

## The legal regime for tax enforcement in Nigeria: An appraisal

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### Abstract

Tax enforcement is an integral part of the tax system as it compels and ensures compliance with tax laws. Under the Nigerian tax laws, enforcement can be carried out through civil action by tax authorities to recover tax owed, criminal prosecution of defaulters, imposition of fines, distraint of property, chattels and bonds and sealing of the business premises of a defaulting taxpayer. However, it would appear that the efficacy of these enforcement mechanisms is in doubt in view of the low level of tax compliance in the country. Through the doctrinal research method, this paper has revealed that the tax authorities in Nigeria prefer civil action against tax defaulters just to recover tax owed without criminal prosecution which has been shown to be more effective as deterrence to crime. It has also shown that enforcement through distraint and sealing of property and premises may inhibit the productive capacity of the taxpayer. In terms of tax enforcement against a foreign tax defaulter who is not resident in Nigeria, the paper has revealed that the Nigerian tax enforcement mechanism is helpless as foreign tax laws and judgments are not enforceable in the forum. The paper therefore recommends criminal prosecution of tax defaulters and increase in fines to serve as deterrence to tax defaulters. It also recommends a multilateral convention seeking the recognition and enforcement of foreign tax laws and judgments abroad so that a defaulting foreign taxpayer who has found his way back home can be proceeded against in his home country.

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### 1. Introduction

Tax enforcement is an indispensable part of tax administration. Infact, it is the point at which the entire process of tax administration terminates.

The term "Enforcement" has been subjected to several definitions by text writers. The Blacks Law Dictionary defines it to mean the act or process of compelling compliance with the law, mandate, command, decree or agreement <sup>[1]</sup> The New International Webster's Dictionary on the other hand defines the term "Enforcement" as the act of enforcing or state of being enforced; compulsory execution or compulsion <sup>[2]</sup>.

Tax enforcement would therefore mean the process of compelling or ensuring compliance with the provisions of the tax laws. This would extend to ensuring that tax payers pay their taxes as at and when due, and in the event of failure to comply, appropriate sanctions melted since payment of tax is compulsory and not voluntary.

Tax enforcement presupposes non-voluntary tax compliance. Tax compliance refers to the voluntary payment of tax as at and when due. It may extend to such measures as providing to the relevant authorities timely and correct information that is required by law for purposes of determination or assessment of chargeable tax. In terms of corporations, this may include correct information for tax assessment in connection with their operations and conforming transfer pricing practices to the arm's length principle.

Tax enforcement may therefore be necessitated by widespread tax resistance schemes. Tax resistance manifest in two major forms. These are tax avoidance and tax evasion. Tax avoidance refers to taking advantage of the tax laws to lawfully reduce one's tax liability. To borrow from

Wheatcraft's aphorison, it is the art of dogging tax without actually breaking the law <sup>[3]</sup>.

The judicial attitude towards tax avoidance in Nigeria is that every citizen has the right to structure his affairs in a manner allowed by law, to minimise his tax liability <sup>[4]</sup> In other words, tax avoidance is a situation where a person reduces or eliminates tax liability through a transaction or a series of transactions that comply with the letter of the law but violate the spirit and intent of the law.

Tax evasion on the other hand means efforts by taxpayers to avoid or reduce their tax liabilities through illegal means. It involves deliberately misrepresenting or concealing the true state of affairs to tax authorities to reduce tax liability. In particular, it includes dishonest tax reporting such as dishonest declaration of income, profits or gains and overstating deductible expenses. It may also extend to outright refusal to pay tax or failure to pay tax as at and when due. It is therefore a crime in Nigeria. Despite the enforcement regime under our tax laws, the menace of tax resistance is still prevalent in the country.

The primary purpose of this paper therefore is to suggest measures to solidify or strengthen the tax enforcement machinery. In achieving this purpose, the various enforcement mechanisms have been appraised and their pitfalls revealed.

### Mechanisms for Tax Enforcement

The Federal Inland Revenue Service has been conferred with powers to enforce any tax due to the Federal Government. By Section 36(1) of the Federal Inland Revenue Service (Establishment) Act <sup>[5]</sup>, the service may obtain the services or assistance of any law enforcement agencies in the enforcement process.

However, the power to enforce tax is only available to the tax authority where an assessment to tax of a taxpayer has become final and conclusive. An assessment to tax is said to become final and conclusive where the taxable person has been properly served with an assessment which he has not objected to<sup>[6]</sup> It may also be final and conclusive where the taxable person's objection in respect of the assessment has been rejected by the tax authority.

Under the Federal Inland Revenue Service (Establishment) Act<sup>[7]</sup>, a taxpayer has the duty to pay the tax pending notwithstanding the fact that he has filed a Notice of Appeal against the decision of the Tax Appeal Tribunal. This is based on the established principle that the court will not deprive a successful litigant of the fruits of his success unless under special circumstances<sup>[8]</sup>.

Tax can therefore be enforced by the tax authorities through civil action for the recovery of tax owed, criminal prosecution of defaulters, distraint of property or premises, sealing of premises, and imposition of fines or penalty. These mechanisms therefore form the crux of the ensuing discourse.

#### a. Enforcement through Civil Action to Recover Tax Owed

Section 78 of the Personal Income Tax Act<sup>[9]</sup> empowers the tax authority to sue for and recover in a court of competent jurisdiction in its official name with full costs of actions from the person charged therewith as a debt due to the government of the federation. Interpreting Section 77 of the Personal Income Tax Decree<sup>[10]</sup> which has been repealed by the Act, the court held in *Elf Oil (Nig.) Ltd. V. Oyo State Board of Inland Revenue*<sup>[11]</sup>, that recovery of tax is made through the institution of actions in court. By Section 251(1) of the Constitution of the Federal Republic of Nigeria 1999, the relevant court with jurisdiction in relation to revenue of the federal government is the Federal High Court. The section vests exclusive jurisdiction in matters relating to the revenue of the government of the federation on the Federal High Court. In terms of revenue of the states, jurisdiction is vested in the relevant State High Courts.

It must be pointed out, that for the purpose of enforcement of the Stamp Duties Act<sup>[12]</sup> and Nigerian Postal Service Act<sup>[13]</sup>, it is only the Attorney-General of the Federation or of the state that has the locus standi to maintain actions for recovery of all duties, fines, penalties and debts due to the government. In *Standard Chartered Bank Nigeria Limited V. Kasmal International Services Limited & 22 Ors*<sup>[14]</sup>, the Court of Appeal, Lagos Division held that

...It is provided under Section 111 of the Stamp Duties Act that: All duties, fines, penalties and debts due to the Government of the Federation imposed by this Act shall be recoverable in a summary manner in the name of the Attorney-General of the Federation or the State... The enforcement of these laws i.e. Stamp Duties Act 2004 and NIPOST Act 2004 is the exclusive preserve of the Executive arm of the Federal Republic of Nigeria. It is never the responsibility or duty of a private person whether human or corporate.

The tax authority may choose to sue for recovery of tax through the normal writ of summons or undefended list also known as Order 11 under the Benue State High Court Civil Procedure Rules, 2007. In the case of *Federal Inland*

*Revenue Service V. Gazette Communications Ltd*<sup>[15]</sup>, tax was recovered through the undefended list.

Where the tax authority or the Attorney-General of the Federation or State obtains judgment against a defaulting taxpayer, the taxpayer as a judgment debtor is ordinary under obligation to pay his debt. However, in event of default, the authority can take steps to recover the debt. Usually, tax authorities in Nigeria have recovered debts owed through garnishee or interpleader proceedings.

Garnishee proceedings have been defined as a judicial proceeding by the judgment creditor against a person in custody or possession of money belonging to a judgment debtor<sup>[16]</sup> In *Union Bank Plc V. Boney Marcus Industries Ltd*<sup>[17]</sup>, the Supreme Court defined garnishee proceedings in the following words:

Garnishee proceedings are a process of enforcing a money judgment by the seizure or attachment of the debts due or accruing to the judgment debtor which form part of his property available in execution... By this process, the court has power to order a third party to pay direct to the judgment creditor the debt due or accruing due from him to the judgment debtor, as much of it as may be sufficient to satisfy the amount of the judgment and the cost of the garnishee proceedings.

Garnishee proceeding therefore means a form of judgment enforcement where the judgment sum belonging to the judgment debtor in possession of a third party is attached in satisfaction of the debt. In *Edo State Board of Internal Revenue V. Okomu Oil Palm Company Plc & 2 Ors*<sup>[18]</sup>, taxes not remitted to the judgment creditor acting on behalf of the Edo State Government were recovered through garnishee proceedings.

The enforcement of judgments through garnishee proceedings may however present legal constraints to the tax authorities. For instance, the position of the law is that a joint account cannot be garnisheed. That is, a joint account cannot be garnisheed in respect of a debt owed by one of the account holders. Consequently, in *Plunkett V. Barclay's Bank Limited*<sup>[19]</sup>, the English court held that in garnishee proceedings, it is the property or funds of the judgment debtor that is intended to be attached for the purpose of satisfying the judgment debt. Therefore, the law does not permit the attachment of funds or property of an innocent person who has no relationship with the debt owed the judgment creditor by the judgment debtor. The court further stated that even where the signatories to the joint account are business partners, the money belonging to the innocent partner cannot be garnisheed in satisfaction of the judgment debtor's debt<sup>[20]</sup>.

This judgment presents a technical problem to tax authorities in enforcement of judgments to recover tax owed through garnishee proceedings, particular where the judgment debtor operates a partnership business and a joint account like in the case of legal practitioners. It will be difficult, if not impossible for the court to determine part of the money in the joint account belonging to the judgment debtor and garnish same in satisfaction of the debt owed.

Enforcement of tax judgment or compliance may also take the form of interpleader proceedings. Interpleader proceedings has been defined by the Blacks Law Dictionary as a suit to determine a right to property held by a

disinterested third party who is in doubt about the ownership and therefore deposits the property with the court to permit interested parties to litigate ownership <sup>[21]</sup> Interpleader proceedings may be initiated by a person in possession of goods, chattels or money belonging to a third party to which he has no claim in order for the court to determine the rightful owner of same. The purpose of this proceeding is to avoid liability to either the judgment creditor or third party laying claim thereto. In other words, through interpleader proceedings, the court is called upon to decide the rightful owner of property, chattel or money in the hands of a person who lays no claim to same. In *Eko Hotels Limited V. Federal Board of Inland Revenue & Attorney-General of Lagos State* <sup>[22]</sup>, the plaintiff instituted this suit at the Federal High Court to determine whether remittance of money collected as tax by plaintiff on its sales tax to its customers be paid to Federal Board of Inland Revenue or Lagos State Government in view of the provisions of the Value Added Tax (VAT) Act and the Sales Tax Law of Lagos State. The position of the plaintiff was that with the provisions of the Value Added Tax Act and the Sales Tax Laws of Lagos State, it was confused as to whom to remit the consumption tax. Overruling the 2<sup>nd</sup> defendant's preliminary objection, the Federal High Court ordered, that the remittance of money collected as tax by the plaintiff on its sales to its customers be paid to the Federal Board of Inland Revenue.

This may not be an effective way of tax enforcement since it is the person in possession of money to which adverse parties are laying claims to, that is competent to initiate interpleader proceedings. The claimants may therefore wait until the person in possession initiate the suit before they can prove their ownership. This has the possibility of causing delays.

#### **b. Criminal Prosecution of Tax Defaulters or Offenders**

Tax evasion is a crime in most jurisdictions, including Nigeria. The law has therefore given the Federal Inland Revenue Service powers to prosecute offenders where any investigation reveals the commission or any attempt to commit any offence <sup>[23]</sup> The powers to prosecute for criminal offences are vested in both the revenue authority suing in its name or the Attorney-General of the Federation or State <sup>[24]</sup>

However, tax authorities have not utilised regularly the use of prosecution of tax offenders to enforce tax in Nigeria. There are many cases which exhibit criminal elements but which only went to court as civil claims to recover tax. In *Ola V. Federal Board of Inland Revenue* <sup>[25]</sup>, there was abundant evidence that the appellant was guilty of failure or willful default in the supply of information or disclosure concerning his sources of income. An offence under the Income Tax Management Act <sup>[26]</sup> though, matter only went to court as a civil claim, without criminal prosecution. It would therefore appear that the desire to recover tax owed more than punish the defaulter might be paramount in the minds of the tax authorities. However, civil actions to recover tax owed are not a bar to criminal prosecution.

In the United States of American case of *Vigilant Insurance Company V. Chiu* <sup>[27]</sup>, the court held that Restitution Code does not preclude entry of a civil judgment for economic losses that may also be the subject of the Criminal Restitution Order. The facts of the case briefly, were that on

the 7<sup>th</sup> of April 2004, the respondent (Robert Chiu) was convicted of the crime of grand theft upon a report made by his employer. He was convicted and a restitution order, including the value of the stolen property made against him. Vigilant who was the employer's insurer filed this action against Robert in March 2006, alleging losses incurred because of the fraud. It sought recovery of the losses it had actually paid to its insured.

Robert sought to defeat vigilant's claim by arguing that vigilant by virtue of the assignment from Viewsonic (Robert's employer) had what amounted judgment. After a bench trial, the court rejected this contention and awarded judgment which consisted of the sum in actual damages, interest and cost in favour of vigilant.

Robert appealed contending, inter alia, that as a matter of law, there cannot be two judgments for the same injury. The issue before the court was therefore, whether or not, Vigilant Insurance Company could recover damages where Robert had been convicted and ordered to pay restitution in a criminal proceeding. Dismissing the appeal, the Court of Appeal held that all defendants who have been convicted of a crime must make restitution for the economic losses suffered by their victims as well as to pay fine payable under the Restitution Fund Act unless the court finds "compelling and extraordinary reasons for not doing so". In other words, Robert could still be subjected to an action for damages after conviction.

However, in Nigeria, the courts appear to have taken a different view. In *Chief Patrick Agbako V. Edo State Board of Internal Revenue* <sup>[28]</sup>, the Court of Appeal held that it will amount to an abuse of court process where the tax authority commences a criminal action against taxpayer for failure to remit taxes that is already the subject matter of a civil action in the court. In this case, the appellant was a member of Association of Hotel Proprietors of Edo State, which association was duly incorporated. In 2011, the Hotels and Events Centres Occupancy and Restaurants Consumption Law of Edo State was made. In 2012, the Registered Trustees of Association of Hotel Proprietors of Edo State instituted an action in the Federal High Court, Benin Judicial Division, holden at Benin City to challenge the validity of the Hotels and Events Centres Occupancy and Restaurants Consumption Law of Edo State, 2011. While the matter was still pending, the respondent filed criminal charges against the appellant. The criminal charges were dismissed as an abuse of court process.

It is doubtful whether the court in this matter actually appreciated and pronounced on the proper issue before it, and if it did, whether its decision is a correct statement of the law. With due respect to the court, this paper takes the view that the court missed the point, probably due to counsel's elegant drafting of Grounds of Appeal. From the facts of the case, the proper issue before the court would have been whether or not, the respondent could validly initiate criminal proceedings against the appellant when the validity of the law under which the charges were brought was being challenged. However, the court decided the issue of whether or not it would amount to an abuse of court process where the tax authority commence a criminal action against a taxpayer for failure to remit taxes that was already the subject matter of a civil action in court. Furthermore, that decision, it is submitted is not a correct statement of the law. The tax laws have made provisions for prosecution of tax offenders and recovery of tax in event of default. These

provisions are complimentary and not alternatives to each other. The implication of the above judgment therefore is that in event of the prosecution of a tax evader, a criminal offence under the tax laws, the tax owed cannot be recovered by the tax authority as a suit to recover same would amount to an abuse of court process. The legislature, definitely could not have contemplated this interpretation or outcome.

It has clearly been established in *Awofeso V. Oyenuga* <sup>[29]</sup> that where same parties feature in the same subject matter but with different issues, there is no abuse of court process. In *Chief Patrick Agbakor V. Edo State Board of Internal Revenue* <sup>[30]</sup>, the issues in the criminal charges were not the same with the civil claim brought against the appellant, though both issues emerged from the same facts. The judgment thereof can therefore not represent the position of the law.

It is even now settled law that in serious corporate offences that go beyond regulatory matters, the directing minds of the corporate entity are to be identified and made to serve prison terms while the company as an entity is fined. In *Federal Republic of Nigeria V. Kingsley Ikpe* <sup>[31]</sup>, the accused persons were arraigned before the High Court of Lagos State, Ikeja on 43 count charge. The accused persons were charged with conspiracy to steal and stealing various sums of money belonging to Anthony Ifeanyichukwu. While the first accused person who was the Chairman and Chief Executive of the second accused was convicted and sentenced, second accused was fined <sup>[32]</sup> Indeed, a taxpayer may be subjected to the imposition of both civil and criminal sanctions for same default in tax payment or underpayment <sup>[33]</sup> The potentials of prosecution of tax offenders as a more reliable form of deterrence against tax resistance informs the position in the United Kingdom which insists on prosecution of tax evaders since just a civil action to recover tax owed is not embracing enough. Again, Blackstone <sup>[34]</sup> has urged that imprisonment characterised by terror, benevolence and reformation appears to be the best way of ensuring deterrence.

In all, tax enforcement through criminal prosecution of offenders appears not to be attractive to Nigerian tax authorities though the tax laws have made elaborate provisions in that regard. From available literature, it does appear that criminal prosecution, conviction and sentence to prison terms has the capacity to serve more as deterrence.

### c. Distrain of Property

By Section 33(1) (a) and (b) of the Federal Inland Revenue Service (Establishment) Act <sup>[35]</sup>, the Federal Board of Inland Revenue has powers to enforce payment of tax due from a company through distraint. Where an assessment has become final and conclusive and a demand notice has, in according with the provisions of the relevant tax laws been served upon the taxable person or upon the person in whose name the taxable person is chargeable, and he has failed to pay the tax due. The Board may distraint the taxpayer by his goods or chattels, bonds or other securities, or upon land, premises, or place in respect of which the taxpayer is the owner. Section 29(1) (a) and (b) of the Personal Income Tax Act has reproduced the enforcement powers under the Federal Inland Revenue Service (Establishment) Act verbatim.

Where an employer deducts tax from the employee notwithstanding the provisions in paragraph 21 of the operation of the Pay As You Earn Regulation which

empowers the relevant tax authority to bring proceedings in court against such an employer for recovery of arrears of tax liability due, the relevant tax authority is at liberty to enforce payment of tax through distraint <sup>[36]</sup>.

To distraint means to force a person by seizure and detention of personal property to perform a duty or obligations <sup>[37]</sup> Due to the special nature of taxation, proceedings in tax matters are said to be sui generis and special laws are promulgated to regulate tax proceedings in achieving the desired goals. Section 29 which is an amendment to Section 104(4) of the Personal Income Tax Act (PITA) 2011 is made pursuant to the achievement of that objective. Subsections 3 and 4 provide that in order to levy distress, the tax authority shall apply to a judge of the High Court sitting in Chambers through motion ex parte who shall issue a warrant of distraint.

The implication here is that for the purpose of distraint of property of a defaulting taxpayer, he is not entitled to be heard before the court can grant an order of distraint once the taxpayer has been served with demand notice and the notice of intention to obtain a warrant of distraint by the tax authority <sup>[38]</sup> This hasty grant of warrant of distraint may cause miscarriage of justice. In both *June George V. Commodore Olabode George (Rtd)* <sup>[39]</sup> and *Ntukiciem V. Oko* <sup>[40]</sup>, it was held that a court should not succumb to the temptation of hastily determining a case in limine without hearing the complaint of the defendant because of the delay which may arise from temporary inability of the defendant to take steps. In this circumstance, the taxpayer should be heard because there might be an explanation as to why he has not complied with the demand notice served on him.

Furthermore, the courts have even held that the tax authority can validly carry out an order to distraint the premises of a taxpayer when a criminal case is pending on the issues giving rise to the order. In *Edo State Board of Internal Revenue V. Niki Manufacturing Company Ltd. & 1 Or* <sup>[41]</sup>, the second defendant was the Chief Executive of the 1<sup>st</sup> defendant. While the defendants were standing criminal prosecution, the plaintiff obtained an order of distraint against the defendant. One of the issues that arose for determination was whether or not, the tax authority could validly carry out an order to distraint the premises of a taxpayer when a criminal case was pending on the issue giving rise to the order. This issue was answered by the court in the affirmative. In the words of the court;

...the distraining order the complainant sought to obtain is district remedy opened to the complainant and same has no nexus with the instant charge. I therefore resolve issue 2 against the defendants and in favour of the complainants.

The above decision shows the preparedness of the tax authorities to ensure that tax is paid, while on the part of the courts, this is a demonstration of the zero-tolerance attitude towards tax evasion.

Under Section 33(4) and (5), things distrained may be kept at the cost of the taxpayer for fourteen days after which they are liable to be sold. After the said sale, the amount of the tax due, the charges for sale and keeping shall be deducted from the amount sold and the balance, if any, returned to the taxpayer. Unfortunately, the law has not provided for a situation where the total sale of the distrained property is inadequate to even pay the tax owed.

Closely connected to the power to distraint as provided under Section 29 of the Personal Income Tax Act, is the power to seal premises of a defaulting taxpayer. In *Edo State Board*

of *Internal Revenue Service V. Niki Manufacturing Company Ltd* <sup>[42]</sup>, the issue that came up for determination was, inter alia; whether or not it would amount to double jeopardy if the taxpayer is found liable or convicted for violation of tax laws when the tax authority have sealed up his factory as provided under Section 36(9) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). In resolving the issue in the negative, the court held that it will not amount to double jeopardy since for a person to raise the defence of double jeopardy, he or she must have been tried by a competent court for a criminal offence and either convicted or acquitted, and that the act of sealing premises does not amount to a criminal trial. The court specifically stated that:

From the preceding analysis, follows the question; was there really a clear case of double jeopardy as alleged by the sealing of defendant's premises pursuant to the enabling statute, that is section 104(3) of the Personal Income Tax Act does not, and cannot by any stretch of the imagination amount to an acquittal by a court of law. I entirely agree with the complainant's counsel that the rule of double jeopardy cannot avail the defendants.

Thus, sealing of a defaulting taxpayer's premises can be validly carried out even when criminal charges are pending against the taxpayer. The drawback with sealing of premises as a form of the tax enforcement however is that, it tends to inhibit the capacity of the taxpayer to carry out his business and fulfill his tax obligations. This issue is important for tax purposes because doing business means taking risk. The business may incur loses or even collapse, and that may account for the failure of the taxpayer to default tax payment. When his premises is sealed or property distrained, the implication is that the business can no longer operate. This tendency will definitely throw the taxpayer out of business as his premises may be sealed or completely sold. This scenario presents a picture of "killing the goose that lays the golden egg". How then will the taxpayer survive and even fulfill his tax obligation?

The power to seal premises as a specie of tax enforcement mechanism can also be faulted in terms of the right of the taxpayer to defend himself. This was brought to light in the case of *Panalpina World Transport Nig. Ltd. V. Lagos State Board of Internal Revenue* <sup>[43]</sup>, where it was argued on behalf of the applicant that as the premises could not run away, the court should make orders that would allow the applicant enter the premises and do business, otherwise the applicant could not even prepare his defence. This argument can be justified for all purposes. The tax authority's action may not be in accordance with the law and to challenge same, the taxpayer whose business premises has been sealed would need funds to make his defence or even documents locked up in the premises. Another important issue that arose from this case was whether or not an action arising from personal income tax, like sealing of premises is capable of giving rise to an action under the Fundamental Rights Enforcement Procedure. Unfortunately, the opportunity to make a pronouncement on this issue was lost due to the court's lack of jurisdiction to determine or inquire into the propriety or otherwise of the power of a State Government Agency like the respondent on personal income tax matters <sup>[44]</sup>.

#### d. Tax Enforcement through Imposition of Fines

Tax laws have also made elaborate provisions in respect of

civil penalties in form of fines against offenders. A civil penalty in this regard is an imposition of fine on a defaulting taxpayer rather than an imprisonment. Some of these civil fines under the various tax laws include the following:

#### Personal Income Tax Civil Penalties and Fines

Under the Personal Income Tax Act <sup>[45]</sup>, a penalty not paid on the due date attracts a penalty of 10% per annum of the sum unpaid. Though this penalty may appear to be severe enough, the inflationary rate in Nigeria may make nonsense of its intendment. The fact is that with the high rate of inflation in the Nigerian economy, a defaulting taxpayer may pay the 10% annual penalty for defaulting to pay tax and yet make a profit out of such default since the yearly inflationary rate may be above 10%.

A penalty imposed under this section shall not be deemed to be part of the tax paid for the purpose of claiming relief under any provision of the Personal Income Tax Act <sup>[46]</sup>. This provision is intended to restrict deductible expenses to expenses that are wholly, exclusively, necessarily and reasonably incurred in the production of income. Consequently, the case of *Spotforth & Prince V. Gulder* <sup>[47]</sup> decided that legal expenses in respect of summons or fines or cost incurred by a taxpayer are not deductible.

Another civil penalty under the Personal Income Tax Act is in respect of failure to deduct withholding tax <sup>[48]</sup> under this provision, a person who fails to deduct withholding tax on rents, interest or royalties and dividends as required under Sections 68, 69, 70 and 71 of the Personal Income Tax Act, 2004 respectively shall be guilty of an offence and shall be liable on conviction to a fine of five thousand naira or 10% of the amount of tax due, whichever is higher, in addition to the amount of tax plus interest at prevailing commercial rate. The same applies to any person who fails to pay the tax deducted to the relevant tax authority within 30 days from the date the amount was deducted. The second arm of this provision is meant to check official corruption on the part of tax officials and employers.

#### Civil Fines under the Petroleum Profits Tax Act

The Petroleum Profits Tax Act <sup>[49]</sup> has elaborate provisions in respect of offences and penalties. The penalty for making, preparing or causing to be prepared, and giving or causing to be given any incorrect accounts is a fine of a one thousand naira (N1,000.00) or double the amount of tax which has been undercharged in consequence of such incorrect account <sup>[50]</sup>.

Also as a civil penalty under the Petroleum Profits Tax Act, <sup>[51]</sup> making of false statements and returns for the purpose of obtaining any deduction, rebate, reductions or repayment in respect of tax or aiding, and abetting the same attracts a fine of one thousand naira (N1, 000.00) plus treble the amount of tax for which the company is liable under the Act <sup>[52]</sup>. It is hereby submitted, that the penalties provided against tax defaulters are highly inadequate to serve as deterrent to petroleum companies. Petroleum being the main sector of the Nigerian economy, penalties against evaders of the petroleum profits tax must be made stiff enough to prevent or check abuses.

#### Civil Fines under the Companies Income Tax Act

The Companies Income Tax Act <sup>[53]</sup> contains provisions in respect of civil offences and penalties against tax defaulters and tax officials. These include the following:

The making of incorrect returns, without reasonable excuse, by omitting or understating any profits liable to tax under the Act <sup>[54]</sup>, and giving of incorrect information, without reasonable excuse in relation to any matter or thing affecting the liability of any company to tax, attracts a fine of two hundred naira (N200) and double the amount of tax which has been undercharged in consequence of such incorrect return or information, or would have been so undercharged if the return or information had been accepted as correct. In *Sieme Offshore Federi As V. Federal Inland Revenue Service* <sup>[55]</sup>, an appeal was brought before the Tax Appeal Tribunal against additional tax assessment and penalty for failure to file correctly and accurately file a return by the appellant pursuant to Section 55(2) of the Companies Income Tax Act. Dismissing the appeal and upholding the additional tax and penalty, the Tax Appeal Tribunal stated that:

Failure of a taxpayer to correctly and accurately file its tax returns on the due date will give rise to additional tax liability and interest and penalties on the additional tax.

From these provisions, if the company has any defence, it may be excused from liability. However, considering the financial strength of the company, it may employ the services of experts who may always be able to show that the making of incorrect return or giving of incorrect information is not deliberate. Conversely, with the weak tax administrative machinery in Nigeria, tax authorities may be incapable of challenging the companies. The result is that a lot of investable revenue is lost. For these offences to serve any useful purpose therefore, they must be made strict liability offences. Most of these civil penalties have been re-enacted in the Federal Inland Revenue Service (Establishment) Act, 2007 for purposes of emphasis.

In order to ensure fairness in imposition of penalties, the Tax Appeal Tribunal held in *Tetrapak West Africa Limited V. Federal Inland Revenue Service* <sup>[56]</sup> that by the provisions of Section 13 of the 5<sup>th</sup> Schedule to the Federal Inland Revenue Service (Establishment) Act, computation of penalties and interests is allowed only when the assessment or demand notices have become final and conclusive. Assessment or demand notices become final and conclusive if the taxpayer fails to file a notice of appeal within 30 days after the order or decision being appealed against is made,

Where the taxpayer is a Nigerian or is resident in Nigeria, the foregoing tax enforcement mechanisms can be invoked. However, where the defaulting taxpayer is not resident in Nigeria and has no asset in the country, the enforcement mechanisms cannot avail the tax authorities. It has been established by a chain of authorities, that a foreign court will not take notice of or enforce revenue laws of another country <sup>[57]</sup> In *Boucher V. Lawson* <sup>[58]</sup>, the House of Lords, upholding the decision of the Court of Appeal, rejected a claim for recovery of capital gains tax levied by the Indian Government on a company trading in India but whose major assets has been transferred to England shortly before it was wound up. Viscount Simmonds lamented over this claim stating that he was “greatly surprised to hear it suggested that the courts of this country would and should entertain a suit by a foreign state to recover tax”. Worst still, judgment based on such foreign taxes cannot be enforced in the forum <sup>[59]</sup>.

The foregoing positions present far-reaching problems for tax enforcement by national tax authorities across national boundaries. First, a defaulting foreign taxpayer who has

escaped out of Nigeria cannot be proceeded against. Again, where a foreigner earned profits sought to be taxed from a source within Nigeria and judgment obtained against the defaulting taxpayer in Nigeria, such judgment cannot be enforced in the home country of the taxpayer. In essence, a foreign taxpayer who has no assets in Nigeria and has left the country cannot be compelled to fulfill his tax obligations in the country.

### Summary/Findings

Tax enforcement machinery is an integral part of the tax system. Without an effective and efficient tax enforcement machinery, the entire tax system will be rendered nugatory. This is in view of the fact that because of the lack of voluntary compliance attitude of taxpayers and prevalence of tax resistance activities, the tax authorities have to invoke their coercive powers to ensure compliance.

In Nigeria, various tax laws have been put in place which provides for tax enforcement mechanisms, some of which are similar to ordinary judgments enforcement procedures. They are in form of civil actions to recover tax owed which may in event of failure to comply with the judgment, end up in garnishee or interpleader proceedings. Tax may also be enforced through criminal prosecution of defaulters and if found guilty stand the risk of conviction, sentence and fine. The tax authorities also have powers to enforce tax through distraint of property or sealing of business premises.

In terms of civil action to recover tax owed, garnishee and interpleader proceedings may present technical problems which have the capacity to impact negatively on their effectiveness. For instance, a joint account cannot be garnisheed even where it is operated by a partnership and one of the partners is a judgment debtor, while only the sheriff or person who is in possession of a disputed property has the locus standi to commence interpleader proceedings. This may occasion technical bottlenecks like issues of locus standi and delays in recovery of tax owed. Again, tax authorities in Nigeria appear to be more interested in civil claims for the recovery of tax owed than to punish the tax defaulter. Blackstone has been very critical of fines and argued that conviction and sentence to prison has more capacity to serve as deterrence to crime.

Closely related to the above is the fact that enforcement of tax through criminal prosecution appears unattractive to Nigerian tax authorities. Though statutory provisions permit tax authorities to enforce tax through criminal proceedings, such opportunities are scarcely being utilized despite the fact that many cases that go to court as civil actions only contain criminal elements.

Enforcement of tax through distraint of property, bond or chattels and sealing of business premises have been shown to have disincentive effects on the productive capacity of the taxpayer. Moreover, when the taxpayer's business premises has been sealed, he may be denied of the facilities to defend himself.

It has also been revealed that tax law being special specie of law cannot avail the Nigerian tax authorities to enforce payment of tax abroad where the taxpayer has no assets in Nigeria and has been able to escape out of the country. This is in view of the fact that tax laws or judgments are not enforceable in the forum.

### The Way Forward

The legal regime for enforcement of tax in Nigeria is similar

to the general regime for enforcement of judgments. However, certain impediments to the enforcement of taxes have been revealed.

First, imprisonment rather than simple recovery of tax owed and punitive fines serves more as deterrence to crime. In the United Kingdom, tax evaders are usually prosecuted. The Nigerian tax authorities must therefore take a cue from the United Kingdom position and insist on the prosecution of

tax evaders since just a civil action to recover tax owed is not embracing enough to serve as deterrence to tax evaders.

On the issue of inadequacy of fines to serve as deterrence, the provisions in that regard must be amended to increase the fines to reflect economic realities and serve as deterrence to tax defaulters. Again, since taxing statutes are special specie, enforcement mechanisms like garnishee and interpleader proceedings should be designed separately to provide for easily enforcement of taxes.

In other to solve the problem of international enforcement of tax laws and judgments, there is need for a multilateral convention that will seek the recognition of foreign revenue laws, entertainment of tax suits by foreign courts to enforce tax, and enforcement of foreign judgments on taxes. Only this will prevent foreign taxpayers, particularly multinational companies from frustrating national tax regimes.

### Conclusion

The paper has identified and appraised tax enforcement mechanisms in Nigeria and their inadequacies in effective and efficient tax enforcement. Inadequacies in Nigerian tax statutory provisions can be cured by the National Assembly. However, it has been noted that only a multilateral approach is capable of curing the problem of non-enforcement of tax laws and judgments in the forum.

Through the suggestions made for reform, it is hoped that the tax enforcement regime in Nigeria will be solidified to effectively stand up to the challenges of enforcement in the technological driven global economy. It is only with an effective and efficient tax enforcement regime that taxation can play its proper role as a tool for sustainable development in the country.

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