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Legislative Efforts at Curbing Tax Avoidance and Tax Evasion in Nigeria: A Legal Infraction

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Abstract

Tax is a potentially powerful instrument for raising government revenue to meet government expenditure in both developed and developing economies, Nigeria is not an exception. However, tax resistance which manifest in form of tax avoidance and evasion constitutes a major impediment to revenue generation in Nigeria. Legislative enactments have therefore been put in place in the country to curb the menace. As palatable as these enactments may appear, this paper has found that they represent a major infraction on the rights of Nigerians. The right to fair hearing, right to own property and right to privacy have been completely eroded in the legislative attempts at curbing the menace of tax resistance. In order to balance the need for the preservation of human rights in Nigeria, on one hand, and the need for efficient revenue generation, on the other, the paper has advocated the enactment of a Tax Payers' Bill of Rights to address some of the identified abuses. It is further advocated that section 104(2), (3) and (4) of the Personal Income Tax Act and section 44(2)(a) of the Constitution of the Federal Republic of Nigeria which have completely abrogated the rights to own property and fair hearing of Nigerian Tax Payers be repealed in order to give meaning to the rights as granted under the Constitution.

1.0 INTRODUCTION

The classical function of taxation is to raise revenue for government expenditure. The Nigerian government needs tax revenue to fulfill her obligations to the citizenry, despite the fact that petroleum is the main stay of the economy. The Constitution of Nigeria specifically provides that “the security and welfare of the people shall be the primary purpose of government.”¹ Though not justiciable², any responsible government must strive to ensure the welfare and security of her citizenry. This can be achieved primarily through the provision of social amenities, infrastructure and security for the citizens. Herein lies the philosophical justification for the imposition of taxes by the government. However, the main impediment to government revenue generation efforts globally is tax resistance which manifests in the form of tax avoidance and tax evasion.

Globally, incidences of tax evasion are reported in the media³. In Nigeria, J.J. Okocha, a former Super Eagles captain was reported to have been arraigned before a Lagos High Court on charges of tax evasion. The presiding judge, Justice Akintoye on 15th April, 2019 was said to have ordered the arrest of Okocha over alleged failure to settle a 2017 income tax evasion case⁴. The menace of tax evasion has been so widespread that it attracted the comments of Sosanya⁵ in the following words:

Tax evading has become the favourite crime of the Nigerian, so popular that it makes armed robbery seem like minority interest. It has become so widespread that there

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¹ Section 14(1)(b) Contained in Chapter II of the CFRN 1999 (As amended).

² See *Bishop Olunmi Okogie v. Attorney General Lagos State* (1981) 2 NCLR 337 at 350.

³ In 2014, Cristiano Ronaldo, a celebrated footballer was reported to have avoided paying 35m Euros tax when he diverted 63.5m Euro of his furniture's into a British virgin Island Tax Heaven. See Editorial, JJ Okocha arraigned for tax evasion, the *Guardian*, (22nd January, 2019), while Diago Coasta, also a popular footballer has been accused of tax fraud worth one Million Euros. See tvnews. Accessed on 5th June, 2019.

⁴ See <https://www.nairaland.com>. accessed on 3rd June, 2019.

⁵ S.O.A. Sosanya “Taxation Reform in Nigeria” NNA (1981) at P.7.

now exist a cash economy of vast proportions over which the tax-man has no control and which is growing at several times the rate of the national economy.

The effect of this cankerworm is the inability of the government to raise revenue to perform her obligations. An analysis of the Internally Generated Revenue (IGR) ratio revealed that twenty one states in Nigeria are below the 25 percent mark, with Yobe, Kebbi and Taraba as the most dependent states on the Federal Government support in 2018⁶

The Constitution of the Federal Republic of Nigeria has in another breath provided strongly for the preservation and observance of Fundamental Rights in chapter IV⁷. These include right to life, human dignity, personal liberty, privacy, religion, fair hearing, freedom of association and freedom from discrimination.

Despite the constitutional safeguards for the observance and preservation of the fundamental rights of the citizenry, some of these rights have been infringed through legislative efforts at checking or curbing the menace of tax avoidance and evasion in the country. The need to balance the preservation of human rights and other contractual relationships on one hand, and efficient generation of revenue for government exigencies on the other, therefore, forms the thrust of this paper. The paper undertakes a critical analysis of the statutory provisions aimed at checking tax avoidance and evasion against the backdrop of the preservation and observance of Human Rights and other contractual relationships in the country. However, in order to ascertain with precision the subject matter under consideration, it is important to undertake a clarification of concepts that are central to this discourse

2.0 CONCEPTUAL CLARIFICATIONS

2.1 TAXATION

⁶ Business Day Newspaper, Monday, 20th May, 2019 vol. 15 No.313 p.2, www.businessdayng.com.

⁷ Chapter iv of the CFRN 1999 (as amended)

The New Webster's Dictionary of English Language has attempted a definition or at least a description of tax in the following words: "Tax is described as a charge imposed by government authority upon property, individual or transactions to raise money for public purposes".⁸ This definition appears sound on its face. However, it can be faulted for neglecting other reasons for the imposition of tax and proceeding under the erroneous presumption that raising of government revenue is the only reason for the imposition of taxes. Tax could as well be described as:

*A ratable portion of the produce of the property and labour of the individual citizens, taken by the nation, in exercise of its sovereign right, for the support of government, and as the means for continuing in operation of the various legitimate functions of the state.*⁹

This definition of taxation has not broken new grounds over the former. In this treatise, taxation is conceived as a compulsory levy imposed by the government on a person's income, property or goods purchased pursuant to legislative authority for economic reasons. Inherent in this definition are four principal elements. The first is that the levy must be compulsory and non-voluntary. The element of compulsion is true even in respect of certain taxes like sales tax and value added tax (VAT) if and when the subject decides to purchase items within the tax base. Secondly, it is an imposition by the government. A third element is that a tax must have an objective. Also, for a tax to be valid, it must be imposed pursuant to legislative authority.

⁸Allen Walker Read. New Webster's Dictionary of English Language (College ed;)(India: Surject Publications: 2003) p. 1574.

⁹Henry Campbell Black. M.A. Blacks Law Dictionary 9th edition U.S.A West Publishing Co. (2004) p. 1496

2.2 TAX AVOIDANCE AND EVASION

2.2.1 Tax Avoidance

Tax Avoidance has been defined as “the act of taking advantage of legally available tax-planning opportunities in order to minimize one’s tax liability”¹⁰ The Supreme Court of Nigeria defined tax avoidance in *Akinsete syndicate V. Senior Inspector of Income Tax*¹¹ in the following words: “...a person may use lawful means to avoid tax, what he may not do is to try to evade it. What he does should be genuine not merely a veil to hide or dissemble the reality of things”. Tax avoidance is, therefore, the manipulation of statutory provisions by a tax payer to reduce or dodge his tax liability. Wheatcraft¹² is more philosophical by saying that it is the art of dodging tax without breaking the law. In other words, tax avoidance is legal. This position was laid down by Lord Summer in *IRC v. Fisher’s Executors*¹³ when he stated that:

My Lords, the highest authorities have always recognized that the subject is entitled to so arrange his affairs as not to attract taxes imposed by the crown, so far as he can do so within the law and that he may legitimately claim the advantage of any express terms or of any omissions that he can find in his favour in taxing cases. In so doing, he neither comes under liability nor incurs blame.

The above principle found favour and was adumbrated in *Ayreshire Pullman motor services & D.M. Richie v. IRC*¹⁴

In *I.R.V v. Duke of Westminster*,¹⁵ Lord Tolman stated that:

Every man is entitled, if he can to 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 as to

¹⁰ Bryan A. Garner. Ed. Black’s Law Dictionary 9th edition (West Publishing Co. 2009) U.S.A p. 1599

¹¹ FSC 164/63/10/66 (Unreported) as per Biamian JSC

¹² G.S.A. Wheatcraft. ‘The Attitude of the Legislature and the Courts to Tax Avoidance’ (1955) 18 M.L. at 209

¹³(1926) A.C. 395

¹⁴ 14 T.C 754 at 763 – 764; see also *IRC v Duke of Westminster* (1936)AC 396

¹⁵ *ibid.*

secure this result, then, however unappreciative the commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay increased tax.

This reasoning found favour and was applied in the Nigerian Cases of *Nasir v. Federal Board of Inland Revenue*¹⁶, and *Reiss & Company (Nig) Ltd. V. Federal Board of Inland Revenue*¹⁷, where the submission that certain transactions were carried out with tax avoidance motive were rejected.

2.2.2 Tax Evasion

Tax Evasion has on the other hand been defined as “the willful attempt to defeat or circumvent the tax law in order to illegally reduce one’s tax liability.¹⁸ Tax evasion has also been defined by the Canadian Department of National Revenue¹⁹ as the omission of an act knowingly with intent to deceive the tax authority and under report taxable income. In other words, tax evasion means efforts made by taxpayers to evade taxes by illegal means. This involves deliberate misrepresentation or concealing of state of affairs to reduce tax. It may also extend to outright failure to pay tax or failure to pay tax as at and when due.

Tax evasion is a crime in almost all jurisdictions including Nigeria and attracts both fine and/or imprisonment²⁰. In China, the penalty can be as severe as death penalty.²¹ The technical use of the words avoidance/evasion in the modern sense originated in the United States of America where it was well established by the 1920s.²² It can be traced to Oliver Wendell Holmes+ in *Bullen v. Wisconsin*.²³ It was slow to be accepted in the United Kingdom but

¹⁶Unrep. Suit No. FHC/L/76

¹⁷ (1964)h. Convn. L.R. 53 SCN

¹⁸ See (n10)ats P.1599

¹⁹Canada Narrow Information Circular No. 73 1999.

²⁰ See Federal Republic of *Nigeria v. Kingsley Ikpe* (2003) QCCR vol. 2, 155 at 192

²¹“Tax Avoidance and Evasion, www.candianttax.com p.5. Accessed on 25th May, 2008.

²² S.O.A. Sosanya see (n12)

²³ 240 US. 625 at 630

by 1950s the distinction had become established.²⁴ In practical terms, the tax avoidance/evasion distinction is nothing but an artificial nonsense. For, some cases of tax resistance overlap and can properly fit into both. Transactions that may start as instances of tax avoidance may end up as proper cases of tax evasion. For instance, an investor may take advantage of a tax holiday and fold up at the expiration of the tax holiday and relocate to another business or a more friendly tax jurisdiction. This is a classic case of tax evasion. Though the tax payer is operating within the law, the arrangement of his affairs is capable of defeating the intent and spirit of the law, which is to encourage investment in a particular industry. In jurisdictions like the United Kingdom and New Zealand, this problem has been solved by making a distinction between tax avoidance and tax mitigation. Tax avoidance is seen as a course of action designed to conflict with or defeat the evident intention of the parliament,²⁵ while tax mitigation (also called tax planning) on the other hand, is seen as a conduct which reduces tax liabilities without avoidance (ie not contrary to the intent and spirit of the law).²⁶ Nigeria can, therefore, take a cue from United Kingdom and New Zealand.

3.0 LEGISLATIVE EFFORTS AT CURBING TAX AVOIDANCE AND EVASION IN NIGERIA

The Personal Income Tax Act,²⁷ the Companies Income Tax Act,²⁸ the Petroleum Profits Tax Act²⁹, and the Federal Inland Revenue Service (Establishment) Act³⁰ have made elaborate provisions aimed at curbing the menace of tax avoidance and evasion in Nigeria. Specifically, these include power to disregard any disposition or transaction which in the opinion of the tax authorities reduces or would reduce tax³¹, power to appoint by notice in

²⁴ M. Levi "The Powers of Revenue Agencies: An Overview" (1982) B.T. RPP. 37-39

²⁵ *IRC v. Willoughby* (1986) STC. 548

²⁶ G.S.A. Wheatcraft. See (n12) p.209

²⁷ Cap. P.8 LFN 2004 (As amended by Act No. 20 of 2011)

²⁸ Cap. C21 LFN, 2004

²⁹ Cap. P13 LFN, 2004

³⁰ Federal Inland Revenue (Establishment) Act, 2007

³¹ Section 17(1) of the PITA Ibid.

writing any person as an agent of who is in possession of any money belonging to the taxpayer for the purpose of paying tax owed by the taxpayer³², the deeming provision³³, authority of the tax officer to have access to all lands, buildings, books and places.³⁴ The tax authorities are also vested with powers to distrain a defaulting taxpayer's goods or other chattels, bonds or other securities and land or premises and sale anything so distrained in order to recover the amount of tax owed³⁵, and power to raise additional assessment.³⁶ The problem, however, is that some of these radical anti-avoidance and evasion provisions in our tax laws have the potentials to infringe on and toy with the taxpayers rights as provided under the Constitution of the Federal Republic of Nigeria and some rights arising out of contractual relationships. Taxing statutory provisions in the light of the foregoing is the subject of the ensuing discussion

3.1 POWER TO DISTRAIN AND SALE GOODS OF A DEFAULTING TAXPAYER

The Federal Inland Revenue Service (Establishment) Act³⁷ empowers the Federal Inland Revenue Service to distrain a defaulting taxpayers' goods or other chattels, bonds or other securities and land or premises and sale anything so distrained in order to recover the amount of tax owed. Similarly, the Personal Income Tax Act³⁸ provides for the power of the tax authority to distrain the property of a taxpayer where a final assessment has been made and served on the taxpayer and he has defaulted in payment. Specifically, section 104(1) provides that for the purposes of enforcing payment of tax due, the relevant tax authority has the powers to:

- a. Distrain the taxpayer by his goods, other chattels, bonds or other securities; or

³²Section 31(1) – (3) of the Federal Inland revenue (Establishment) Act. Ibid.

³³Section 17 (2), and (1) CITA Ibid, Section 17 PITA Ibid,

³⁴Section 29(1) FIR (Establishment) Act Ibid.

³⁵Section 33(1) Ibid.

³⁶Section 34(2) Ibid.

³⁷Section 33(1)

³⁸S. 104 Ibid.

- b. Distrain upon any land, premises or places in respect of which the taxpayer is the owner and, subject to the following provisions of this section, recover the amount of tax due by sale of anything so distrained.

Section 29 of the Personal Income Tax (Amendment) Act³⁹ amends section 104 of the Personal Income Tax in the following terms:

1. Without prejudice to any other power conferred on the relevant authority to enforce payment of tax due from a taxable person that has been properly served with an assessment which has become final and conclusive and a demand notice has been served upon the person in accordance with the provisions of this part of the Act, or has been served upon the person, then, if payment of tax is not made within the time specified by the demand notice, the relevant tax authority may, in the prescribed form, for the purpose of enforcing payment of tax due:
 - a. Distrain the taxpayer by his goods, other chattels, bonds or other securities; or
 - b. Distrain upon land, premises or places in respect of which the taxpayer where he is the owner and, subject to the provision of this section, recover the amount of tax due by sale of anything so distrained.
2. For the purpose of levying any distress under this section, an officer duly authorised by the relevant tax authority shall apply to a judge of a High Court sitting in chambers, under oath for the issue of a warrant under this section.
3. The judge may, on application made ex-parte, authorize such an officer referred to in sub-section 3 of this section, in writing to execute any warrant of distress and, if necessary, break open any building or

³⁹ The Personal Income Tax (Amendment) Act, 2011

place in the daytime for the purpose of levying such distress and he may call to his assistance any police officer and it shall be the duty of any police officer when so required to aid and assist in the execution of any warrant of distress and in levy the distress.

4. The distress taken pursuant to this section may, at the cost of the owner, be kept for 14 days, at the end of which time, if the amount due in respect of tax and the cost and charge incidental to the distress are not paid, the same may be sold.

The foregoing provisions received judicial approval in *I – D Sam Nig. Ltd. V. Lagos State Internal Revenue Service*⁴⁰, where the Lagos State High held that:

Where a taxable person fails and or refuses to make the necessary tax payments, sanctions are prescribed in the relevant tax laws, which include, but are not limited to the power to distrain. There is no doubt that the claimant has the right to distrain for non-payment of tax including for unremitted deductions in respect of PAYE and withholding tax on directors fees, commissions and so on.

The court further laid down a condition for the sale of distrained goods in the following words:

*Things distrained may be kept at the cost of the taxable person if all outstandings are not paid, the goods may be sold.*⁴¹

In *Edo State Board of Internal Revenue v. Okomu Oil Palm Company Plc*⁴², the Court of Appeal held that an order of distrain for non-payment of tax deemed final and conclusive is a final judgment capable of enforcement through garnishee proceedings.

⁴⁰(2011) STLRN 41 at 50

⁴¹ibid at 51

⁴²(2018) 36 TLRN 60 at 63

In *Independent Television/Radio v. Edo State Board of Internal Revenue*⁴³, it was argued before the Court of Appeal, Benin Division that section 104 of the Personal Income Tax Act violates the right of the taxpayer to own property, privacy and freedom from compulsory acquisition of property. The court agreed with that submission in the following words:

Enforcement of tax no doubt affects the right of the individual to own property, right to privacy and freedom from compulsory acquisition of property as entrenched in S.37, 43 and 44 of the Constitution.

The court, however, held further that:

*Owing to the provisions of S.44(2)(a) of the Constitution above, the question of whether S.104 of the PITA offends the taxpayer's rights to own property, privacy and freedom from compulsory acquisition of property, is of no moment in matters of tax enforcement. To argue contrary will be to argue that because a debtor has freedom from compulsory acquisition of property, his property cannot be taken even when a court order for enforcement of a debt payment is given. Let us not forget the position of a taxpayer who has failed to pay the tax due is that of a debtor. As such, to that extent, S.104(2) of PITA is constitutional.*⁴⁴

The honourable court reached this decision on the basis that the act of distraint of the taxpayers property was pursuant to the order of a court and that the taxpayer was given fair hearing by service of demand notices on him. However, service of demand notices alone does not constitute fair hearing. The application brought for the distraint of appellant's property in this case was a motion ex-parte made pursuant to section 104(2),(3) and 4 of the Personal Income Tax Act⁴⁵. The implication is that the taxpayer cannot be heard before

⁴³(2011) 5 TLRN 41 at 50

⁴⁴ See (n43) at pp80-81

⁴⁵ PITA see (n39)

his property can be distrained. Section 104 (2), (3) and (4) looks good on its face, same having the backing of section 44(2)(a) of the Constitution which is to the effect that the right to own property cannot be guaranteed” for the imposition or enforcement of any tax, rate or duty”. However, section 104(2),(3) and (4) of the Personal Income Tax Act,⁴⁶ it is hereby submitted, offends the right to fair hearing entrenched in section 36(1) of the 1999 Constitution. Section 36(1) states that:

In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.

A combined reading of sections 44(2) (a) and 36(1) of the Constitution shows that section 104 (2),(3) and (4) is in conflict with the spirit of the Constitution and violates the right to fair hearing of taxpayers since the main issue at stake was the determination of the rights and obligations of the Nigerian citizens. The issues of distraint of a taxpayers property and tax obligation properly come within the contemplation of section 36(1) of the Constitution.

It is a settled principle of law that the entire Constitution must be read as a whole and no provision thereof shall be read in isolation. In *Attorney General of Lagos State v. Attorney General of the Federation &Ors*⁴⁷, the court held that:

The duty of the court when interpreting a provision of the Constitution is to read and construe together all provisions of the Constitution unless there is a very clear reason that a particular provision of the Constitution should not be read together. It is germane to bear it in mind the objective of the constitution in enacting the provisions contained therein. A section must be read against the background of other

⁴⁶PITA Ibid.

⁴⁷ (2014)14 TLRN 50 at 71

sections of the constitution to achieve a harmonious whole. This principle of whole statute construction is important and indispensable to the construction of the constitution so as to give effect to it.

The court held in *Panalpina World Transport Nigeria Limited v Lagos State Board of Internal Revenue & 2 Ors*⁴⁸ that where a tax authority has no power or seals a tax payers property without regard to the relevant tax law and regulations, the tax payer can recover damages under the Fundamental Rights Enforcement Procedure. According to the court:

This is because the alleged issue of Fundamental right is inextricable tied down to the issues of whether the action of the respondents being called to question in this suit are justified in the relevant tax law and Regulations or not.

It is hereby submit that this is not enough guarantee since the law and regulations are themselves fundamentally defective in content and intent. Consequently, in issues as serious as the deprivation of a Nigerian citizen of his right over his property, an ex-parte application is simply a denial of fair hearing. Such an application must be on notice. Section 104(2), (3) and (4) of the Personal Income Tax Act is therefore null and void to the extent of its inconsistency with the provisions of the Constitution.

3.2 POWER TO SEAL UP PREMISES

The next issue is whether it will amount to double jeopardy if the taxpayers are found liable or convicted for violation of tax laws when the tax authority have also sealed up their factory. The Constitution of the Federal Republic of Nigeria, 1999⁴⁹ guarantees freedom from double jeopardy. In the words of the Constitution:

No person who shows that he has been tried by any court of competent jurisdiction or tribunal for a criminal offence and either convicted or acquitted shall again be tried for that offence or for a criminal offence having the same

⁴⁸ (2013) 10TLRN 174

⁴⁹Section 36(a).

ingredients as that offence save upon the order of a superior Court.

In *Edo State Board of Internal Revenue v. Niki Manufacturing Company Ltd*⁵⁰, the Court answered the issue of whether it will amount to double jeopardy if the tax payers are found liable or convicted for violation of tax laws when the tax authority have also sealed up their factory in the negative. In the words of the court:

... section 104(3) of the Personal Income Tax Act does not, and cannot by any stretch of imagination amount to an acquittal by a court of law. I entirely agree with complainants' counsel that the rule of double jeopardy cannot avail the defendants.

This judgment has far-reaching implications in the preservation or observance of the rights of a tax payer. It is hereby submitted, with due respect, that the act of sealing up the premises of a tax payer pursuant to section 104(3) of the Personal Income Tax Act is predicated on a court order meant to serve as punishment to a defaulting taxpayer. Consequently, sealing up a taxpayers factory after he has been convicted of the same offence definitely amounts to double jeopardy from all ramifications. Where a taxpayer has been convicted, the only other remedy available to the tax authority is a civil action to recover the amount due. Consequently, after securing a conviction against a defaulting taxpayer, the proper thing for the tax authorities to do is to bring a civil claim to recover the tax due and not to seal up the factory as done in *Edo State Board of Internal Revenue V. Niki Manufacturing Company Ltd*.⁵¹ It is instructive to note that a conviction and the order of sealing up the factory are both punitive measures which cannot ordinarily be used to recover the tax due. Both will only “kill the goose that lays the golden egg”, an age long aphorism in tax administrative circles.

3.3 POWER TO ACCESS ALL LANDS, BUILDINGS AND DOCUMENTS FOR THE PURPOSE OF COLLECTING TAX

⁵⁰ 2018 34 TLR 1 at 26

⁵¹ *Ibid.*

Another anti-avoidance and evasion legislative enactment is that provided under section 29(1) of the Federal Inland Revenue Service (Establishment) Act⁵² and section 29(3) of the Personal Income Tax (Amendment) Act⁵³. These provisions permit an authorized officer of the Federal Inland Revenue Service to have access to all lands, buildings, places, books and documents in custody or under the control of a public officer, institution or any person at all reasonable times for the purpose of inspecting the books or documents including those stored or maintained in computers or on digital, magnetic, optical or electronic media and any property for the purpose of collecting any tax. This provision represents a radical modern trend in checking incidences of tax evasion and avoidance and is intended to eliminate the tendency to conceal information regarding the taxpayers' chargeable income. However, the provision is an infraction on the right of taxpayers to privacy as Nigerian citizens. Section 37 of the Constitution which guarantees this right states as follows: "The privacy of citizens, his homes, correspondences, telephone conversation and telegraphic communications is hereby guaranteed and protected".

This constitutional guarantee admits of no exceptional circumstances warranting the infringement of the right to privacy. However, the court in *Independent Television (Radio v. Edo State Internal Revenue Service*⁵⁴ held that in matters of tax enforcement, the citizen is stripped of this right, among others. It is hereby submitted, with due respect, that decision is not founded on any provision of the law and is therefore undesirable.

Also relevant to the above guarantee of the right of privacy of citizens is another anti-avoidance and evasion provision which has placed an obligation on the banks or any person carrying on banking business in Nigeria to prepare and send to the service on demand quarterly returns specifying all transactions involving the sum of N5,000,000.00 and above in case of an individual, and N10,000,000.00 in case of a corporate body including the names and addresses

⁵² FIRS (Establishment) Act. See (n30)

⁵³The Personal Income Tax (Amendment) Act, 2011.

⁵⁴See (n43) at 80 to 81

of all customers connected with such transactions.⁵⁵ The banker or bank must also submit to the Service names and addresses of new customers on demand. This provision is an effective check against individual and corporate persons who refuse to disclose their incomes for tax purposes. With this information, the Service shall be better placed to ascertain with precision the taxable incomes of taxpayers and charge them accordingly. This provision is, however, an infringement of the customer's right to secrecy which is a duty the bank must preserve. This is routed on the fact that the banker/customer relationship is basically contractual in nature.⁵⁶ The philosophical basis of this duty is that a customer's financial standing should be kept secret. From time, the courts have propounded exceptions to this duty of secrecy. That is, there are situations where the bank may disclose its customer's financial standing without liability. Statutory provisions have also been made in this regard. These circumstances are as follows:

- a. Disclosure under compulsion of the law. The bank has a duty to disclose its customer's account where the bank is served with a summons to appear before a court and disclose its customer's affairs, where the bank is required under the Banker's Books Evidence Act, 1879 to deliver copies of the customer's account to an investigating police officer. Here, the court held in the case of *Yesufu v. African continental Bank Ltd*,⁵⁷ that "Books of Account" do not include vouchers but many include ledger cards. Other circumstances in this regard include where the bank is required to disclose to tax authorities, where the affairs of a company are under investigation⁵⁸, where the bank is required to disclose under garnishee proceedings, where the disclosure is required under the Banking (Freezing of Account) Act⁵⁹, and where the bank is required to provide information to law enforcement agencies like the National Drug Law Enforcement

⁵⁵ FIRS (Establishment) Act: *ibid.* S.28(1)(a)(b)(c)

⁵⁶ See *Inna Mohammed Mai v. Standard Trust Bank Ltd.* (2008) All FWLR (Pt. 399)552 at 563-564

⁵⁷(1976) NCLR 118

⁵⁸See S. 314(2) of the Companies and Allied Matters Act Cap. LFN 2004

⁵⁹2002

Agency (NDLEA) or the Economic and Financial Crimes Commission (EFCC)⁶⁰

- b. Disclosure under public interest. In *Weldblundel v. Stephen*⁶¹, it was held that duty to the state supersedes duty to the customer. This may occur in times of war or where the customer is using his account to cheat unsuspecting members of the public.

Though laudable as an anti-avoidance and evasion provision, this may serve as a disincentive to savings in the bank, and also result to the unconventional and uneconomically viable situation where large sums of monies are kept at home or in overhead water tanks.

In all the above circumstances, if due process is not followed, then the customer's right to secrecy is at the risk of infraction.

⁶⁰Under the Money Laundry Act of 1995 (as amended in 2002)

⁶¹(1920) AC 956

3.4 IMMUNITY OF TAX OFFICIALS

In other to ensure efficiency, the Federal Inland Revenue Service has also provided for immunity from litigation against revenue staff in respect of acts done in the course of their official duties.⁶² Arguably, this provision has the potential to encourage hard work by staff. However, it is subject to abuses by overzealous tax officials. This immunity should however not apply when the tax officials commit crimes against taxpayers which may warrant prosecution. Thus, tax officials who in the course of their official duties engage in over assessment of the tax liability of taxpayers should be personally liable if accuracy, diligence and efficiency are to be ensured among revenue staff.

4.0 CONCLUSION

This paper has identified major provisions in the Nigerian tax laws targeted at curbing tax evasion and avoidance in Nigeria. However, these enactments when enforced infringe on the Fundamental Right of taxpayers of Nigerian Citizens as enshrined in the Constitution of the Federal Republic of Nigeria, 1999⁶³.

Specifically, section 33(1) of the Federal Inland Revenue (Establishment) Act and section 17 of CITA⁶⁴ which empowers the revenue authorities to distrain the goods or chattels of a defaulting taxpayer and sale them represent a major infraction on the rights of taxpayers. This is particularly in view of the provisions of section 44(2)(a) of the Constitution and section 104 of the Personal Income Tax Act⁶⁵ which do not give the taxpayer the right to fair hearing once his goods or chattels have been distrained. These provisions constitute serious violation of the right to fair hearing enshrined in section 36(1) of the Constitution of the Federal Republic of Nigeria. Unfortunately these provisions have been slavishly enforced by the courts.

⁶² S. 38 Ibid

⁶³ Ibid.

⁶⁴ CITA Ibid.

⁶⁵ PITA Ibid

Similarly, the freedom from double jeopardy guaranteed by the Constitution has been eroded by tax authorities in efforts to ensure tax compliance through court orders. It is now permissible for the taxing authorities to seal up a defaulting taxpayers factory as a punitive measure when the same taxpayer has been convicted by the court on the same facts.

Again, the right to privacy of Nigerian Citizens can no longer be guaranteed once the collection of tax is involved. The tax authorities have the powers to break into a taxpayer's premises, go through documents and even access information stored on the computer in the course of enforcement of tax laws. Worst still, tax officials have been granted immunity against litigation in the course of their official duties. This is even against the fact that this position will not encourage diligence and efficiency on the part of the staff.

Again, the taxpayer's right to privacy in commercial transactions can no longer be preserved. The banks are now under obligation to disregard their duty to maintain the secrecy of their customer's accounts and transactions upon demand by tax authorities.

In all, the exceptions to the taxpayers enjoyment of fundamental rights in Nigeria appears to outweigh the constitutional guarantees of these rights. The liberty of the taxpayer is therefore at the mercy of tax authorities.

As a way forward, there is need to balance the preservation of human rights and other commercial relationships on the one hand, with efficient generation of revenue on the other hand so as to make the Constitution of the Federal Republic of Nigeria a valuable document.

Towards this end, a Bill of Rights of taxpayers must be enacted to take care of the rights of the taxpayer in Nigeria. Issues of infraction of taxpayers' rights like accurate assessment of tax liability, avoidance of double jeopardy and right to privacy should be addressed in the proposed amendment.

Furthermore, the Personal Income Tax Act must be amended and section 104 (2),(3) and (4) and section 29(3) of the Personal Income Tax (Amendment) Act which provides for an order on motion ex-parte to distrain a taxpayers good or chattels must be made to insist on putting the taxpayer on notice

where an order to distrain the taxpayers property is being sought. Only then can the taxpayer's right to fair hearing as guaranteed by the Constitution be preserved.

Again, section 44(2)(a) of the Constitution which has stripped the taxpayer of all his rights as enshrined in the same Constitution is too sweeping and generous in favour of the tax authorities. It must therefore be amended to provide some restrictions on the powers of the tax authorities. The age long tax aphorism which says "do not kill the goose that lays the golden egg" must be within the contemplation of the legislature when legislating on tax issues. It is better that the "art of taxation consists in so plucking the goose as to obtain the largest amount of feathers with the smallest amount of hissing".⁶⁶ That is, the laws must be designed in such a manner as to preserve the taxpayer who will always be called upon to pay tax.

⁶⁶ See the case of Andre Mearrisse, *Histoire de Uimpot*(1978)83-90