

LEGAL RESPONSES TO TAX EVASION AND AVOIDANCE IN NIGERIA¹

Abstract

Tax evasion and avoidance are both phenomena that are probably as old as taxation itself. Wherever and whenever authorities decide to levy taxes, individuals and firms try to avoid paying them. Though this problem has always been present, it becomes more pressing in the course of globalization as this process extends the range of opportunities to circumvent taxation while simultaneously reducing the risk of being detected. Tax evasion and tax avoidance are practices that have eaten deeply into the revenue that ought to be generated by the government, and hence affect the economic life of the country as a whole, in view of this, this paper seeks to examine the issue of tax evasion and avoidance in Nigeria, its effects on the tax system and the efforts of the legislature and the judiciary aimed at curbing the menace of tax evasion and avoidance in Nigeria.

Introduction

Tax is a civic contribution imposed by the government on her subject with a view to finance its core responsibilities of ensuring optimum public welfare socially, economically and politically. A number of challenges hindered effective administration of tax system. In particular, tax evasion is argued to be the most challenging practice in developing countries such as Nigeria. All forms of taxes in Nigeria are to some extent avoided or evaded largely because the administrative machinery to ensure effectiveness is weak. This paper examines the legal framework in place to combat the menace of tax evasion and avoidance. In doing so we examined to what extent the legislative provisions measure up with the objectives of taxation. We also looked at the judicial attitude to tax evasion and in the final analysis we offer possible solutions to tax evasion and avoidance in Nigeria.

Definition of Terms

Tax Evasion

The Nigerian tax codes have neither defined nor drawn any distinction between tax evasion and avoidance.

The Black's Law Dictionary defines tax evasion as the willful attempt to defeat or circumvent the tax law in order to illegally reduce one's tax liability².

Tax evasion has also been defined as the act of illegally paying less in taxes than the law permits; committing fraud, willful default or neglect to reduce the tax liability or escape the payment of tax altogether³.

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² B.A. Garner, *Black's Law Dictionary 8th ed*, (Thomson West, United States of America, 2004), P. 1501

³ J.A. Arohundade, *Nigerian Income Tax and Its International Dimensions*, (Ibadan, Spectrum books Ltd, 2005), P.74; J.A.A. Agbonika, *Problems of Personal Income Tax in Nigeria*, (Ababa Press Ltd, Ibadan, 2012), P.296

In *Bullen v. Eisco*⁴, Justice Holmes defined tax evasion as the illegal or fraudulent attempts to escape or avoid the payment of their dues.

In *Commissioner of Inland Revenue v. Challenge Corporation Ltd*⁵, Lord Templeman said that tax evasion occurs when the commissioner is not informed of all the facts relevant to an assessment to tax.

In *R v. Kingston Crown Court*⁶, Burton J. held that ... these cases are those in which the commissioner or inspector is actually deceived or deliberately misled as to these relevant facts.

Tax Evasion is the deliberate refusal or failure to pay one's tax or the reduction of one's tax liability through illegal or fraudulent returns or failure to make a return or pay tax on time⁷. Tax evasion usually entails taxpayers deliberately misrepresenting or concealing the true state of their affairs to the tax authorities to reduce their tax liability and includes, in particular dishonest tax reporting (such as declaring less income, profits or gains they actually earned, or overstating deductions)⁸. Quite a large number of companies declare losses year in, year out, yet it is surprising that such companies do not voluntarily wind up, neither are they compulsorily liquidated. Rather they still continue in business unabated with directors remuneration increasing every year as well as increases in luxurious or conspicuous and prestigious investments such as landed properties and expensive cars⁹. There can be no clearer evidence of tax evasion than these. Tax evasion is therefore not only morally wrong but also it involves a breach of the tax laws.

From the foregoing, the following elements are deductible as basis for determining liability for tax evasion:

- (a) The statute must have stipulated payment of tax;
- (b) The tax has become due on the tax payer;
- (c) He has completely and deliberately ignored it or has under declared his income so as to enable him pay less tax;
- (d) The act is illegal and punishable¹⁰.

As earlier stated, the Nigerian tax statutes provide no legislative definition of tax evasion, the Personal Income Tax Act¹¹, did not define tax evasion but rather enumerated acts that constitutes tax evasion,

⁴ (1927) 275 U.S. 100

⁵ (1987) AC 155 at 167; *Best v. FBIR* (2013) N.R.L.R. 1, 161

⁶ (2001) EWHC Admin, Paragraph 2

⁷ I.A. Ayua, *The Nigerian Tax Law*, (Lagos: Spectrum Law Publishing 1996), P. 250

⁸ "Tax Avoidance and Tax Evasion", available at http://en.wikipedia.org/wiki/tax_avoidance_and_tax_evasion accessed on December 12, 2016

⁹ I.A. Ayua, *Op. Cit* at 264.

¹⁰ J.A.A. Agbonika, *op.cit* at 297-297

¹¹ Cap P.8 Laws of the Federation of Nigeria 2004 (as amended in 2011)

having advertence to the definitions proffered above. For instance section 95 of the PITA makes it an offence for any person to make incorrect return by understating or concealing any income liable to tax or gives incorrect information in relation to a matter or thing affecting the liability to tax¹². The Value Added Tax Act also did not define tax evasion but states acts that amounts to tax evasion¹³.

The view of the tax Authorities in this respect is also relevant as to what amounts to tax evasion. The definition offered by the Canadian Department of National Revenues¹⁴ is quite comprehensive and of immense assistance in the quest for an acceptable definition. They stated that:

Tax evasion is the commission or omission of an act knowingly with intent to decide so that the tax reported by the tax payer is less than the tax payable under the law, or a conspiracy to commit such an offence. This may be accomplished by the deliberate omission of revenue, the fraudulent claiming of expenses or allowances, and the deliberate misrepresentation, concealment or withholding of material facts.

An adoption or endorsement of this view in Nigeria would indeed make the routes of escape extremely narrow

Tax Avoidance

Tax Avoidance may be simply defined as the reduction or minimization of a person's tax liability by carefully arranging one's affairs in such a way as to take advantage of loopholes in the tax law provisions, it is the intentional act of a tax payer to pay less than what he ought to legally pay to the tax authority.

Tax avoidance is a phrase that has been frequently used in a three-cornered – fighting ring embracing as it were, the tax payer, the legislature and the executive, with the court as the umpire¹⁵. The taxpayer has always been the common target. To the taxpayer, tax avoidance is synonymous with tax planning which is a legitimate exercise of his legal right to arrange his legal relations to his business or property in such a way as to prevent the revenue from putting the largest possible shovel into his stores.¹⁶ In other words, tax avoidance means payment of less or zero tax in a legitimate manner.

In *Pete v. Commissioner of Taxation*¹⁷, Menzies J. stated as follows:

¹² See also sections 48(3), 52(1), 76(1), (4), 77, 94(11) (a), (b), 96, 97 dealing with acts that constitutes tax evasion. See also section 26 of the Value Added Tax Act.

¹³ Section 26 of the Value Added Tax Act, Cap. V1 Laws of the Federation of Nigeria, 2004 (as amended)

¹⁴ Canada Narrow Information Circular No. 73, 1999

¹⁵ S.O. Fashokun “*Assessment of Efforts Against Tax Avoidance and Evasion in Nigeria, the Legal View Points*” (1976) 10, *Nig. LJ*, 13

¹⁶ Per Lord Clyde in *Ayrshire Pullman Motor Services v. I.R.C.* (1929) 14 T.C. 754 at 763.

¹⁷ (1963 – 64) 11 CLR 443 at 445.

It is perhaps inevitable in an acquisitive society that taxation is regarded as burden from which those who are subject to it will seek to escape by any lawful means that may be found.

In *I.R.C. v. Duke of Westminster*¹⁸, Lord Tomlin held:

Everyman is entitled, if he can order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then however unappreciative, the commissioner of Inland Revenue or his fellow taxpayers may be of his ingenuity he cannot be compelled to pay an increased tax.

In *I.R.C. v. Willoughby*¹⁹, Lord Nolan adopted the definition of counsel to the Inland Revenue who said:

Tax avoidance is a situation when a tax payer reduces his liability to tax without incurring the economic consequences that parliament intended to be suffered by any tax payer qualifying for such reduction in tax liability.

The Lord Justice went ahead to add that tax avoidance is a course of action designed to conflict with or defeat the evident intention of parliament. It is understood to mean some acts by which a person so arranges his affairs in such a way that he is liable to pay less tax than he would have paid but for the arrangement²⁰.

M.C. Flesch has defined tax avoidance as the lawful carrying out of a transaction which was either entered into or which took a particular form, for the purposes of minimizing taxation.²¹

Tax avoidance is in effect, the act of dodging tax without breaking the law. Tax avoidance is a transaction in which the tax payer;

- (a) Avoids tax by planning in taking advantage of provisions for reduction and reliefs,
- (b) Adopts some artificial or unusual means for the purpose of avoiding tax,
- (c) Is carried out lawfully,
- (d) Is not a transaction which the legislation had intended to encourage, but it has failed to clearly outlaw it.

¹⁸ (1936) A.C. I at 19 – 20.

¹⁹ This definition was adopted by Lord Hope in *Westmoreland Investments Ltd v. MacNiven* (2001) All ER 865 at 889

²⁰ Royal Commission on Taxation of Profits and Income para 1016 (1955)

²¹ M.C. Flesch, “*Tax Avoidance, The Attitude of the Courts and the Legislature*” (1968) 21 CLP, 215.

Distinction Between Tax Evasion and Avoidance

There is need at this point to draw a distinction between tax evasion and avoidance.

The use of the terms “tax avoidance” and “tax evasion” was considered in the case of *Fashogbun v. Layade*²². The Court of Appeal held that; “the word ‘avoidance’ is to be contrasted with the word ‘evasion’. It involves the notion of escaping by any device or artifice but conveys simply the notion of actually escaping through not being called up to pay.”

In *7up Bottling Co. Plc v. L. S. I. R. B.*²³, Nzeako J.C.A., stated as follows:

Whereas tax avoidance is permissible, tax evasion on the other hand is illegal and gives rise to penalties and in some cases imprisonment. Thus, it is to avoid escape of taxation of taxable subjects that tax laws are amended or even re-enacted from time to time as has been the case, in order to meet new developments and to plug loopholes. It is not only to stop persons who employ legal devices permissible to minimize liability to tax.

The judicial pronouncement is generally in agreement that tax avoidance is generally lawful but that tax

evasion is illegal²⁴. Consequently, the courts would not intervene in favour of the revenue authority if the taxpayer has taken advantage of the provision of the tax law or the absence of a provision in it to escape or reduce his tax liability. The intention of both the tax avoider and tax evader are the same to gain tax advantage.²⁵

From the decided cases, with due respect it does appear that judges did not appreciate the significance of taxation as an economic tool for stimulating the overall development of the country, and hence the need to ensure that taxation generates the required revenue by pronouncing against tax avoidance schemes aimed solely at diminishing tax that otherwise would be payable. Furthermore, it seems that the Judges lost sight of the question of equitable burden of taxation which demands that tax liability should be fairly uniform in respect of taxable persons of roughly the same income, hence the need again to prevent ingenious ways of avoiding tax.

²² (1999) 11 NWLR (PT 628) 543. See also *Federal Commission of Tax v Westgarth* (1985) 18 Commonwealth Law Report (C.L.R) 396 at p. 414

²³ (2000) 3 NWLR (Pt. 650) 565 at 591.

²⁴ M.N. Umenweke, *Tax Law and its Implications for Foreign Investments in Nigeria*, (Nolix Educational Publications, Enugu, 2008), P.173

²⁵ S.O. Fashokun “*Assessment of Efforts against Tax Avoidance and Evasion in Nigeria. The Legal View Point*” (1976) 10, *Nig. L.J.*, P. 14.

It is perhaps necessary to point out that there is no reason why judges should shy away from taking account of the context and purposes of the taxing statutes, after all it is axiomatic now that judges do make law where public policy is required.²⁶ There does not therefore appear to be any valid argument why a judge after recognizing tax avoidance as an evil cannot counteract it by his ruling.²⁷

There is no gain saying that no matter how legal tax avoidance is, it is unpatriotic, anti social and undermines the essence of taxation. The avoider normally increases and sheds the burden of tax on others mainly the illiterates in the society.

Tax Evasion Devices

Whilst it is not possible to provide an exhaustive list of the various methods adopted to evade tax, apparently because new ones come into play now and then, there are some more common forms of tax evasion in Nigeria. The following are some of the obvious examples:²⁸

1. Indulging in fictitious or artificial transactions;
2. Non-declaration of assessable income for the purpose of tax;
3. Under-declaration of assessable income for the purpose of tax;
4. Making incorrect claims for tax reliefs and allowances;
5. Engage in transfer pricing techniques between or among companies in a group; and
6. Evasion of customs duty, the importers evade customs duty by under invoicing and misdeclaration of quantity and product description. When there is ad valorem import duty, the tax base is reduced through under invoicing. Mis-declaration of quantity is more relevant for products with specific duty²⁹

Tax evasion is often classified as a typical white collar crime, defined as a crime committed by a respectable person of high social status in the course of his occupation.³⁰ In *Spies v. United States*³¹, the United States Supreme Court ruled that an overt act is necessary to give rise to the crime of income tax evasion.

²⁶ Friedman "Limits of Judicial Law Making and Prospective Overriding"(1966) 29 MLR, 593.

²⁷ See *Finsbury Securities v. I.R.C.* (1965) 43 T.C. 591, *Reeves v. Evans Boyse and North Colt Syndicate* (1971) 48 T.C. 495.

²⁸ O.S. Obatola, *The Rudiments of Nigerian Taxation*, (Lagos, ASCO Publishers, 2013) P.96-97; M.N. Umenweke, *op.cit* at 181; M.T. Okorodudu, "Measures Against Tax Evasion and Avoidance. Some Equity Questions and Suggested Reforms",

being a paper at the 15th Annual Senior Staff Conference of the Federal Inland Revenue Department, December, 1985.

²⁹ Chowdhury F.L., *Evasion of Customs Duty in Bangladesh*, Desh Prokashon Dhaka, 2006, available at www.wikipedia.org accessed on May 12, 2017.

³⁰ Sutherland, Edwin H., *White Collar Crime*: 1949, New York, Dryden, P. 9.

³¹ (1943) 317 U.S. 492, also available at <http://answers.encyclopedia.com/question/did-spies-V-united-states>, accessed on May 12, 2017

Tax Avoidance Devices

There are several devices used by taxable persons to avoid tax. the devices are infinite, since tax planners are continuously in search of ingenious and sophisticated means of avoiding tax. As the tax authorities discover their tricks and adopt anti-avoidance means, the tax planners go back to the drawing board to device more sophisticated means.

Tax avoidance is done by the tax payer taking advantage of the tax relief(s) or exemption(s) created by the Act so as to encourage taxpayers to engage in certain ventures which is likely to be profitable to the country at large or to assist individuals from suffering undue hardships; eg. The reliefs provided under the Act, include, wife allowance, children allowances, dependent relatives allowance, disabled person's allowance and capital allowances. a legitimate claim of these allowances would constitute legitimate tax avoidance³².

Reasons for Tax Evasion and Avoidance

Various researchers and studies in Nigeria indicated several reasons responsible for tax evasion and avoidance³³. These reasons range from social, economic and political to religion. They include (1) excessive corruption on the part of government officials, (2) problems of assessment, (3) collection and enforcement of tax, (4) administrative incompetence on the part of tax authorities, (5) general dishonesty amongst Nigerians, (6) low political culture, (7) ignorance, (8) unfairness of the tax system, (9) lack of regard for equity, law and justice, (10) historical, unpatriotic and genetic behavioural patterns.

Social Factors

(a) Lack of Justification for taxpayer's money

Failure on the part of government to justify the huge sums of money collected as taxes from Nigerians has been identified as the major factor that encourages tax evasion. There is abysmal failure on the part of government to provide social and other amenities (the principal reason for which taxes are collected). The existing public utilities are epileptic while there is apathy on the part of the government to make them functional. The individual taxpayers struggle to get the basic necessities of life and at the same time are starved in the face with the demand for taxes. The citizens pay their tax yet government does not provide the basic amenities like water, security and electricity. When out of frustration they

³² J.A.A. Agbonika, *Op.cit* at 303

³³ M.N. Umenweke, I.A. Ayua, C.S. Ola, M.T. Abdulrazaq, S.A. Okorodudu, J.A.A. Agbonika.

dig boreholes to have water the government will turn around to tax them on that. When they pay security levies, the security is not provided despite the numerous security agencies, yet they engage private security outfits and pay them. The issue of electricity is the worst. They engage private firms/individuals to evacuate their waste yet the government demand sanitation tax from them. In *Eti-Osa Local Government v. Rufus Jegede*³⁴, the Court of Appeal, Per Dongban-Mensem J.C.A., stated as follows:

...taxation should be a tool of social engineering, of societal class structural adjustment in the hands of a responsive and sensitive government. This method can however be effective only in an economy where good records are kept, where the government is truly, responsible and answerable for the welfare of the people. In a situation where the constitution of the Federal Republic of Nigeria renders basic social services non-justifiable (Chapter Two of the Constitution), the Government must be weary of over burdening the citizens with all manner of levies and taxes...

To many taxpayers, the fundamental principle of government has been defeated and the moral obligation to pay taxes for the salaries of government officials no longer exists. Bad governance is therefore a disincentive to tax payments. When basic infrastructure in the form of street lights, good roads, potable water, schools and hospitals, etc are lacking, this discourages voluntary payment of tax.

(b) Inefficient Tax Administration Machinery

Experience has shown that the institutional capacity to administer taxes effectively is woefully lacking in Nigeria. The various tax authorities that are charged with the responsibility of administering the tax laws are faced with a lot of challenges. Tax administration and individual agencies suffer from limitations in manpower, money, tools and machinery to meet the ever increasing challenges and difficulties. Accordingly, it is very difficult to effectively identify individual taxable persons and businesses for the purpose of assessing them to tax. Philips, considers the paucity of administrative capacity as a major impediment to the government in its attempts to raise revenue through taxation in Nigeria.³⁵ The majority of the staff of the various tax authorities does not have the requisite

³⁴ (2007) 10 NWLR (Pt. 1043) 537.

³⁵ Philips A, *Nigeria's Fiscal Policy, 1998 – 2000*, Ibadan, Nigeria Institute for Social and Economic Research Monograph Series, No.17. The Challenges of Tax Evasion, available at www.sunnewsonline.com, accessed on July 02, 2015, where the then Minister of Finance Dr. Ngozi Okonjo-Iweala said that something urgent must be done to checkmate tax dodgers. It appears that those saddled with ensuring strict compliance with the prompt payment of taxes are either slothful in their duties or have compromised their position. Not long ago, the Federal

knowledge or training to practice tax. The tax authorities do not properly keep records. There are cases where demand notes are sent for assessments that have either been paid for or remitted. Notices are addressed wrongly resulting in either loss or non-delivery leading to imposition of penalties and or court action.

Economic Factor

Poverty

There is high level of poverty in the country, where scarce resources compete with legion of needs, people are increasingly finding it difficult to feed properly let alone pay tax.

Political Factor

It is unusual to evade tax for political reasons; however, there are rare instances where tax is evaded for political considerations. For instance, where political office holders come from a particular community, there is likelihood that people from other communities not so represented in government may refuse to pay tax in order to frustrate the government. This factor expressed itself in the 2nd republic in a western town of Ogbomoso in Oyo State, where the general populace refused to pay tax for political difference. It took harsh measures on the part of the Oyo State government to restore its payments³⁶.

Effects of Tax Evasion and Avoidance

The problem of tax evasion is a cankerworm which eats fast into the fabric of the Nigerian revenue yield from taxation. It has become the favorite crime of the Nigerian, so popular that it makes armed robbery a minority interest³⁷. Tax evasion is of serious concern for at least three reasons.

First, it results in a loss of tax revenue³⁸. Secondly, given that opportunities to evade taxes differ among taxpayers, tax evasion impairs the chances of realizing the distributional equity goals of

Ministry of finance stated that at least 350,000 registered companies in the country have consistently failed to file their tax returns to the Federal Inland Revenue Service (FIRS). That could be a deliberate act to evade payment of tax. It speaks volumes of the laxity in the tax administration in the country.

³⁶ T. Abdulrazaq, *Judicial and Legislative Attitude to Tax Evasion and Avoidance in Nigeria: An Appraisal of some Cost*. Paper presented During the National Conference on State Taxation Organised by Department of Commercial Law, Ahmadu Bello University, Zaria at Kongo Conference Hotel, 1980. See also J.A.A. Agbonika, *Op.cit* at 301

³⁷ J.N. Samba, *Tax Evasion and Tax Law Reform in Nigeria*. Paper Presented at the 21st Conference of the Nigeria Association of Law Teachers, University of Lagos, 1983.

³⁸ Issac Anumihe and Akin Alofetayan, *FG Loses N80bn to Tax Evading Firms*, available at www.sunnewsonline.com, accessed on July 02, 2015. See also *The Challenges of Tax Evasion*, available at

taxation. Thirdly, if tax evasion becomes too wide spread and out of control, honest taxpayers may lose faith in tax administration and be tempted to join the ranks of tax evaders.³⁹

The President of the Chartered Institute of Taxation of Nigeria as at 2005, Mr. Foluso Fasoto said this of the impact of tax evasion on Nigeria's revenue yield:

The issue of tax evasion has really done a lot of damage on the income of the country, and the effect in financial terms runs into billions of naira in this country annually. Unfortunately, we do not have an official figure because of the poor statistical situation in the country. But my estimate is that on an annual basis, there is no way this can be less than ₦50 billion⁴⁰.

These commentaries testify to the magnitude and effect of tax evasion on the revenue yield via taxation generally.

Anti Tax Evasion and Tax Avoidance Provisions in the Nigerian Tax Laws

The legislators aware of the antics of the tax evaders and avoiders have enacted provisions aimed at checking the incidence of tax evasion and avoidance. These are some of the anti tax evasion and tax avoidance in the various tax laws:

1. Section 7 of the Personal Income Tax Act.⁴¹ The section enables the tax authorities to tax a business on such fair and reasonable percentage of the turnover of the business as the relevant tax authority may determine where the said business produce either no assessable income or an assessable income, which in the opinion of the relevant tax authority, is less than might be expected to arise from that business as the case may be, or the true amount of the assessable income of that person from the business cannot be readily ascertained.

In *Mobil Oil Nigeria Ltd v. F.B.I.R.*⁴², a similar provision was successfully used to assess mobil oil in 1977, and same was upheld by the Supreme Court as proper, after making slight adjustment to the assessment made by the Federal Tax Board.

www.sunnewsonline.com, accessed on July 02, 2015, where the then Minister of Finance Dr. Ngozi Okonjo-Iweala states that the Federal Government loses over N80bn to tax evasion by 75% of the registered companies in the country has once again highlighted the scope of tax evasion in Nigeria.

³⁹ M.T. Abdulrazaq, "Indices for Measurement of Tax Evasion; A Useful Tool for Nigeria", *MPJFIL*, Vol. 2 No. 3, 1998, P. 166, Spicer, New M.W. Approaches to the Problem of Tax Evasion, *B.T.R.* (1975), P. 152, Evasion occurred when the authorities were not told of all facts relevant to assessment of tax. The Chairman of Edo State Internal Revenue Service has disclosed that only 141,000 of the over four million people in the state pay their taxes. G. Enogholase, Only 141,000 People pay taxes in Edo – State IRS, available at www.vanguardngr.com, accessed on May 10, 2015, Ifeanyi Onuba, We'll Invoke Relevant Tax Laws Against Defaulting Taxpayers – FIRS, available at www.punchngr.com/tax/laws, accessed on July 11, 2013.

⁴⁰ *The Guardian*, Monday, October 24, 2005, P.57; see also J.A.A. Agbonika, *Op. cit* at 297

⁴¹ Cap. P.8, Laws of the Federation of Nigeria, 2004 (as amended).

⁴² (1977) 3 S.C. 53.

2. Section 33 of the Federal Inland Revenue Service (Establishment) Act, 2007 which gives the service the power in the enforcement of payment of any tax due to distrain the taxpayer by his goods or other chattels, bonds or other securities.

In Lagos state, the state Board of Inland Revenue acting under a similar provision under the Personal Income Tax Act⁴³, embarked on the closure of companies which violated the provisions of the law by failure to pay or remit the taxes due from the companies to the board.⁴⁴

Distrain is the seizure of someone's property in order to obtain payment of rent or other money owed, especially in common law countries. Distrain is the act or process whereby a person (the distrain) traditionally even without a court approval, seizes the personal property of another located upon the distrainor's land in satisfaction of a claim, as a pledge for performance of a duty, or in reparation of an injury. In the past, distress was often carried out without court approval. Today, some kind of court

action is usually required⁴⁵.

In *Lagos State Internal Revenue Board v. First Bank of Nigeria Plc*⁴⁶, the court upheld the power of the defendant to distrain a corporation for the purpose of enforcement of tax laws. "It is hereby declared that ... the applicant is empowered to distrain the respondent of its goods, chattels, land or premises, etc for non payment of tax; being unremitted deductions in respect of PAYE and WHT under the said law and/or under the Personal Income Tax Decree 104 of 1993.

The following conditions must be met before the revenue authority can exercise this power:

- (a) The respondent must have been properly served with an assessment;
- (b) The assessment must have become final and conclusive;
- (c) A demand notice must have been served on the respondent as prescribed; and

⁴³ Section 104 Personal Income Tax Act.

⁴⁴ Tax Evasion: LIRS Closes 546 Companies in 1 year, *Vanguard*, Wednesday, September 15, 2010, P. 43, See also *NBC v. L.S.B.I.R.* (2000) 1 L.H.C.R. (Pt. 8) 147, Tony Chinonso; LASG Shuts 6 Firms Over N18.73Million Tax Liabilities, available at www.vanguardngr.com (accessed on February 26, 2016)see also; George Onyejiuwa; Imo Govt. Seals Off 8 Banks Over Non-Payment of Taxes, available at www.sunnewsonline.com, accessed on July 02, 2015.

⁴⁵ *Fast Forward Sports v. Port-Harcourt Local Council* (2011) 4 TLRN 45; *Independent Television/Radio v. Edo State Board of Inland Revenue* (2014) 16 TLRN, 55

⁴⁶ (1999) 1 NRLR 1, see also *First Bank of Nigeria v. Attorney General Anambra State & Anor*, (2000) NRLR 129. Nduka Chiejina; Tax Evasion: Law Court to the Rescue, available at www.nationonlineng.net, accesses on July 02, 2015.

- (d) The respondent must have failed to effect payment of the assessed tax within the time specified by the demand notice⁴⁷.

3. Section 65 (3) Companies Income Tax Act. The section provides as follows:

Where a company has not delivered a return and the board is of the opinion that such company is liable to pay tax, the board may, according to the best of its judgment, determine the amount of total profits of such company and make an assessment accordingly, but such assessment shall not affect any liability otherwise incurred by such company by reason of its failure or neglect to deliver a return.

This section empowers the Federal Inland Revenue Service to make assessment upon companies that do not submit their returns prior to or at the end of an accounting period⁴⁸. The only restriction is that the service has to use its best of judgment to determine the amount of the total profits of such company and make assessment upon the company accordingly.

In *Nigerian Breweries Plc v. Lagos State Internal Revenue Board*⁴⁹, where the Court of Appeal in the interpretation of section 29 of the Personal Income Tax Law of Lagos State, a section of the law which has provisions similar to section 65 of the Companies Income Tax Act, held that:

...that the tax officer has to make an assessment to the best of his judgment against a person who is in default as regards supplying information, he must not be dishonest, vindictive or capricious. He is expected to make what he honestly believes to be a fair estimate of proper figure of assessment.

The essence of this provision is that, if the taxpayer intends to avoid or evade payment of taxes by not submitting its returns to the tax board, the service, invoking powers conferred upon it under section 65(3) of the Companies Income Tax Act, can assess the company by using its best of judgment. It is only bound in the use of its best of judgment not to be dishonest, vindictive or capricious. The power of the tax authority in respect of best of judgment assessment does not yield itself to easy clarification for obvious reasons. Thus, the power may be exercised once the tax authority has formed an opinion that the tax payer has under declared or under paid his due taxes. The basis of best of judgment varies

⁴⁷ L. Akinsola, *Personal Income Tax Act: Principles and Cases in Nigeria*, London, Prime Publishers, 2014, P.125

⁴⁸ *FBIR v Akwa Ibom State & 4 ors* (2008) 4 CLRN, 99

⁴⁹ (2001) FWLR (Pt. 72) 1974 at 1984, See also *Income Tax Commissioner v. Badridas Ramrat* (1937) L.R., 641, *FBIR v. F. M Solanke* 4 TLRN 165,

from one individual to another. It may be based on the lifestyle of taxpayer, expenditure, investments etc.⁵⁰

4. Section 22(1) of the Companies Income Tax Act which states as follows:

Where the board is of the opinion that any disposition is not in fact, given effect to or that any transaction which reduces or would reduce that amount of any tax payable is artificial or fictitious, it may disregard any such disposition or direct that such adjustments shall be made as regards liability to tax as it considers appropriate so as to counteract the reduction of liability to tax affected, or reduction which would otherwise be affected by the transaction and any company concerned shall be assessable accordingly⁵¹.

A transaction will be fictitious where it is a sham that is where it is not intended to be acted upon and is only used as a cloak to conceal a different transaction.⁵²

Discerning whether a transaction is artificial or not, can be done from two perspectives. The first is by looking at the object of the transaction. It has been held that a transaction cannot be artificial if the taxpayer can show that the transaction was carried out for *bonafide* commercial reason, and did not have as its main object the obtaining of tax advantages.⁵³

The alternative line of approach to discerning whether a transaction is artificial or not would be to look at the form which the transaction takes. It has been held that ... where unusual features have been included in an otherwise simple transaction in order to produce a particular tax result, taxpayer has uniformly lost.⁵⁴

This approach can derive some support from the Supreme Court decision in *Akinsete Syndicate v. Senior Inspector Taxes*⁵⁵ an agreement was signed between one Chief G.M. Akinsete, the licensee of certain timber extraction rights and another company, Coast Timber Company Limited, for the extraction, management and sale of the timber of the land over which the licensee had concession. The agreement permitted the sharing of profits between the two parties and it was signed in June, 1953. Another supplemental agreement was signed between the licensee (Chief Akinsete), the company and a joint licensee made up of four individuals in January, 1959. The supplemental agreement which

⁵⁰ L. Akinsola, *Op. cit* at P.105

⁵¹ See also, Section 17 of the Personal Income Tax Act, which has a similar provision.

⁵² *Johnson v. Jewitt* (1961) 4 T.C. 231.

⁵³ *I.R.C. v. Brebner* (1976) A.C., 18.

⁵⁴ Walton J. in *Read v. Nova Securities Ltd* (1982) S. T. C. 1724

⁵⁵ Unreported Judgment of the Supreme Court, SC/164/67.

created a partnership between the licensee and the joint licensee and merged the interest of the licensee and the joint licensee into one, provided that the interests and benefits of the licensee under the first agreement “now belongs” to the joint licensee called G.M. Akinsete Syndicate. The respondent assessed Chief Akinsete to tax for the income accruing to him out of the timber business for the accounts of the year ended 1958. The appellant contended that because of the words “now belongs” in the second agreement, the income and other benefits accruing to Chief Akinsete had reverted to the joint partnership since the date on the first agreement in 1953 and that for that reason Chief Akinsete could not be taxed on the income of the timber business in 1958. It was also argued by the appellant that the partnership had existed as a matter of fact since the signing of the first agreement although the partnership agreement itself was signed in 1959. The respondent contended that there was no partnership in fact and in law by the year 1958, on which the assessment was based and that if there was any, the transaction was artificial and fictitious and should be disregarded in accordance with section 15 of the Income Tax Law of Western Nigeria, 1959. It was on evidence that the share of projects of the partnership was paid into the account of Chief Akinsete who withdrew as he pleased and handed out money as he please. It was held that the profits of the venture were in reality his own profits and could be personally taxed on them.

The issue of tax evasion and avoidance is one of the greatest problem facing the Nigeria tax system efforts are made at various levels to address this issue⁵⁶, yet it continues to linger. At the regional level, the African Tax Administration forum has been established to tackle the problems of taxation.

The general principle is that to prevent tax evasion and avoidance it is necessary that each taxpayer’s tax is properly assessed and properly paid. This cannot be done merely by imposing penalties against those who fail to pay their taxes but only by introducing measures which will make it possible for tax authorities to assess the reasonably accurate taxable income on persons in all cases with or without the assistance of the person concerned. In Nigeria there are some monetary penalties and criminal sanctions in connection with tax evasion. There seem to be weak tax administration. Certain aspects of tax administration such as assessment and collection of tax are therefore directly concerned with the prevention of tax evasion. The loss of revenue caused by the widespread tax evasion in the country is due largely to our inefficient and inept tax administration. Another problem is perhaps, the issue of corruption, where the officers are corrupt, even if they are aware of the tax evasion or avoidance scheme, they are likely to compromise their position upon financial or other inducement. The tax

⁵⁶ “Tax administration Challenge: Nigeria, Others Plot Fresh Roadmap”, *Daily Sun*, Monday April 25, 2011, P. 41, “Tax Reforms and Oshoimohole’s. Challenge in Edo”, *The Guardian*, Saturday, March 21, 2009, P.14.

authorities still have much work to do in closing the gaps open to these unpatriotic tax evaders and avoiders who discover new and more advanced ways of evading and avoiding taxes daily.

Judicial Attitude to Tax Evasion and Avoidance

It is apt to examine the attitude of our courts to the issue of tax evasion. There is no doubt that taxation is the creation of statute. However, a great deal not only depends on the interpretation of the statute by the courts; we also require the courts to enforce some of the provisions of the tax laws, particularly those such as the ones considered under the preceding heading. So far, as the issue of tax evasion is concerned regrettably, our courts have not made a far reaching impact. The fault is not so much with the courts, but more so with the tax authority that has not prosecuted tax offenders with much vigour⁵⁷. The basic doctrine of the construction of tax statutes is also very fundamental to the role of the judiciary in the battle against tax evasion. The doctrine is that no tax can be imposed on the subject unless there are clear words in the statute showing an intention to impose a tax on the person as was decided in the case of *Phoenix Motors Ltd v National Providence Fund Management Board*⁵⁸. The onus is on the state (i.e taxing authority) to discharge. Once this is successfully done the next issue is how the court construes the facts of the fact before it to determine if the defendant being prosecuted for tax evasion is liable as charged. Here again, the issue of strict interpretation of the tax statutes lurks behind the decision of the judge as was delivered in the case of *Ahmadu v. Governor of Kogi State*⁵⁹. It has been said that there is no equitable construction with regard to a tax statute. The court simply has to adhere to the clear words of the statute. The Supreme Court of Nigeria emphatically made it clear in the case of *Shell Petroleum Development Co. Ltd v FBIR* that there is no room or an intendment and no equity about a tax⁶⁰. Judges are enjoined not to read anything into or imply anything into the tax statute but to simply consider fairly the language used⁶¹.

An overview of Nigerian courts judgments in the late 1960s and 1970s on these issues leaves much to be desired⁶². In particular, they displayed an apparent lack of judicial will to strike down the infamous

⁵⁷ M.T. Abdulrazaq, *Nigerian Tax Offences and Penalties*, (Lagos, Princeton Publishing Company, 2014), P.147; D.C. John and P.I. Onuh, *Evaluation of Judicial Attitude Towards Tax Offences and Penalties: Cases, Analysis and Recommendations*, ABUJCL, P. 105

⁵⁸ (1992) 1 NTC 205. See also *Employers Mutual Insurance Association Ltd v Inland Revenue Commission* (1944) 27 T.C. 344

⁵⁹ (2009) 1 TLRN 319; (2002) 3 NWLR (Pt. 755) 503

⁶⁰ (1996) 2 NWLR (Pt. 256) 386. See also *Intercontractors (Nigeria) Ltd v National Fund Management Board* (1990) FHCRC 76.

⁶¹ *Supra*

⁶² *Aluminium Industries Aktien Geselishaft v F.B.I.R* (1971) NMLR 339

device through piercing the corporate veil of the Nigerian subsidiary Companies as independent legal entities to see the realities of the state as English court often do.

For instance, in the case of *Reiss and Co. (Nigeria) Ltd. V Federal Board of Inland Revenue*⁶³ this lack of judicial dynamism was quite glaring. In this case, the question arose as to whether the Federal Revenue Court (now Federal High Court) could disregard the legal entity of the Nigerian subsidiary Company for the purposes of taxing the profits of the expatriate parent company Reiss and Co Amsterdam which were derived in Nigeria. Justice Karibi — Whyte (as he then was) has this to say:⁶⁴ Considerable importance has been attached and emphasis laid on the relationship between appellants and Reiss & CO. (Amsterdam), it is evidence that appellant was before 2nd September, 1960 only an overseas branch of Reiss & Co (Amsterdam) following upon the promulgation of the Companies Decree, 1968 and in compliance with the promulgation of the Companies Decree, the Nigerian branch became incorporated as a separate legal entity with its own managing Director and Board of Directors. There is however evidence before me that Reiss & Co (Amsterdam) still has a controlling share of 55 percent of the appellant company.

In spite of this evidence and the fact that the judge himself has conceded that there is a considerable dark cloud of suspicion regarding the genuineness of the transactions between the two companies, he surprisingly concludes that:⁶⁵

The separate legal identity of appellants and Reiss & Co (Amsterdam) cannot be denied; *Salmon v Salmon & Co.* Respondent cannot impugn the legal situation successfully without adducing sufficient evidence to the contrary.

From the foregoing it becomes evident that our judges in the late 1960s and 1970s are just too ready to take the law and the legal consequences of transactions as they find them without the willingness to set the legal form of transactions and see what lies behind them. In this way, they seem to encourage tax avoidance schemes particularly those cleverly devised by multinational enterprises operating in Nigeria through their subsidiaries.

Now, with the enactment of the Companies and Allied Matters Act (CAMA) 2004, Companies Income Tax Act (CITA), 2004, Federal Inland Revenue Service Act (2007), judicial decisions appear to be proactive in matters brought to them for adjudication unlike in the 1970s.

In the case of *Seven Up Bottling Co. Ltd v Lagos State Board of Internal Revenue*⁶⁶, the Court of Appeal held that failure to remit tax deducted from salaries and emoluments of its employees was a

⁶³ Suit No. FRC/LIA/76

⁶⁴ *Ibid* at pp. 19 -20

⁶⁵ Suit No. FRC/LIA/76 of P.2 6

debt to LSBIR which is enforceable and recoverable in the Court of law. The Court was also emphatic that a refusal to deduct withholding tax from contractors for the supply of spare parts, goods and services etc was unlawful.

This goes on to show that, tax evasion and avoidance and all non-deductions and non-remittances are recoverable taxes for the Revenue as was held in the case of *Aboud's case*⁶⁷.

The modern approach is thus aimed at considering the totality of an artificial transaction and examining whether each of the steps had any commercial purpose other than tax avoidance. One would have thought that this departure from the Westminster's era would abate tax avoidance; unfortunately, the attraction to avoid tax waxes stronger. In 2006, a scam involving chevron was uncovered, however, the matter has not yet been judicially determined. The measures taken by tax authorities to curb tax evasion can only be remedial measures. Reference is made to the American experience where, inspite of the sophisticated techniques to discover the arrangements and stiff penalties for many of the discovered cases, the practice still continues.

In *Chairman of the Board of Inland Revenue v. Joseph Rezcallah and Sons Ltd*,⁶⁸ the question was whether a taxpayer can impinge the validity of an assessment after the time prescribed by the Income tax had elapsed. The Supreme Court held that the special procedure for disputing an assessment under the Act(in Nigeria) does not preclude the court from inquiring into the validity of an assessment in the absence of any express provision to that effect.

In *Godson Okoli v. Commissioner of Internal Revenue*,⁶⁹the appellant received the sum of 2,855 pounds commission from UAC Nigeria Ltd as a servant of a company known as The Produce General Service Company, the commission was deemed to be part of his personal income. An assessment notice dated 15th March, 1958 was served on the appellant about three months later on 23rd June, but the circumstances of alteration were not made clear to the court. Rather than producing sufficient evidence of his income, the appellant contended the assessment notice was time barred having been served on him three months after it was dated. The respondents, on its part, contended that the proper date for the assessment was 15th March and that the appeal was not time barred. It was held that the appeal was not time barred as it was released 3 months after it was written to the appellant, and no fixed date of payment appeared on the notice. In any case, since the appellant did not give sufficient

⁶⁶ (2000)3 NWLR (Pt.650) 565

⁶⁷ (1992) 1 NTC 12 and *Akinsete's case* (Supra)

⁶⁸ (1962) I All NLR 1.

⁶⁹ Nigeria Tax Cases, Appeal from the decision of Palmer A.G.J. of High Court of Enugu; J.A.A. Agbonika, *Op. cit* at 312

evidence of the income of the company of which he received, he has not discharged the onus of proof of his income.

In *Commissioner of Revenue v. Attah*⁷⁰ which came up for hearing before the high court of the former North Central State of Nigeria, the Plaintiff having discovered from information obtained by his field workers that the income declared by the defendant was less than he actually received, made additional assessment on the defendant for the relevant years according to the best of his judgment. The defendant denied liability and on this particular issue contended that: before an additional assessment could be validly made, a return form must be sent to the taxpayer and since there was no sufficient evidence that had been done the additional assessment were invalid; and the additional assessment were arbitrary and not the best of the plaintiff's judgment since they were not based on evidence. On the first issue raised by counsel to the defendant, the court said:

"I do not agree with the contention put forward on behalf of the defendant that a return must be served on the defendant before an additional assessment can be raised I can find no such duty imposed upon the commissioner by the provisions of section 25 of the Personal Income Tax Law... on a fair and reasonable construction of section 25(1) of the Personal Income Tax Law, I am unable to spell out any obligation imposed upon the commissioner to first send a return to the tax payer before an additional assessment could be raised".

The decision of the court in the case of Attah shows that our courts will look beyond mere form to the substance of the case to justify the intendment and spirit of the provision of the tax statutes, which in the instance case is to dissuade the tax evader.

In all these cases, the court avoided technicalities device to evade and avoid taxes and held in favour of the revenue⁷¹. Generally speaking, the attitude of the judiciary in tax evasion cases suggests that if the role of our courts in battle against tax evasion is fully enlisted, we would be on the right path substantially to reducing the incidence of tax evasion in this country.

Conclusion

We have in this paper attempted to elicit the salient statutory measures against tax evasion and the attitude of the courts and while we noted that no amount of legal reforms will make people and corporate bodies pay tax voluntarily. It is also evident that all the foregoing tends to suggest that Nigeria's tax effort has not been as high as is desirable. Thus, from the threshold, the pertinent issue

⁷⁰ (1970) NCLR 121

⁷¹ See also *F.B.I.R. v. I.D.S. Ltd* (2009) 8 NWLR (Pt. 1144) 615 at 639 Para. B-G.; H. Monrue, *Reflections on the Tax Law* (London, Stevens & Sons, 1981), P. 51; A.L. Suleman in J.A.A. Agbonika Ed., *Topical Issues on Nigerian Tax Laws and Related Areas* (Ibadan, Ababa Press Ltd, 2015), P. 377-378.

arising from what possible legal solutions can be proffered in the circumstances, a developing country like Nigeria is seriously handicapped in several ways quite apart from the fact that existing provisions were drafted at the time the problem was not clearly recognized. All forms of taxes in Nigeria are to some extent avoided or evaded largely because the administrative machinery to ensure effectiveness is weak. There are insurmountable problems confronting the administration.

Therefore, there should be completely overhaul of the Nigeria tax system. The existence of substantial number of tax evaders should be a matter of concern to the policy makers and tax administrators. Tax avoidance can largely be checked by plugging the loopholes in the tax law and carefully drafting of all new tax legislation. All the tax laws should be further codified and harmonized. Furthermore, tax enforcement machinery should be strengthened. The level of punishment should also be stricter and the legal provisions for doing this should be clearly stated. Continuous education for citizenry has to be embarked upon and step has to be taken to convince the tax payers that the money collected in form of taxes are judiciously spent. The relevant tax authorities must wake up to their duties. Finally, database for tax administration at all levels of government should be promptly computerized to ensure that the system of information storage processing and retrieval is efficient.