLLING PROBLEM FOR TAXING AUTHORITIES

By Oguntoye Jesutofuni*

1.0 INTRODUCTION

It is a general maxim that no one pays tax with a smile on his face; it is also a common phenomenon that taxpayers want to minimize their tax liability to the greatest extent possible. However, taxpayers who overzealously pursue this aim risk crossing the line separating permissible tax avoidance from tax evasion.

Tax avoidance is taking advantage of loopholes in the tax laws to reduce tax liabilities. Whilst, tax evasion is the deliberate and dishonest misrepresentation of financial affairs and information to the tax authorities to escape paying tax on those taxable income accrued to them during the financial year in review (LexisNexis Tax Law Community Staff 2014). [1]

2.0 INTERNATIONAL TAXATION

It is the study or the determination of tax on a person or business subject to the tax laws of different countries or the international aspects of an individual country's tax laws as the case maybe. It is also a discipline of study and practice that centres on the application of taxes and tax laws in the international community as it relates to individuals, businesses and government agencies conducting cross border commerce. When the Income is earned in the foreign state, its tax implication arises in that foreign state (source based taxation) as well as in the resident state (the state of which the person is resident). There is dual taxation, one in the resident country taxing the income and the other in source country which levies taxes on the same

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* Jesutofunmi Rachael Oguntoye is a student 300 level of the Department of Accounting, Faculty of Management Sciences, University of Lagos. An AAT (The Association of Accounting Technicians) holder, ACA (Associate Chartered Accountant) in view. She is a lover of figures and a financial enthusiast which is evident in her joining the Investment Society of the University of Lagos and University of Lagos Tax Club. She is passionate about developing a career in investment banking and tax consultancy, email:jesutofunmioguntoye@gmail.com.

[5] Priyanka Jain ,ACA from The Institute of Chartered Accountants of India (2015)

income. Due to this, a new concept emerged 'International Tax' or we can say "Taxes on Cross Border Transactions."

3.0 WHAT IS TRANSFER PRICING?

It is a profit allocation method used to attribute a MNE's net income (profit or loss) to the tax jurisdictions where it operates its subsidiary controlled foreign corporations (CFCs) (LexisNexis Tax Law Community Staff 2014)[1]. Therefore, it is the rule and method for pricing transactions within and between enterprises under common ownership or control.

Transfer price is the price charged by associated enterprises or connected taxable persons for the transfer of goods, services and intangible property which are consistent with the Arm's Length Principle. United State transfer pricing law requires that the best method rule be used to determine which transfer pricing methodology is most appropriate for determining the arm's length price of a given transaction.

In the realm of international business tax law, nowhere is this issue more pressing than in the arena of transfer pricing, in cases where the taxpayer is a multinational enterprise (MNE) comprising corporate entities located in several tax jurisdictions worldwide. This means that the multinational enterprises increasingly abuse 'transfer pricing' between the parent company and its controlled foreign corporation as a vehicle to shift its profit to a lower-tax country to a higher one. While transfer pricing, in and of itself, is not an unlawful(illegal) activity, the abuse associated with transfer pricing in recent years have adulterated that term, making it synonymous with inimical activity: tax dodging, corporate greed, and social irresponsibility of MNEs, and often rendering legal distinction between tax avoidance and tax evasion superfluous. Therefore, what is illegal or abusive is transfer mispricing, also known as transfer pricing manipulation or abusive transfer pricing.

Arm's Length Principle holds that the condition of controlled transactions should not differ from the conditions that would have applied under uncontrolled transactions in comparable circumstances. This principle is supposed to stop this transfer mispricing by ensuring that the prices are recorded as if the trades were conducted at arm's length.

3.1 Abuses in Transfer Pricing Strategies

Abuses arise when the MNE taxpayers uses transfer pricing to shift income to low or no tax jurisdictions, typically by adding steps to an intercompany transaction such that most of the profit is made in a low (or no) income tax jurisdiction.

Since each country has different tax rates, they can increase their profits with the help of transfer pricing. By lowering prices in countries where tax rate is high and raising them in countries with a lower tax rate, MNCs can reduce their overall tax burden, thereby boosting their overall profits. That is why one often find that corporations located in high tax countries hardly pay any corporate taxes[2] .The number of transactions taking place within MNCS is unimaginable. Hence, it makes the task of tax authorities extremely difficult to monitor and control each and every transaction taking place within a particular MNC. The rapid expansion of internet-based trading (E-commerce) has further complicated the tax of national tax authorities.

Not only do MNCs reap higher profit by manipulating transfer pricing: there is also a substantial loss of tax revenue to countries, particularly developing ones, that rely more on corporate income tax to finance their development programs. Additionally, MNCs can use overpriced imports or under-priced exports to circumvent governmental ceilings on profit reputation, thereby causing a drain of foreign exchange.

4.0 CONCLUSION

Given the magnitude of manipulative transfer pricing, the Organization for Economic Co-operation and Development (OECD) has issued detailed guidelines.

[2] Global Research: Kavaljit Singh 2007

Transfer pricing regulations are extremely exacting in developed countries such as United State, The United Kingdom, and Australia[3].

However, developing countries are still lagging behind in enacting regulations to check the abuse of transfer pricing though local authorities have responded by focusing increased attention on transfer pricing transactions, holding them to higher levels of scrutiny and nongovernmental organizations have also started to pay attention to corporate fraud, focusing on abusive financial behaviours and transfer price manipulation.

[3]Ibid

VAIDS: ENSURING THE SUSTAINABILITY OF NIGERIA'S TAX SYSTEM

By Nkechi Evelyn Okochi*

The Voluntary Assets and Income Declaration scheme was launched on 29th June, 2017 as part of the current administration's Economic Recovery and Growth Plan (ERP) by the then acting President, Professor Yemi Osinbajo SAN. It is a move to encourage taxpayers with a time-limited opportunity to regularize their tax statuses relating to previous tax periods and pay any taxes due. In exchange for fully and honestly declaring previously undisclosed assets and income, tax payers will benefit forgiveness of overdue interest and penalties and the assurance that they do not face criminal prosecution for tax offences or tax investigations. In order words, declare your assets and income, pay due taxes and go and sin no more.

This is a step in the right direction as a successful implementation will greatly increase revenue generated from tax collection in the country in order to diversify the country's sources of revenue and reduce the over dependence on proceeds from already dwindling crude oil sales. At six percent, Nigeria's tax revenue to GDP is one of the lowest in the world and many factors are responsible for this. First, the larger percentage of economically active adult citizens does not pay tax. Second, a large percentage of companies operating in Nigeria are not registered with the Federal Inland Revenue Service while majority of the registered ones do not make appropriate filings to the tax authorities.

The above problems are caused by a plethora of circumstances. However, one apparent cause of low tax revenue is the issue of mistrust between the citizens and the government. Nigeria is known both in the international community and by its citizens as a country that is rife with corruption. In various levels and arms of

* Nkechi Okoli is a student of the Department Of Accounting, Faculty of Management Sciences, University of Lagos. She can be reached on nkechiokochi@gmail.com

government, accounts of corrupt practices by government officials are prevalent. While the current government is intent at eradicating this menace, it is apparent that it would take a long time before corruption can be uprooted and the trust of Nigerians fully earned.

The resultant effect of this mistrust is the refusal of citizens to pay tax. Citizens vehemently evade taxes as they think the government cannot be trusted to make proper use of their hard earned resources in providing adequately for the needs of its citizens. Armed with the belief that any money made available to the government will be swiftly embezzled by corrupt officials, they refrain from paying taxes lest they make more funds available for the “looters” to cart away thus reducing government revenue and making it even more difficult for the government to fulfil its obligations to the populace. Citizens also do not see the need to pay tax when they have not seen or felt the impact of government’s activities in their communities.

There is incontrovertible evidence that VAIDS has been successful as it delivered about 17 billion Naira into government coffers within the first four months of its inception and has even had its deadline extended to June 2018 after appeals by professional bodies and individual taxpayers. Without any doubt, it is apparent that the aim of bringing more taxpayers into the tax loop is gradually being achieved. However, care must be taken to ensure that this progress is not just made in the short run. In order to achieve the overall objective of sustained increase in tax revenue, the government has to earn the trust of the citizenry. The citizens should be made to understand that paying their taxes is instrumental to the development of their societies. ‘Tax Thursday’ should be extended beyond the period of VAIDS and made a permanent activity as it will go a long way to ensure continuous tax awareness and inculcate tax payment culture among Nigerians.

Ensuring that corruption by public office holders is dealt with will also go a long way in reassuring citizens that their resources are not going to be diverted for private use. In addition, taxpayers should be furnished with information on how tax revenue is expended in order to ensure accountability and build citizens’ confidence in the government. All these measures are necessary in order to ensure that the benefits of VAIDS are not just transient but will outlive the current administration for the benefit of the Nigerian economy in the long run.

THE INFORMAL SECTOR AND TAXATION IN NIGERIA: CHALLENGES AND PROSPECTS

The bulk of Nigeria's economic activities can be categorized into the formal and informal sectors. The informal sector is also referred to as "Grey economy." It is the part of an economy not monitored by government. This sector widely account for wealth creation function as well as personal income generation capacity through various small scale businesses and entrepreneurial activities. To this end, the informal sector can be explained as the sum total of income generating activities outside government regulated contractual relationship.

The informal sector many be subdivided into productive, service and financial sectors. The productive sector involves economic activities relating to production of goods such as food and agricultural products, small scale manufacturing, furniture and iron making, garment making etc. The economic activities of the informal sector include informal money lenders, cooperative activities, thrift collectors "*Ajo / Esusu*" among others while the service sector of informal arm include menial labour, traditional healers, herbalists, traditional birth attendants etc.

Over the years, almost every efforts aimed at improving tax collection among informal sector has not yielded expected outcome since the sector consists of firms and individuals who are not fully registered and regulated. Research has shown that, it is often difficult to ensure voluntary compliance among this group due to poor knowledge of tax matters, poor book keeping system, large size of this sector etc. Thus, the need for a global awakening on how to strengthen taxation of the informal sector. For instance, in Nigeria a number of studies have been conducted and many focused on eastern and northern part of the country[1]. But Lagos being the economy capital of West Africa with a growing population coupled with the existence of various small scale businesses stands a chance of improved tax revenue

[1] Okoye, Akenbor and Obara 2012, Udoh 2013, Henshaw 2017

generation if this opportunity is exploited. This raises the question of whether or not businesses in the informal sector be taxed?

It is pertinent to note that the informal sector emerged to absorb the short falls of the formal sector as well as provide means of livelihood for the semi-skilled and unskilled individuals. The Nigerian informal sector constitutes over 50% of the economy's GDP and this reflects in two ways. In the first place, it would appear that it reflects an increase in Per capita Income. On the other hand, it implies that government is losing potential revenue since income generated from this sector often times are not officially captured into the tax net of the economy. Government on its part has over the years introduced several programmes which are designed to support the operation of this sector, some of which include: management and technical training, creating an enabling business environment, credit policies and strategies among others. The establishment of Small and Medium Enterprises Development Agency of Nigeria (SMEDAN), creation of Special Intervention Fund, National Women Empowerment Fund aimed at supporting grassroots women operating informal businesses are evident means of providing assistance to informal sector. It is noteworthy that government efforts would appear albeit minimal given the robustness of the informal sector coupled with the opportunities being provided if this sector is being left untaxed.

However, some of the challenges affecting the proper taxation of businesses in informal sector include the following:

- Poor knowledge of book keeping and accounting records;
- Poor knowledge on tax matters;
- Informal sector is operated by liquid cash (that is assets are easily converted into cash);
- Absence of a data base in view of the non-registration of businesses within the informal sector;
- The Nigerian tax operations are more suited for direct sectors necessitating the need for a system which makes voluntary compliance easy;

- Lastly, an average business person within the informal sector does not consider himself a taxable person.

In response to these challenges, government must develop possible solutions unique to this sector and the Lagos State Internal Revenue Service (LIRS) offers a good reference point because of its approach. Upon recognizing the huge flow of income in the informal sector which consists of market men, women, artisans, micro , small and medium scale enterprises, thrift collectors etc. The LIRS begun the process of revising its informal sector operations to ease voluntary compliance by tax payers. Also, section 6 of Personal Income Tax (Amendment) Act 2011, provides for a new subsection (6) to section (36) of the principal Act which states:

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

In essence, the above provisions mandates that the income of a tax payer from the informal sector shall be taxed in accordance with presumptive tax regime.

Furthermore, massive tax enlightenment for participants of informal sector should be embarked upon to reiterate that tax payment is part of their civic duties. The enlightenment must also seek to demystify the process of taxation characterized by complex financial jargons.

Given the fact that to access government supports, business owners are required to undertake some form of registration, inter agency collaboration will also be helpful to at least identify potential tax payers. It remains a matter of fact that the law mandates taxable adults to pay their taxes regardless of whether or not government provides infrastructures to support economic activities as the penalty for tax evasion is jail term. It would however be morally justified if government fulfil its duty to the citizens in order to motivate them perform their civic duties.

The taxation of informal economy should continually be harnessed due to the potentials of this sector to contribute to revenue generation drive and to allow government meets its financial obligations. Therefore, the efforts of all players should be to evolve an efficient tax system that works perfectly for all parties and the economy and to provide lasting solution to government revenue short falls.

UGANDAN SIN TAX: THE FEASIBILITY OF SOCIAL MEDIA TAX IN NIGERIA

By Eniola Akinoso

1.0 INTRODUCTION

The question "Why do we pay taxes?" is recurrently met with an assortment of answers ranging from 'revenue generation, control of the economy, redistribution of income, and social engineering to regulation of social behaviour', among other things.

The latter reason is designed to discourage/regulate a particular behaviour and to generate revenue. This type of tax is referred to as 'Sin Tax'. Sin Taxes garner support when items like tobacco and alcohol are taxed (usually in form of excise duties) but one can only wonder at the sanity behind the historic imposition of Sin Taxes like the Russian Beard Tax, the French Window Tax, the Indian Breast Tax and the Chinese Salt Tax among others.

The Excise Duty (Amendment) Bill has just been passed by the Ugandan parliament. It includes the imposition of a daily tax at a rate of 200 Ugandan shillings (₦20) on Ugandans who use social media platforms like Facebook, Twitter, Whatsapp, Instagram, Skype, Viber, etc. The Bill would come into effect on 1 July, 2018.

A major proponent of the social media tax school of thought is President Yoweri Museveni of Uganda who feels that this tax would be the proverbial libation to cleanse the land of the consequences of *"olugambo"* – (gossiping, opinions, prejudices, insults, friendly chats), as idle media talk is costing the country much needed time and income. The Ugandan Minister for Finance, Matia Kasaija said the tax would also help Uganda pay off its growing national debt, maintain security and extend electricity. The revenue estimate of this social media tax is 400 billion to 1.4 trillion shillings annually.

The two elements of Sin Tax – Discouraging/regulating a social behaviour (*olugambo*) and revenue generation are present in the Ugandan Social Media Tax. Nigeria is in debt running into billions of dollars. This simply affirms that we are perpetually in need of means to generate revenue, whether from taxation or other sources. If there is a legit basis for imposing more tax to deepen the tax revenue base and generate more revenue, the government may just be all for it. As this precedent has been set by an African country, it becomes imperative to examine how viable it would be in Nigeria. The best steps to take are to evaluate (from Nigerians use of the social media), if there is need for a Sin Tax like the social media tax or if it would be one tax too many.

2.0 PRO- SOCIAL MEDIA TAX

Indeed, we have graduated from those days when internet cafes were glorified havens for connecting for some precious 30 minutes or 1 hour to the wonders of the worldwide web. Our gadgets that now connect us to the internet are the last things we see before we sleep and one of the first things we reach for when we wake. We have evolved from a disjointed, unconnected people to a network of people connected and with information to share and 'gist' to spread. We have become one of the top ten countries in the world with the most internet users and we have joined the realm of social media, to stay.

Of Nigeria's population of over 180 million people, over 90 million use the internet and according to the Minister of Communications, Mr Adebayo Shittu, 75% of Nigeria's internet population is on social media. There are almost 100 million tweets per day and over one billion messages daily from Facebook Chat. The proliferation of social media by Nigerians is driven by the widespread access to the internet, low-cost and low-maintenance smartphones, the quest for information, sharing of opinions, news, politics, civil advocacy like the '♯*bring back our girls*' campaign, entertainment, etc.

Pro-social media tax exponents would advocate for the imposition of the tax from the perspective of the two elements of discouraging behaviour and revenue generation.

Social media is utilized to build brands, to drive E-commerce which contributes in no small measure to Nigeria's Gross Domestic Product, to connect with people sharing a community of interest, to access and share real-time news, to advertise and make money, to learn and research, for entertainment among other things. It is however not without its defects. These defects might lead to behaviours which in the long run, are equivalent to Uganda's '*olugambo'* and which may form a basis for imposition of Social Media Tax as a Sin Tax in Nigeria.

Social media has paved way for activities like cyber bullying, kidnappings, addiction, murders, online harassment, fraud, identity theft, backlash, etc. These have caused many to succumb to illegal peer pressure, depression, suicide and crime which has cost many lives, wasted time, money, property, damaged reputations and rendered many mentally and physically diseased and severely incapacitated. Worse still, it has damaged our image within and outside Nigeria.

Various falsehoods abound on different social media platforms which can stir up trouble and confusion within the area where such misinformation is spread. Social media has been blamed for escalating herdsmen/farmers clashes across the country. Disturbingly, there have also been reports of massive recruitment by terrorist organizations via social media. The Government has not escaped unscathed. Hate speeches, derogatory writings, criticisms, commentaries and grossly damaging fake news against the government has led to incitement of violence fuelled by the multi-religious and multi-ethnic differences of the people of Nigeria.

One might argue that these varying ranges of vices are substantial enough to classify as our own version of '*olugambo'* and as such, a Social Media Tax would greatly discourage/regulate the use of the various social media platforms and reduce the perpetration of these vices.

Another very moving argument might be the revenue estimate of the imposition of the tax. For example, if the same rate of 200 Ugandan shillings (₦20) per day was taxed daily on say 40 million Nigerians who are very active on social media, there would be a whooping eight hundred million naira (₦800,000,000) realized daily, twenty four billion naira (₦24,000,000,000) realized monthly and Two hundred and eighty-eight billion naira (₦288,000,000,000) realized annually. The magnitude of this amount does not really sink in until we realize that this estimate is just from 40 million of the almost 80 million Nigerians on social media. If this can be achieved, the possibilities would be staggering. Asides offsetting some national debt, the revenue would be plunged back into powering the government to engage in activities to boost our economy, build bridges, hospitals, fund our youth, among other things.

Before there is some actual salivating at this prospect, it is pertinent to reflect over the reasons posited in opposition of social media tax in Nigeria.

3.0 ANTI- SOCIAL MEDIA TAX

Subscribers to the anti-social media tax movement will likely question why there should be a social media tax at all. As regards the vices leading to anti-social behaviour, it must be admitted that majority of these vices had prior existed on the internet and even outside the confines of the internet. As such, they do not necessarily emanate from and are not exclusive to social media.

Most pertinent is a fundamental deficiency in the idea of even attempting to greatly discourage or regulate the use of the various social media platforms for any reason. It is a violation of the Fundamental Right to Freedom of Expression and the Press as provided for in **Section 39 of the Constitution of the Federal Republic of Nigeria I999** (as amended) which states that "Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference". Section 22 under Chapter II – Fundamental Objectives and Directive Principles of State Policy also provides that

> "*The press, radio, television and other agencies of the mass media shall at all times be free to uphold the fundamental objectives contained in this Chapter and uphold the responsibility and accountability of the Government to the people".*

Article 19 of the International Convention on Civil and Political Rights, Article 19 of the Universal Declaration of Human Rights and Article 9 of the African Charter on Human Rights - all of which Nigeria is a signatory to - entrench the right of citizens to hold opinion, freely express themselves and freely disseminate information.

The revenue estimates are mouth-watering, but more important are considerations like whether the canons of taxation would be reflected in social media tax if imposed. The Canons as proposed by Adam Smith in his work "*Wealth of Nations*" are Equity, Certainty, Convenience and Administrative Efficiency.

A social media tax imposed at a flat rate on all persons in Nigeria, regardless of their varying income ranges will not exhibit Equity. It would instead be a regressive tax as it would take a higher percentage from low income earners than high income earners. It would widen the digital divide, further distress the poor and may successfully pitch the masses against the government.

Certainty and Administrative Efficiency go together in considering crucial questions. What determines the rate of tax to be imposed - Would it be our ₦20 Nigerian equivalent of the Ugandan Tax or some amount lesser or most likely higher? When would the tax be daily deducted? How? By whom? Would the tax be solely administered by the Federal Government or would there be a concurrent administration with the state Governments? How would data usage for social media for good purposes like educational/motivational purposes be differentiated from data usage for social media for the vices for which the social media tax would be imposed? What if the data usage on a social media platform is for both educational and vice-related purposes? How would all the users be tracked? How would all content accessed by users be tracked? Would the tracking of users and their content, if any, amount to a breach of privacy? What if use of social media through traditional means becomes boycotted for some black market side door? This is Nigeria after all. What are measures that would be put in place against evasion or avoidance of the tax? How many taxes today are efficiently administered?

It may turn out that the lack of certainty and likely administrative inefficiency of any such social media tax would ultimately render it redundant and boycotted along the line but the damage would have already been done.

There is also the matter of Multiple Taxation. No nation has ever taxed itself into prosperity. This alludes to the fact that those in support of deepening tax bases for the ultimate good and perfect country might be labouring under a delusion. If that was the case, why have the over 20 taxes being paid by millions of Nigerians not already made a utopia of our country? Why are we, as a nation still battling with 4,000 megawatts of electricity which is the same amount that Heathrow airport in London alone consumes? Why are our roads still bad, why do not we have any airline to our name?

It follows that social media tax is not our redemption. In fact, it might just be the bane of the IT Sector in Nigeria. It would lead to increase in prices of services and remove the toppings and icing which attracts investors to our national cake. It is getting increasingly quick to exhaust data and bundles are becoming more expensive. Expenses abound, the cost of living is high and the average Nigerian is almost at breaking point. Adding a social media tax might produce a backlash unlike one the government has ever seen.

A leisure ride down the boulevards of history reveals that in the past, the Nigerian government has made futile attempts to tax communications/data usage. There was once proposed in 2016 a communications service tax at a rate of 9% on charges payable by consumers of electronic communication services in Nigeria. Electronic communication services subject to the levy included Voice Calls, SMS, Mms, Data Usage, Pay Per View TV Stations, etc. The tax was to be paid together with the electronic communication service charge payable by the service user to the service provider. The Federal Inland Revenue Service (FIRS) was to be responsible for collecting the tax from service providers, all service providers were expected to file monthly returns with penalties accruing for failure to file or late filing etc.

Outcries as to how the tax would cripple the ICT Sector by reducing broadband penetration rate, inflating consumer prices, putting pressure on low income earners, rendering the ICT Sector unfriendly to foreign investors and being counter-productive in the long run led to the Bill being dropped.

Also, the Frivolous Petitions (Prohibition, etc) Bill of 2015 provided that persons who

> *"allege or publish any statement petition in any paper, radio or any medium of whatever description, with malicious intent, to discredit or set the public against any person, group of persons or institutions of government shall be guilty of an offence and liable upon conviction to an imprisonment term of two years or a fine of four million naira (₦4,000,000,000)".*

It also provided that

> *"any person who through text messages, tweets, whatsapp or through any social media posts, makes an abusive statement knowing same to be false with intent to set the public against any person, group of persons or an institution of government shall be guilty of an offence and liable upon conviction to imprisonment for two years or a fine of two million naira (₦2,000,000,000) or both."*

It was received with derision by the masses as violating all forms of democratic practice, freedom of expression and the press, transparency and accountability and open governance. It was dismissed as frivolous and unwarranted and the Senators were reminded that they were mere public servants and not untouchable gods whom the media and civil society are free to make accountable through any legitimate means. The Bill was subsequently abandoned.

4.0 CONCLUSION

It appears that the scale weighs heavily against all appearances of a social media tax. Nigerians are an innately opinionated people. The need to disseminate information is wired into us. Social media has the power of immediacy, of real-time content, of participatory engagement. We have a powerful voice via the social media. A tax on social media would be anti-social.

The country will fare better if government ups its ante by consolidating on the already existing taxes, being perpetually accountable and transparent and by employing schemes like VAIDS (Voluntary Asset and Income Declaration Scheme) which focus on high net worth individuals, corporations and multinational enterprises to widen the national tax base.

Effective implementation of our new national tax policy will also revamp major setbacks of our tax system like tax evasion and avoidance. Social media tax as a sin tax would result in syntax problems on the long run.

TAX POLICY ON SMEs IN NIGERIA – HOW FAIR?

By Ani Chizoba*

Small and medium enterprises (SMEs) are the bedrock of the Nigerian economy. They serve as an important source of employment generation, economic dynamism, competition and innovation; thus contributing to national growth and poverty alleviation. In order for SMEs to thrive, there is need to create a favourable business and regulatory environment. Most large companies have their roots in SMEs. In other words, the future large corporations in developing countries like Nigeria are present day SMEs that need to be nurtured.

The significance of contributions of SMEs to economic growth is seen in more developed climes where their potentials have been successfully harnessed. For instance, SMEs accounted for about 20% of patents (a measure of innovation), in bio-technology-related fields in Europe in 2014. SMEs are also known to account for over 95% of businesses, 60-70% of employment, 55% of gross domestic product (GDP) and generate the lion's share of new employment.

Also, there are evidences to support the contributions of SMEs to economic development in many developing countries. However, the Nigerian government tends to focus more on larger corporations, with foreign investments, to the detriment of SMEs, whose activities are wrongly perceived to have insignificant impact on the economy. This perception had since been debunked by evidence from antecedents of OECD countries, suggesting that SMEs have a high propensity to transform a country's economy if a conducive environment is created for them to grow through appropriate regulation and tax policies.

In Nigeria, SMEs are subjected to multiple taxes by the different tiers of government, each with its own rigorous process and significant compliance cost. Considering the size of their operations, the absence of harmonized tax regime increases the strain on cash-flow and other limited resources of SMEs when

* Manager, Tax & Regulatory Services. Contact - email: chani@deloitte.com.ng

compared to large corporations. SMEs are also regulated by several government agencies; thereby leading to significant regulatory compliance cost, which in most cases are duplicated.

Though, there are numerous incentives and support facilities available to SMEs in Nigeria (e.g. the Federal Government Special Intervention Fund for MSMEs, Bank of Industry and the Central Bank of Nigeria's Intervention Fund, etc.), access by SMEs to such incentives and facilities seem to have been hampered by bottlenecks. Also, lack of awareness of these government funds, absence of supportive environment and poor access to finance has reduced the competitiveness of SMEs in Nigeria.

The main objective of the new National Tax Policy (NTP) is to establish a robust and efficient tax system in Nigeria with focus on legislative amendments to reduce the tax burden on MSMEs. The NTP also proposed reduction of corporate tax rates and introduction of tax registration thresholds as an incentive to encourage compliance and protect MSMEs. However, taxes still appear to be a major constraint to the development of these SMEs in Nigeria.

For instance, businesses that make profits are usually subjected to multiple taxation in their first three years of commencement due to the rules for taxation of a new business; thereby increasing the risk of failure of SMEs within the first few years of business. Also, exemption of companies with at least 25% imported equity from minimum tax is discriminatory to Nigerian owned businesses. More notably, it discourages investment and increases the risk of failure for companies in periods of little or no profitability in the case of SMEs. In the same vein, a good number of SMEs are not able to adequately benefit from tax incentives due to the small size of their operations.

The challenges highlighted above raise some important questions about the policy direction vis-à-vis the reality of SMEs in Nigeria; such as;

- Does the tax policy encourage investment by SMEs?

- How well can the current tax policy encourage successful transition from the informal to the formal sector?
- Are basic public services (healthcare, infrastructure, security, etc.) provided to these SMEs and their employees despite the taxes collected from them?
- Is the Nigerian Government prepared to consider increasing tax incentives and exemptions that will not only attract investors who are potential taxpayers but also encourage voluntary compliance, which would ultimately lead to expansion of existing business interests of the SMEs in Nigeria?

In an attempt to provide answer to the above questions, some stakeholders have suggested the need for special and preferential tax regimes for SMEs in view of the difficulties in raising finance, inherent disadvantaged tax system and high costs of tax and regulatory compliance. Tax policies should be designed in such a way that they do not only directly affect SMEs but also indirectly pushes them to grow. For instance, provision of finance for SMEs may be encouraged by granting exemptions from business tax for financial institutions that provide guarantee for loans to SMEs.

Policies can also be implemented to ensure that businesses in the informal sector regularize their tax status to have access to finances and tax incentives. This way, business owners are able to see the gains of moving from the informal sector to formal sector. This would also translate to a much wider pool of taxpayers for the government.

There is no gainsaying that the current NTP is well intended to support and protect the interest of SMEs; albeit the intent is yet to translate to reality for SMEs. Therefore, efforts must now be channel led towards addressing the specific needs of SMEs from a perspective of tax policy if we are to realise their potentials in Nigeria.

The 2018 National Budget Review

By The International Centre for Tax Research and Development (ICTRD)*

1.0 EXECUTIVE SUMMARY

The assumption that the Federal Government operates a zero budget based planning makes it natural for experts to wonder why the extension of spending of one year's allocation to another year. It is assumed that there must be an established cut-off date in which all activities not carried out in one year is automatically carried over to the following year's budget. There are so many reasons why an activity planned for a particular year may not actualize, and there is no good reason for wanting to carry its allocation to a new year under the zero budgeting system. Under the zero budgeting system, it is a new beginning every year. Each year, Project must be revalued and confirm its priority

It is indeed true that the Federal Government is working hard, but it cannot continue to do things the same way and expect different outcomes. With yearly budget increase, it appears that the government is finding it difficult to actualize its plans and there must be reasons for this failure. This must be investigated and addressed. Is the Federal Government over planning for its activities? Are there problems with revenue estimates and loans expectations? Are there unforeseen circumstances that are beyond the control of the government? Are there problems in the statistics used in planning and preparing budgets? Is the Federal Government too much in a hurry for development?

ICTRD organized the 2018 National budget review as it is part of our promise to assist government find solutions to national problems. Budgeting and implementation is now a national problem and solutions must be found. The cost of servicing debt is worrisome and we continue to search for such facilities year in year out. It is possible to have a balanced budget if we are determined to cut our

* On January 2, 2018 In Lagos, Nigeria

coat according to our cloth. We cannot continue to do so many projects at the same time.

We cannot continue to increase recurrent expenditure and we cannot continue to pretend that all is well with our nation. There is abject poverty in the land, economic activities are grounded, and political and economic saboteurs create problems of instability making it difficult for the government to concentrate. For example, barely one and half year in office of this present administration, had political saboteurs started campaigning for 2019 and all attention is now on 2019 election. Up till today, we can still not understand why one dollar should exchange for N360. Obviously all these actions affect the social fabric of our society - education, health, housing, electricity and the standard of living of the people. Spending out of budget is another new dimension which is worrisome.

There is the need to explain the demand of US$1billion by the Federal Government from the Excess crude Account. Was this to replace part of the US$5.5 billion loans earlier approved by the National Assembly? Has approval being obtained for the use of this money outside the budget approved? When one realizes that the capital budget for meeting the social needs of the people is N883.3 billion, the question is what can this cover in the midst of several schools and hospitals without facilities? The federal government must pay local contractors regularly, and the legislators must put up a bill to discourage government and people's attitude of not paying debts. I suggest that there should be a 'debt tax' of 10% on any outstanding debt that is over three months. Our attitude towards repayment of debt is very poor and it is affecting us socially and economically. Something drastic must be done by the legislators to put this in check. Apart from changing our attitude, the debt tax will also generate revenue for the government.

Sources of revenue that the Federal Inland Revenue should address is the VAT payable on services such as consultancy services. In view of the fact that the service sector is not the same as the manufacturing sector, VAT on services should be paid by the recipient of the services directly to FIRS at the time the consultant or contractor is paid. This will eliminate delay in the payment of VAT and loss of revenue to the government.

The Executive must design a method of scrutinizing its budget process. This can be done by Ministers ensuring that the Ministry, departments and Agencies under them defend their budget before them, defend their performance on a quarterly basis. This should be done in the presence of the Budget Monitoring Committee of the Ministry of Budget and Planning. The Ministers should defend their budgets before the President and Vice President. The President and Vice President must fully be aware of cost of administration to avoid crisis management. The national embarrassment being witnessed on account of budget defence is worrisome. It is recommended that Recurrent Expenditure should be defended before the National Assembly in June of every year while capital expenditure is defended in September of same year. By November, the Budget should have been approved and sent for President's assent. The Medium Term Expenditure Framework should be defended before the legislators in March of every year. This will ease budget debate and approval. The Minister of Finance must present a Finance Bill for approval of the legislators before the presentation of the yearly Budget. The habit of changing revenue generation system in direct and indirect taxes during a fiscal year is not acceptable.

Finally, the legislators should as a matter of urgency expunge from the Constitution section 6 (6)c which deals with the enforcement of the obligations of government to the society, and I quote,' The judicial powers vested in accordance with the foregoing provisions of this section – shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution; This simply means that the performance of government on the fundamental objective in chapter II cannot be enforced . This is a great limitation on the power of the people and legislators in a democratic setting.

(a) Harness the resources of the nation and promote national prosperity and an efficient, a dynamic and self-reliant economy;

(b) Control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity;

(c) Without prejudice to its right to operate or participate in areas of the economy, other than the major sectors of the economy, manage and operate the major sectors of the economy;

It is against this background that the International Centre for Tax Research and Development (ICTRD) constituted the member of the Economic Expenditure committee to examine the 2018 Appropriation Bill. The members of the committee came up with the following recommendation after extensive deliberation on the 2018 Appropriation bill vis-à-vis prevailing economic reality.

Item	**Economy Budget**
	NGN
Ministry of Communication Technology	19,260,740,637
Infrastructure Concessionary Regulatory Commission	1,542,198,903
Federal Ministry of Agriculture and Rural Development	172,796,092,743
Federal Ministry of Finance	2,247,577,377,798
Federal Ministry of Industry,Trade and Investment	95,372,284,173
Federal Ministry of Labour and Employment	17,494,584,056
Federal Ministry of Science and Technology	75,677,747,631
Federal Ministry of Transportation	278,825,582,503
Federal Ministry of Power,Works and Housing	590,087,014,099
Ministry of Petroleum Resources	74,090,670,305
Ministry of Mines and Steel Development	23,461,575,245

Ministry of Budget and National Planning	1,785,525,979,666
Federal Ministry of Niger Delta	127,229,020,657
	5,508,940,868,416

Budget before the amendment by the National Assembly. Categorization of Ministries was that of the experts**.**

2.0 ECONOMIC GROUP RECOMMENDATIONS

1. Transparency & Accountability

a) Fiscal Responsibility Act and the 31 agencies covered by the Act should be checked. The revenue accruing from these agencies should be properly reviewed and accounted for.

b) Harmonization of Fiscal and Monetary policies is crucial in the successful actualization of the budget. A practical and simple example of this harmonization is customs duties revenue projection must be harmonized with the imports prohibition, if there is a motor vehicle ban, customs duties cannot continue to have projected revenue from it.

c) Timing and implementation of the budget is critical to success. For example, the 2017 budget was passed in July and implemented in August; this definitely compromises the effectiveness of the budget.

2. Political Will

a) Leadership is a major challenge and rules all issues in Nigeria. There is half-hearted effort to harness the resources of the nation. The 2018 National budget is still largely based on revenue from oil sources.

b) N590 billion allocated to Ministry of Power, Works and Housing is less than 1/8th of the Ministry of Budget and Planning's overheads. The Capital expenditure budget at a mere 30.8% of total budget cost cannot secure infrastructural development we so desperately need. This budget does not serve the national welfare, foundation and happiness of the citizens as the economic expenditure of N5.5 Trillion is from the total N8.6 Trillion budget.

c) Government should enact policy which is tailored towards development of local content.

d) There should be certainty of workers entitlement whether in public or private sector after several years of service in the public and private sector.

e) There should be a single rate for importation in order to prevent currency round tripping.

f) There should be passage of finance bill during the year before the passage of the budget.

g) Nigeria's rising debt profile is of concern, therefore external borrowing should be curtailed.

h) The budget should be tailored in line with the Economic Recovery and Growth plan of the government in order to achieve sustainable growth.

i) The government should fully implement Zero based budgeting as it ensures efficient allocation of resources, cost effectiveness and focuses attention on national objective. The government should reduce dependence on oil revenue and focus more attention to non-oil revenue in order to achieve a diversified economy. This can be achieved by allocating more funds to agriculture, and solid minerals.

3. Revenue Generation

a) The Corporate Affairs Commission and the Federal Inland Revenue Service should be integrated in order to bring more individuals and entities into the tax net which will enhance revenue generation.

b) Tax rebate and incentives by the government need to be matched with realized benefits and reviewed regularly as it is another area of revenue leakage. Government should exploit revenue making opportunity on transfer pricing regime currently in operation. There should be more advocacy on increased tax compliance just as the current drive to stamp out corruption in Nigeria.

c) There should be annual amendment to tax laws to reflect the prevailing economic conditions. The capacity of the fiscal policy desk in the Ministry of Finance should be broadened to incorporate tax research. The issue of multiple taxation in Nigeria still persist and should be addressed. The Federal Inland revenue Service must intensify effort in the collection of taxes from Ministry, Departments and Agencies. Voluntary Asset and Income Declaration Scheme should not be targeted only at high net worth individual. Tax compliance should be for all.

4. **Budget Assumption**

a) The Nigeria Budget should not be rigid, there should be a revised budget at all times as the fundamentals in the economy changes.

b) The exchange rate of N305 to a dollar is not acceptable as it gives room for a significant budget deficit within the budget. If revenue is budgeted at N305, and actual payment is N360, then leaving room for borrowing.

d) The executive should ensure that loan request is finalized and linked with specific project before inclusion in the budget.

5. Excess Crude Account

a) There should be transparency in the management of excess crude oil account and service wide vote account of the federation.

b) The executive should ensure that loan request is finalized and linked with specific project before inclusion in the project.

c) There should be more advocacy on increased tax compliance just as the current drive to stamp out corruption in Nigeria.

d) The government should provide immediate cash backing after release of appropriated fund.

3.0 THE REVIEW BY THE SOCIAL OBJECTIVE GROUP

The Social Component of 2018 National Budget

	NGN
2018 Budget Estimate	8.6 Trillion
Less: Debts Servicing Portion	(2.0 Trillion)
Available for Disbursements	**6.6 Trillion**
Social Component of Available for Disbursement	2.7 Trillion
Recurrent Expenditure Part of Social Component	1.5 Trillion
Capital Expenditure Part of 2018 Budget	883.3 Billion

The observations and concerns from the review of the social component of the 2018 budget estimate are highlighted below for each of the Ministries considered.

1. General Observation and Comment

The Federal government needs to revisit the **Oronsaye Report** and urgently realign / collapse some (Ministries, Departments, and Agencies) MDAs whose functions are duplicated in other Ministries. Having proper remodeling of Ministries in the face of current realities, such that single MDAs having different specialized desks manned by experts will significantly reduce costs of running government affairs as such heavy costs impact negatively on the welfare of the people.

A comprehensive Costs versus Benefits analysis as well as personnel audit needs to be carried out by Federal/State governments to achieve the following:

Significant reduction in the huge personnel costs in the MDAs. A true picture on funding for Technology and Infrastructural development that can leap frog developmental aspirations of the nation. Nigeria must imbibe the spirit of a balanced budget. The government must stop budgeting for too many projects at the same time. It must stop the habit of borrowing to finance projects that can wait for another budget year.

2. Information & Culture Ministry

Over 90% of recurrent expenditure of the Ministry (i.e. 38.9 Billion) represents personnel costs for the Headquarters of the Ministry. The positive effect of this in terms of national benefit to citizens and businesses is yet to be seen considering the huge personnel costs to be funded by tax monies from the people as stated in the 2018 budget estimate.

The Federal government can assist States to develop tourism sites as a very viable income generation vehicle - promoting Project Nigeria internationally - while States are direct beneficiaries.

3. Interior Ministry

There is an unhealthy recurrent expenditure over capital expenditure spread, which is not good for any nation's development. In order to address this:

a. There should be a clear distinction between what the States handles and the activities at the Federal level. This narrow focus we believe will bring lower expenses on the long run.

b. Cost of Federal policing is too high without a commensurate benefit to the society. This needs to be managed within the realities of the social needs of the people.

c. The men and officers of the Nigerian Police Force needs to be trained in the judicious use of national assets such as maintenance of the permanent assets [i.e. barracks] and movable assets [i.e. patrol vehicles]. This will further significantly reduce the annual expenditure on policing.

4. Transportation Ministry

a. There is a good Capital versus Recurrent expenditure spread. However, there are areas of concern in relation to:

b. The percentage of the Rails project costs captured in the 2018 budget estimate, considering that previous budgets have made significant provisions for the project (especially the Nigerian portion of the counter-part funding arrangements).

c. Federal government should promote local production of solar powered small vehicles instead of importing Tricycles which do not befit the status of Nigerians. The Overarching Nigerian Content Act should be revisited and give

Nigerian automobile engineers the opportunity to research and develop befitting small vehicles for Nigerians. This will cause local eco-system around solar energy as well as small vehicle manufacture. These small vehicles should be used to replace Tricycles. The Tricycles are dangerous, unhealthy and it is a stain on our national pride.

d. The consultant for the Nigerian Carrier project needs to be a Nigerian consortium, rather than it being handed over to foreign firms. This will ensure our National interest is protected and safe cost of invisible transactions which drain our foreign exchange.

e. The Ministry should ensure that the development of the rails projects and other such publicly used transportation infrastructure makes special care of the aged, the children and the disabled.

   i. One of the ways this can be addressed is by giving them consideration in the construction of access to train tracks, entrances to train landing stations, etc. This is the global best practice to which Nigeria must abide within the 21st century.

   ii. To meet the needs of the society, the Ministry should look into the provision of free bus and train passes for children, aged of over 60 year old and the disabled. This we believe is a minimum that can be done as part of the Millennium Development Goals.

f. There is need for a careful review of the 2017 vis-à-vis 2018 budget estimates to ensure that there are no carry-overs or overlaps of expenditures.

5. Power, Works And Housing Ministry

The Ministry has an excellent Recurrent versus Capital expenditure spread but some areas need further clarification to ensure that the society gets the full benefit of the projects.

a. Which of the Ministry's Headquarters buildings will be constructed for N7 billion and which ones are to be repaired at N6 billion?

b. The total expenditures on the **Zungeru Hydro project** is too high **[5.6 billion]** and unjustifiable for the **700 megawatts power** it will generate compared with the cost for the **Mambila project at 9 billion** which will generates **3050 megawatts.** The Mambilla project has a better project cost versus benefit outlook than all other power projects combined.

c. The expectation of the society is that our national road networks should radically improve with the capital and maintenance costs for roads and bridges embedded in the 2018 budget.

d. The Ministry's projects are critical to the existence of the citizens because the roads and bridges as well as provision of affordable housing scheme have direct impact on the lives and businesses of the people. Their availability will have positive impact and the construction works will also require employing the people which will in turn result in tax revenue for government through deduction from the paid wages and salaries.

6. Water Resources

The Ministry has a good Recurrent versus Capital expenditure spread. However, there is the need to monitor that the Dam projects get completed within the budget year cycle and should not be repeated in succeeding year's budgets.

7. Youths And Sports Development Ministry

The Ministry's budget estimate shows a lopsided Capital versus Recurrent expenditure outlook evidenced by very little capital projects. Other observations include:

a. The NYSC costs are too high [i.e. 90.5 billion out of a budget of 116.2 billion budget]. A careful review will be required to verify the unit cost per Youth Corp versus how many Corps get remunerated per year?

b. There is the need for serious review of the cost-benefit analysis of the Youth Corp project as its usefulness to the society is becoming questionable. Alternative arrangements whereby Youth Corp use this period as training period for their professional career training may be looked into if the Youth Corp project is not to be abolished.

c. The Federal government programme on youth development needs to be more holistic and encompassing of all youths - educated and non- educated alike - so that there is inclusive development across board - men, women and disabled together.

d. The Federal Government needs to take care of the needs of the non-educated youths as this category of youths pose the greatest security threat and redundancy risks to the nation's economy.

8. Women Affairs Ministry

The budget allocation for this Ministry is so insignificant to make any meaningful improvement in the lives of the women-folks in the nation especially those in rural areas. However, our observations and concerns are as follows:

. The Monitoring & Evaluation cost of N1.3 billion is too high for a N6 billion annual cost and needs to be investigated.

. There is no social development costs in relation to managing maternal mortality, AIDS programme, food security, employment support, etc. for women across board in the 2018 budget. The World Poverty Report states that maternal mortality rates in Nigeria is the 2nd worst rates in the world next to India despite the fact that India has 5 times Nigerian population.

. Nigeria needs to meet up with the expectations of Social Development as contained in the Millennium Development Goals to which the country is a signatory. Therefore there should be alignment of intents and actions on the part of the Federal government through the Women Affairs Ministry.

. There are concerns around what constitutes the N1.1 billion Headquarters cost component in the 2018 budget estimate. Also, renovation cost of N730 million as contained in the budget is considered high considering the benefit to the society.

. The Federal government needs to increase capacity development deficit in the management of the Ministry by ensuring that ministerial appointments to such a sensitive women ministry should not be based only on political considerations, but the requisite and technical ability to deliver value to vast majority of women in the country.

9. Education Ministry

The Ministry's Recurrent versus Capital expenditure spread is too high and will negatively impact the development of education in the country. Areas of concern that requires more attention are highlighted below.

. The solar lighting component in the 2018 budget estimate should be checked with 2017 budgets to ensure that there is no duplication of costs.

. The foreign scholarship for exemplary Nigerians is noteworthy and should be continued. However, the basis of selection should be robust enough to have a fair representation across the country.

. There are significant provisions to tertiary institutions in the budget estimate but concerned about the incessant strikes actions crippling educational pursuits of our young nationals. There seems to be an issue with the actual distribution of the allocations given to the Institutions, which need to be looked into.

. There should be an alignment between the allocation of the Tertiary Education Trust Fund and the Expenditure of the Ministry to improve the quality of the education system in the country, which is gradually going down.

. Education Tax should be used to fund education in all the three levels and not serve as an intervention fund. The education tax contributed by companies, if well managed, is enough to meet the needs of all education institutions. However, if more money is required, governments must approve tax relief and exemptions to individuals and organizations who want to contribute more to education costs of the nation.

. Government should request the Ministry to bring about the actual cost of providing qualitative primary, secondary and tertiary education in the country so as to budget efficiently for this important social objective of the Constitution, and to prevent future shortfall in the education requirements.

10. Health Ministry

The Ministry's budget estimate presents a huge Recurrent versus Capital expenditure spread, negating development. The people's agitations are around the following:

a. Whether the funding allocated to the Ministry gets distributed to the various agencies considering the low deteriorating state of our health facilities.
b. The country is being faced with the challenges of brain drain in the health sector and the Federal government needs to address the negative effect on the sector.
c. The people are not getting value for the huge amounts spent by the Federal government on health delivery as they end up paying for drugs, diagnosis and other services rendered by the health care Institutions or run the risk of losing their lives where the financial capacity is not available.
d. There is huge infrastructural development deficit, which needs to be urgently addressed to stop the health tourism to India and other foreign nations; negatively impacting our scarce foreign exchange resources.

e. The **National Health Insurance Scheme budget** is too low. It also does not cater for all the segments of the population as it is presently constituted. This negates the wording of our Constitution, which protects the disadvantaged in the society.

f. The Federal government needs to address the structural problem of misdiagnosis in the health sector through a comprehensive approach rather than a draconian one, which only punishes offenders.

g. The Federal government must adduce reasons why it is difficult to implement the National Health Act 2014 and uses this Act for the preparation and implementation of its budget.

11. Ministry Of Environment

a. The Ministry has a good Capital expenditure versus recurrent expenditure spread. However, there are some observations, which matters to the well-being of the people.

b. There is no mention of the different cleanup activities being carried out in the country, especially in Ogoni land. ii. There is also no provision for the Ecological fund and its operations within the 2018 budget estimate.

c. There is no provision in the 2018 budget to mitigate erosion in the South-East region, which causes inter-ethnic conflagration.

d. Federal government's plan redeveloping the North-East is not captured in the 2018 budget of the Ministry.

e. The government must ensure that all expenditure are properly classified. For example, ecological fund should be under the Ministry of Environment rather than putting under Presidency or any other category which may not be clear as to who has the power to carry out the activity.

4.0 RECOMMENDATIONS FOR IMPROVEMENTS OF THE SOCIAL COMPONENT OF THE 2018 BUDGET ESTIMATE

Having gone through the Social components of the 2018 budget estimate and noted the observations and areas of concern, it is worthy to provide recommendations to be considered by the Federal government to ensure that the social needs of the people are met in the delivery of the 2018 budget cycle so as to have positive impact on the lives of the people.

1 **Taxes**

i. Taxes paid by the people needs to be judiciously spent and Federal government must be seen to be accountable in her spending priorities.

ii. The issue of transfer pricing among multinationals needs to be addressed most especially where it involves foreign exchange transactions in order to minimize the negative impact on the nation's tax revenue and reduce pressure on scarce foreign exchange. This is necessary considering the use of foreign contractors for the execution of government projects.

iii. The education tax paid by companies should be used for holistic comprehensive education for all rather than tertiary education alone, as it is presently and it should not be used for intervention.

iv. A specialized Tax Research Unit should be set up in the Ministry of Finance with the mandate of research and development, aiding the FIRS to be better positioned to run more optimally. This will help the Ministry and FIRS to run more professionally in understanding how to plug loopholes in taxing the people, as well as advise government about how to judiciously spend the taxes collected. The Fiscal policy department of the Ministry should be strengthened to be able to focus more on professional tax and revenue related research work. This department should monitor and assess tax incentives, concessions and rebates given to organizations and provide government with cost-benefit analysis. The value of such incentives, concessions and rebates must be part of the budget of the Ministry for transparency and accountability. The amount of tax forgiven or foregone is an integral part of tax revenue.

2. **Loan Repayment**

The N2.1 Trillion costs for repayment of debts needs to be redressed urgently considering that the burden of debts repayment lies more on taxes collected from the people (either individually or through their businesses).

3. **Intervention Fund - Central Bank**

The Federal government should make concerted efforts to ensure that there are no idle intervention funds within the coffers of the Central Bank of Nigeria. Such funds should be utilized to fund some of the government projects rather than always resorting to costly loans.

4. **Government Ministries**

i. The budget for the Women Ministry should be significantly improved on, as it is presently too low. The social impact expenditure in the 2018 budget should be increased, to leapfrog Nigeria out of the present chaos of lowest poverty and Maternal Mortality indexes in the world. The Minister designate in future needs to be a professional with skills requisite and qualifications to fundamentally administer the Ministry and positively impact women in the society holistically.

ii. The revenue potentials of the Ministry of Information and Culture from Tourism need to be urgently assessed and harnessed by the Federal government.

iii. The budget for the Environment Ministry should consider the Ecological Fund, Desertification in the North East and Erosion in the South.

5. **Electricity**

The cost of generating power is too high and unsustainable in the long run. Therefore, the Federal government should, as a matter of urgent policy use an "energy mix" approach consisting of the expropriation of the vast solar, wind, waves, and waste to boost the energy potentials of the nation. Government must introduce tax incentives for alternative energy providers, and grant tax relief on loans obtained by landlords to purchase alternative energy. Government should encourage banks to give loans for alternative energy for homes and factories. The foreign exchange on the importation of generators can be better utilized for other national projects.

6. **Assessment of Previous Year Budget**

. Performance Evaluation of the 2017 budget implementation must be carried out in order to ascertain the cost benefit analysis to the people. This requires an assessment of value to the people vis-à-vis the amount spent on salaries and recurrent expenditure [especially considering redundancy costs associated with many people employed to do a few tasks per time]. The huge expenditure on salaries is undesirable. Therefore, government needs to conduct a comprehensive audit and review so as to determine the huge potential to the nation that spending on developmental purposes **[i.e. Technology, Tourism**, **and Infrastructural**

Development] will bring over and above mass employment of non-skilled personnel.

. Any provisional account managed by the Federal government must be reconciled to expenditures run transparently in the interest of the people.

. Any expenditure from **the Excess Crude Account [ECA] and the Federation Account MUST** be approved as provided in the Constitution (i.e. by the Legislators) before funds are allocated for spending any part of it.

7. **Health Care Delivery**

. **The 1% Health Intervention Fund deductions** need to be properly utilized to develop our health care network such as addressing brain drain, misdiagnosis and maternal/infant mortality rates. There is also the need to reduce the high cost of our scarce foreign exchange resources filtered away through health tourism.

. The National Health Act 2014 must be implemented in the 2018 budget. There must be provisions in our budget to take care of the disadvantaged or less privileged in the society – children, orphans, women, aged and the disabled (either mentally or physically challenged). This will significantly reduce the loss of lives.