CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study.

Taxation over time has proven to be an effective economic management tool for the development of several economies in the world. In most developed countries of the world, taxation is the major source of revenue, without which government may not be able to meet her obligations to the citizens. Thus, most developed countries have developed an effective tax system to sustain their economic development agenda.[1]

In Nigeria, taxation for many years was not a major contributor to the revenue profile of any tier of Government. This is because of the over reliance on revenue from oil. However, in recent times, things are changing; oil revenue has been dwindling due to the volatility of the international oil market.[2]Consequently, the implementation of the National Fiscal Budget is adversely affected due to dwindling revenue from oil.[3]Nigeria depended largely on oil revenue for a long time and has to a large extent neglected the potentials of non-oil revenue in stabilising the economy.The future of Nigeria as a nation cannot continue to depend on an unstable source of revenue like oil. Even more worrisome is the prediction that oil wells will one day dry up. Also, the oil market is getting saturated, with new discoveries of oil in several countries.[4]

Government at all levels has suddenly woken up to the realization that non-oil revenue is the most stable source of revenue. This source of revenue has steadily increased over the years,[5] and has the potentials to grow to a level where it can sustain the economic development of

[1] KA Mohammed 'Delta State Beyond Oil: Taxation as a Catalyst for Socio-Economic Development,' A Paper delivered at the Delta State House of Assembly 2nd Anniversary Lecture on 14th June, 2013, p.7.
[2] www. Statista.com/262858/ change in opec-crude.oil prices-since 1960 accessed on the 16th of January, 2016.
[3] S Salau and D Anazia. 'Crude Oil Prices Plunges to $27.67 per barrel'. *The Guardian*, January 19th 2016, p.I.
[4] I Ekweremadu. 'Keynote Address' delivered at the Delta State House of Assembly 2nd Anniversary Lecture on 14th June, 2013. p.3.
[5] 10 Okauru 'Effective and Efficient Tax Collection and Administration in the Three Tiers of Government' A

Nigeria.Consequently, new tax laws have been enacted and necessary mechanisms have been put in place for the enforcement of these tax laws.

Unfortunately, Government at all levels seem to see taxation as principally a means of generating revenue without considering its overall impact on the economy. The need to generate revenue should be balanced with the more important need to achieve socio-economic development. In this direction Okauru has suggested that '… our attitude towards taxation, and tax related issues should show that we understand the vital role it plays in our quest to achieve national development.'[6] Thus, the ultimate aim of Government should be to develop a tax system that will not only generate revenue, but also stimulate socio-economic development. This has been the position of tax experts, who have consistently argued that government at all levels should develop tax systems that encourage investment and position the private sector as an effective engine for economic growth and prosperity.[7]

The Nigeria Tax System has not been able to play any significant role in the development of trade and investment. For most investors taxes play a major role in how investment decisions are reached. Certainly, investors will want to invest in economies that theirtax system will have positive effects on their business.Governments benefit and generate more tax revenue if the economy is thriving.The Federal Inland Revenue Service in particular recorded significant improvement in tax collection during periods when the economy thrived.[8]

For the economy to grow, the fiscal policy which includes taxation must be investment friendly. It is therefore necessary; for all tiers of Government to see it as a primary responsibility of Government to create a conducive atmosphere for economic activities from which revenue is

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Paper delivered at the Revenue Mobilisation and Fiscal Commission Retreat, on 15th February, 2011. p. 8.

[6] *Ibid*.

[7] F Adekoya 'Reforming Nigeria Tax System for Virile Development' *The Guardian*, November 30, 2011, p. 23.

[8] I0 *Okauru loc cit*.

realized in the form of taxes, charges, fees etc. Thus, Government must begin to change its perception of taxation as principally a revenue generating tool, to a veritable instrument for socio economic development.

In this research, the researcher intends to demonstrate the relationship between taxation and trade and investment. Also, the impact of the Nigeria tax system on trade and investment will be examined; particularly the effect of incentives under the various tax laws on trade and investment. Furthermore, the implications of multiple and double taxable and high tax rates on trade and investment will be examined.

1.2 Statement of Problem.

The Government plays a critical role in the development of trade and investment in Nigeria, one major way of doing this is through the introduction of fiscal policy measures.Taxation is a vital part of fiscal policy and can be effectively used as an economic management tool. Thus,taxation apart from the traditional role of revenue generation ought to be a catalyst for the growth of trade and investment in Nigeria. Unfortunately, the Nigerian tax system is confronted with a lot of challenges which, has largely impeded the development of trade and investment in Nigeria. This research seeks to address the following issues:

(1) What is the effect Multiplicity of tax laws and taxes on trade and investment in Nigeria?

(2) What is the impact of Double Taxation on trade and investment in Nigeria?

(3) What is the effect of High Tax Rate on trade and investment in Nigeria?

(4) What is the impact of the Lack of Fiscal Federalism and overconcentration of taxing powers at the Federal level on trade and investment in Nigeria?

(5) What are the factors responsible for the abuse of taxing powers by State Governments and its on trade and investment in Nigeria?

(6) Whether tax incentives in the various tax laws has considerable impact on the development of trade and investment in Nigeria?

(7) Whether the tax dispute resolution mechanism has helped in addressing the problem of taxation in Nigeria?

(8) Whether the National Tax Policy addressed the challenges of taxation in Nigeria?

1.3 Purpose of Study.

This research generally seeks to examine the effect of the relationship between taxation and trade and investment in Nigeria. The objectives of this research specifically are:

(1) To examine the impact of taxation on trade and investment in Nigeria.

(2) To discourage the proliferation of tax laws in Nigeria.

(3) To examine the impact of double taxation and multiplicity of taxes on trade and investment in Nigeria.

(4) To determine the extent to which the fiscal federalism structure under the Constitution of the Federal Republic of Nigeria, 1999(as amended) (hereinafter referred to as the Constitution) affects the Nigeria tax system.

(5) To show the negative impact of the abuse of taxing powers by State Governments.

(6) To demonstrate the effect of high tax rate on trade and investment.

(7) To examine the provisions of Nigerian Tax laws and policies and identify provisions that needs to be amended to stimulate trade and investment.

(8) To examine the status and constitutionality of the National Tax Policy and identify areas of reforms.

(9) To look at the impact of fiscal dispute mechanism in Nigeria and advocate for the use of alternative dispute resolution mechanism in the resolution of tax dispute.

1.4 Scope of Study.

This research focuses on examining the effect of the Nigerian Tax system on Trade and investment. It seeks to show that there is a correlation between taxation and economic development. In the cause of the research, the researcher shall discuss the general concept of taxation, history of taxation, sources of tax laws, powers to impose and collect tax and tax administration in Nigeria. Also, the impact of fiscal federalism on taxing powers and the abuse of taxing powers by State Governments and its effect on trade and investment will be examined.Furthermore, the impact of tax incentives, particularly tax reliefs,tax exemptions, tax holidays, allowable deductions and free trade zones on trade and investment will be examined.

In addressing these issues the provisions of the under listed tax laws shall be discussed:

(1) Company Income Tax Act (as amended)[9]

(2) Personal Income Tax Act (as amended)[10]

(3) Value Added Tax Act[11]

(4) Industrial Development (Income Tax Relief) Act.[12]

(5) Capital Gains Tax Act.[13]

(6) Nigerian Export Processing Zones Act.[14]

(7) Oil and Gas Export Free Zones Act.[15]

(8) Petroleum Profit Tax Act.[16]

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[9] Cap C21 LFN, 2004.
[10] *Op cit.*
[11] Cap V1 LFN, 2004.
[12] Cap I7 LFN, 2004.
[13] Cap C1 LFN, 2004.
[14] Cap N107 LFN, 2004.
[15] Cap O5 LFN, 2004.

(9) The National Tax Policy.[17]

(10) The Constitution of the Federal Republic of Nigeria 1999 (as amended).

1.5 Significance of Study.

This research seeks to show that tax is not only a revenue generation tool but a major fiscal policy management tool. The research further seeks to show that taxation has impact on the development of trade and investment. Thus, policy makers must consider the impact of tax laws on the economy when formulating tax laws. In this direction, indirect taxes should beemphasized above direct taxes. Also, the study will show that tax concessions alone cannot stimulate the economy nor lead to the development of trade and investment in Nigeria. It must be complemented by the provision of critical infrastructure.Furthermore, the study will highlight the negative effect of multiplicity of taxes, double taxation, high tax rates and illegal State taxes on the development of trade and investment.

1.6 Methodology.

The methodology adopted in this research is the doctrinal method of research. While the approach to the research shall comprise of descriptive, comparative and analytical examination of relevant local and international statutes, textbooks, journals, articles, newspapers, magazines and materials from the internet.

1.7 Literature Review.

The role of taxation in the Nigeria economy has been the subject of discussions by several authors of textbooks and journals over the years. The researcher acknowledges that there has been some work in this area of research, which forms a foundation for this present work.

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[16] Cap P13 LFN, 2004.
[17] Adopted by the Federal Executive Council on the 20th of January 2010.

However, most of the works reviewed did not fully capture the essence of the relationship between taxation and trade and investment in Nigeria.

For instance, Abdulrazaq[18] discussed the general principles of taxation, types of taxes under the various tax laws. He examined tax concessions for companies income tax,[19] capital gains tax,[20] petroleum profit tax[21] and value added tax.[22] He also, looked at the resolution of tax disputes and the structure of the Tax Appeal Tribunal.[23]His work was basically on the general principles of tax laws; he did not look at the impact of these taxes on trade and investment. Also, he did not discuss the effect of fiscal federalism on taxing powers in Nigeria and the abuse of taxing powers by State Governments. Furthermore, he did not discuss the impact of high tax rates on trade and investment in Nigeria.

The researcher intends to look at the relationship between taxation and trade and Investment. Thus, the impact of tax concessions on the Nigerian economy will be examined. Also, state tax Laws and the impact of the lack of fiscal federalism in the Nigerian tax system will be discussed. Lastly, the possibility of using alternative dispute resolution mechanism in resolving tax disputes particularly arbitration will be advocated.

Agbonika in her book discussed the general principles of tax law, and the history of taxation in Nigeria.[24] She also, looked at the rate of taxes in Nigeria and the provisions on tax concessions under several tax laws.[25] She observed that the high rate of petroleum profit tax is in order, that it is the only way Nigeria can derive revenue from the exploitation of her natural

[18] MT Abdulrazaq, *Revenue Law and Practice in Nigeria*, (3rd edn., Lagos: Malthouse Press Ltd., 2015) pp. 1-47
[19]*Ibid*, pp.204-208.
[20]*Ibid*, pp.157-175.
[21]*Ibid*, pp.265-284.
[22]*Ibid*, pp. 307-338.
[23]*Ibid*, pp. 375-395.
[24] JAA Agbonika, *Problems of Personal Income Tax in Nigeria*, (Ibadan: Abuba Press Ltd, 2012) pp.1-52.
[25]*Ibid*, pp. 57-134.

resources by wealthy companies.[26] Her work generally was on personal income tax, She observed that despite the enforcement provisions of the Personal Income Tax Act[27] which is sufficient enough to guarantee efficient tax collection if properly implemented; the current revenue status of personal income tax shows that Nigeria places no reliance at all on personal income tax but puts most focus on the oil and gas sector.[28] She also, looked at value added tax and noted that the objectives of value added tax are to reduce overdependence on oil revenue, tilt taxation towards consumption than income, provide incentive for export production and to maintain progressive approach by taxing luxury consumption and minimising the impact on essential goods and services for low income earners.[29] However, she did not discuss the effect of Personal Income Tax Act[30] on trade and investment in Nigeria, the effect of the lack of fiscal federalism on the distribution of taxing powers, abuse of taxing powers by states and impact of high tax rates on trade and investment inNigeria.

In this research, the researcher intends to demonstrate the effect of high tax rates on investment in Nigeria and will further demonstrate the limitations of tax concession in driving economic growth. Also, the researcher intends to show how the lack of fiscal federalism leads to the abuse of taxing powers by States and how this has led to the multiplicity of tax payments in Nigeria.

Similarly, Umenweke[31]carried out an exposition on the general principles of tax law, with particular emphasis on its impact on foreign investments in Nigeria. He looked at the provisions for tax concession under our laws and particularly discussed the provisions on tax incentives, tax

[26]*Ibid*, p. 130.
[27]*Op cit.*
[28] JAA Agbonika, *op cit*, pp.267-268.
[29]*Ibid*, p. 135.
[30]*Op cit.*
[31] MN Umenweke, *Tax Law and its Implications for Foreign Investments in Nigeria* (Enugu: Nolix Educational Publications, 2008) pp. 1-203.

exemptions, tax holidays, tax reliefs and allowable deductions.[32] He looked at the provisions of Personal Income Tax Act[33] and observed that it's provisions encourages the attraction of foreign investors especially with regards to the taxation of foreign and local staffs by providing tax reliefs and exemptions to their foreign and local workers[34]He stated further that, the tax exemptions, reliefs and allowances under CompaniesIncome Tax Act[35] have developmental and industrial implications.[36] Thus, any sector of the economy which the Government considers critical towards the attainment of certain level of development will enjoy the status of a preferred sector and favourable policies are evolved towards such sectors.[37]He concluded that there is need for the National Assembly to enact a lawcontaining every relief, allowances and exemption obtainable in Nigeria even if it amounts to repeating what is already contained in another statute.[38]He noted that the Taxes and Levies (Approved List for Collection) Act[39] seeks to delineate the taxes collectable by all tiers of Government and that the taxes collectable by each tier of Government as stated in the Taxes and Levies (Approved List for Collection)[40] should be followed and adhered to the letter.[41]However, he did not discuss the impact of high tax rates and the abuse of taxing powers by State Governments. He also, did not consider the implications of the lack of fiscal federalism under the 1999 Constitution[42] on taxation.

The researcher intends to look at the impact of high tax rates on trade and investment in Nigeria and also, show that tax concessions alone does not necessary drive investment. In most cases the

[32]*Ibid*, pp. 362-456.
[33]*Op cit.*
[34] MN Umenweke,*op cit,* p.452.
[35]*Op cit.*
[36] MN Umenweke,*op cit,* pp.453.
[37]*Ibid*.
[38]*Ibid*, pp. 462-463.
[39]*Op cit.*
[40]*Op cit.*
[41] MN Umenweke, *op cit, p.*462.
[42]*Op cit.*

effect of tax concession is diminished by other factors like high tax rates and multiplicity of tax payments. The researcher will also, discuss the effect of fiscal federalism on the Nigerian tax system. In this direction the effect of the abuse of taxing powers by state Government and the constitutionality of the Taxes and Levies (Approved List for Collection) Act[43] in determining the taxes collectable by each tier of Government will be examined.

Ngwaba has observed that: one of the factors that have made our tax system unable to drive investment is insufficient incentives.[44] He considers tax incentives as a major requirement for a tax system to be able to drive investment and particularly advocates for the introduction of more incentives for free trade zones.Similarly,Moneke observed that: Nigeria taxincentives are uncompetitive and unable to play a significant role in opening up the Nigerian economy to foreign direct investment.[45]He noted that one of the reasons for the failures of free trade zones in Nigeria is the lack of adequate incentives to investors. They are of the view that more tax incentives will lead to economic transformation and the development of trade and investment in Nigeria.

The researcher intends to show that there are sufficient incentives in our tax system,

and that what makes our tax incentives uncompetitive are high corporate tax rates and multiple tax payment. Also, the research intends to show that tax incentives alone cannot transform a society, it must be complemented by the provision of critical infrastructures like good roads, electricity and sound economic management principles.

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[43]*Op cit.*

[44] U Ngwaba 'Legislative Framework of Export processing Zone' in E Azinge and S Omo *Legal Regime of Free Trade Zones* (Lagos: NIALS, 2013) p. 192.

[45] EU Moneke, 'Nigerian Export Processing Zone Authority: A Critique' in E Azinge and S Omo, *op cit*, p. 110.

Ibraheem and Jegede have argued that: the provisions of the Federal Inland Revenue (Establishment) Act[46]seeks to unify tax administration in Nigeria albeit through the back door. They stated that the Act has completely wiped out the division of tax administrative responsibilities that hitherto existed between the Federal Inland Revenue Service and the State Boards of Internal Revenue. They stated further that the Federal Inland Revenue (Establishment) Act[47] Unlike the previous tax legislations does not even recognize the existence of the State Boards of Internal Revenue as a revenue collection agency not to talk of identifying where they belong in tax administration under the new dispensation.[48]Similarly, Atilola, stated that the intention of the Federal Inland Revenue (Establishment) Act[49] is nothing but unification of tax administration in Nigeria. He noted that the Federal Inland Revenue (Establishment) Act[50] seems to be eroding the jurisdiction of the States to legislate on certain tax species not falling within the Exclusive and Concurrent Legislative List of the Constitution.[51]

In this research, the researcher intends to show that the Federal Inland Revenue Service (Establishment) Act[52] did not in any way unify tax administration in Nigeria; neither did the Act erode taxing powers of states.The researcher intends to show that it is the constitution that distributes taxing powers and not an act of the National Assembly. Furthermore, the National Assembly does not have powers to create statutory tax authorities for states; neither does the National Assembly have powers to determine how states administer their taxes.

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[46] Cap F36 LFN, 2004.
[47]*Op cit.*
[48] A Ibraheem and RO Jegede, 'Federal Inland Revenue Service (Establishment) Act 2007: Centralisation of Tax Administation in Nigeria through the Back Door' http://www.icmaservice.com accessed on the 20th of October , 2015.
[49]*Op cit.*
[50]*Op cit.*
[51] B Atilola, 'Reflections on the Federal Inland Service (Establishment) Act 2007' *NJBCL*, Vol 1, No. 4, 2010, 10.
[52]*Op cit.*

Okauru has noted that the position of the Federal Inland Revenue Service is that since Tax Appeal Tribunal is an inferior body to the Federal High Court, its jurisdiction does not conflict with that of the Federal High Court. She stated further that the Tax Appeal Tribunal is not a court but an administrative body thus, all tax matters must necessarily start from the Tax Appeal Tribunal[53] Furthermore, She argued that it is a successor to the Value Added Tax Tribunal, and thatthe law which establishes the Tax Appeal Tribunal seeks to cure the defect in the establishment of the Value Added Tax Tribunal that gave rise to the Court of Appeal decision in *Stabilini Visinoni v Federal Board of Inland Revenue*,[54]since appeals from Tax Appeal Tribunal now go to the Federal High Court, subjecting the proceedings of the Tribunal, as it were to the judicial review of the Federal High Court.[55]

The researcher intends to show that the conflict between the Federal High Court and The Tax Appeal Tribunal cannot be resolved by the Federal Inland Revenue Service (Establishment) Act[56] because the Act is inferior to the Constitution.The Federal High Court is a creation of the Constitution thus, the solution is in the amendment of the 1999 Constitution.[57]

Monye has suggested that tax issues are not resolvable by arbitration. He seems to support the view that, the courts are the only appropriate forum to resolve tax disputes.[58]The researcher intends to discuss the possibility of using alternative dispute resolution mechanism, particularly arbitration in the resolution of tax disputes.

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[53] I0 Okauru, (ed.) *Federal Inland Revenue Service and Taxation Reforms in Democratic Nigeria*. (Abuja: FIRS, 2012) p. 147.

[54] (2009) 1 TLRN, 1. The Court of Appeal, declared the establishment of Value Added Tax Tribunal noil and void for contravening section 251 of the 1999 Constitution *op cit.*

[55] I0 Okauru, (ed.) *Federal Inland Revenue Service and Taxation Reforms in Democratic Nigeria, op cit,* p. 149.

[56]*Op cit.*

[57]*Op cit.*

[58] O Monye, 'FIRS Secures Landmark Judgment Against the Arbitration of Tax Disputes' *Gauge* April – June, 2012, 20.

Similarly, Lerkwagh has opined that taxing statutes are special specie of statutes, which must be given strict interpretation by the courts especially where the provisions are clear and unambiguous.[59] Theresearcher intends to advocate that courts should not interpret tax laws strictly, were the decisions that would be reached may not meet the justice of the case. Also, in adjudicating on tax matters the courts shouldbalance the obligation to interpret tax laws strictly with the need to protect the economic objectives of Nigeria as a nation.

This research intends to add to the body of knowledge by discussing areas not covered by the works reviewed above. Particularly, the impact of tax laws and the National Tax Policy on trade and investment. Also, Impact of high tax rates, multiple and double taxation and tax incentives on trade and investment will be discussed. Furthermore, the effect of the lack of fiscal federalism under the 1999 Constitution[60] on trade and investment and the abuse of taxing powers by state governments will be reviewed in the course of this dissertation.

1.8 Organisational Layout.

This research work is divided into eight chapters. Chapter one, contains the general introduction to the work, which includes the background to the study, statement of problem, purpose of study, scope of study, significance of study, methodology, literature review, organizational layout and definition of key terms.

In chapter two a general overview of the concept of taxation will be discussed.The researcher will undertake an examination of thedifference between taxation and other Government receipts, objective of taxation, characteristics of a good tax system,classification of taxes, and historical

[59] K Lerkwagh, 'Shell Petroleum Development Company of Nigeria Limited v Federal Board of Inland Revenue (1996) 8 NWLR 257 SC: An Overview' (2011) 11 *NSCR*, 138 – 139.

[60]

development of taxation in Nigeria from the pre-colonial period to the post-colonial period. A general overview of the sources of tax laws will also, be done in chapter two.

In chapter three the discussion will center on tax administration in Nigeria and its impact on trade and investment in Nigeria. Thus, the powers to Impose and Collect Taxes by the Federal, State and Local Governments in Nigeria will be examined to identify its impact on trade and investment in Nigeria. Also, the role of stakeholders in the administration and collection of taxes in Nigeria, like the Joint Tax Board, the Federal Inland Revenue Service, the Minister of Finance, State Boards of Internal Revenue andLocal Government Revenue Committee will be discussed. Also, procedure for tax assessment will be considered in chapter 3.

In chapter four the discussion will be on the impact of tax Incentives on trade and investment in Nigeria. Tax incentives under the various tax laws will be looked at, specifically provisions on tax exemptions, tax reliefs and allowances, pioneer status and tax holidays, allowable deductions, double taxation reliefs for foreign companies and expatriates will be examined. Also, incentives for free trade zones and its impact on trade and Investment in Nigeria will be examined.

In chapter five theimpact of State Government tax laws on trade and investment in Nigeriawill be discussed. The issue of non-fiscal federalism and the abuse of taxing powers byState Government will form a major part of the discussion. Furthermore, the Local Government tax system, particular the issue of property tax will be considered. The propriety or otherwise of the Use of Tax Consultants will also, be discussed.

In chapter six, the provisions of the National TaxPolicy document will be analysed. Specifically, the process of formulating the document, the legal statusand constitutionality of the document will be discussed. Also, its provisions on fiscal federalism and its impact on trade and investment in Nigeria will be examined.

In Chapter seven the discussion is on tax dispute resolution mechanism and its impact on trade and investment. The constitutionality of the Tax Appeal Tribunal and the role of the courts in resolving tax disputes will be examined. Also, the possibility of adopting alternative disputes resolution methods, especially arbitration in resolving tax disputes will be advocated.

Chapter eight is the concluding chapter; it contains the conclusions and recommendations on how to position the Nigerian tax system as an effective stimulator for trade and investment.

CHAPTER TWO

CONCEPTUAL FRAMEWORK AND HISTORICAL DEVELOPMENT OF TAXATION IN NIGERIA.

2.1 Conceptual Clarifications.

It is important to discuss some basic concepts of taxation as a foundation for this dissertation. Thus, the researcher shall briefly discuss some fundamental conceptsin taxation.

2.1.1 Tax.

There is no universally acceptable definition of tax; however there have been several attempts to define tax. The Oxford Dictionary of Law defined tax as 'a compulsory contribution to the State's fund.'[61] This definition is too wide in scope, as there are several other compulsory contributions to State funds that cannot be called tax. For instance, fines and penalties imposed on defaulters cannot be considered a tax.

The Blacks Law Dictionary defined tax as 'a charge usually monetary imposition by the government on persons, entities and transactions to yield public revenue.'[62] This definition seems to emphasize revenue generation as the only purpose for taxation; revenue generation is not the only purpose of taxation. Similarly, Ayua defined tax as 'a compulsory exaction of

[61] J Law and EA Martin (eds), *Oxford Dictionary of Law* (7thed, Oxford: Oxford University Press, 2009) p. 541.
[62] BA Garner (ed. In chief), *Blacks Law Dictionary* (9thed, St. Paul, Minnesota: Thomson Reuters, 2009) p. 1594.

money by a public authority for public purposes or tax is raising money for the government by means of contributions from individual persons.'[63] With the greatest respect, Ayua's definition is similar to that of Blacks Law Dictionary and it's inadequate.

In Nigeria, there has been no judicial definition of tax. The closest opportunity the Supreme Court had to define tax, with the greatest respect was not utilized. That was in *Shell vFBIR*[64] where the Supreme Court stated that: 'tax should be deemed as a debt due to the government.' Also, no Nigerian legislation defined the word tax. However, in the National Tax Policy,[65] (hereinafter referred to as NTP) it was defined as 'a pecuniary burden laid upon individuals or property to support government expenditure.' This definition seems to restrict the purpose of taxation to revenue generation only. Tax is therefore defined by the researcher as a compulsory exaction of money by the government in furtherance of the policies of government.

2.1.2 Trade.

The Personal Income Tax Act (as amended)[66] (hereinafter referred to as PITA) and the Companies Income Tax Act (as amended)[67] (hereinafter referred to as CITA)defined trade as: 'trade or business or that part of a trade or business, the profit of which are assessable under the Act.'[68] This cannot fit into a proper definition at best it is an explanatory note. The Supreme Court took judicial notice of this fact in *Arbico Limited v Federal Board of Inland Revenue,*[69]but, with the greatest respect failed to use this opportunity to define trade.

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[63] IA Ayua, *The Nigerian Tax Law* (Ibadan: Spectrum Law Publishing, 1996) p. 3.
[64] (2004) FWLR (pt 859) 46
[65] Adopted by the FEC on the 20th of January, 2010, Chapter One, paragragh 1.1.
[66] Cap P8, LFN, 2004.
[67] Cap C 21, LFN, 2004.
[68] Paragraph 1(d) of the Fifth Schedule to PITA, and Paragraph 1(1)i of the Second Schedule to CITA.
[69](2012) 8 TLRN, 117, pp at 128, (1966) 2 All NLR 303.

Trade was defined by Umenweke as '…the exchange of goods and services for a profit.'[70] Trade is therefore defined by the researcher as a transaction where goods or services are exchanged for profit.

In determining whether a transaction constitutes a trade, the Courts both in the UK and Nigeria,[71] often adopt the badges of trade formulated by the Royal Commission on Trade (United Kingdom) in 1955.[72]The badges of trade are:

(1) The subject matter of the transaction. The nature of the subject matter of the transaction could help to determine whether a transaction constitutes trade. There are some goods that are most likely the object of trading; any transaction on these goods raises a presumption of trading.[73] Thus, an isolated purchase and resale of over one million rolls of lavatory papers was held to constitute trading.[74]

(2) Duration of Ownership. A property or goods acquired for trading, is expected to be disposed of within a reasonable time. A long period between the acquisition and disposal of an asset will suggest the asset was bought as an investment,[75] while a property disposed of as soon as it is acquired is indicative of a trading activity.[76]

(3) Frequency of Transactions. Repeated transactions will definitely raise a presumption of trading. Thus, in*Pickford v Quirke*[77]it was held that a series of four related transactions, constituted a trade.

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[70]MN Umenweke, *Tax Law and its Implications for Foreign Investments in Nigeria*(Enugu: NolixEducational Publications (Nigeria) 2008) p. 235.
[71]*Ibid*.
[72]J Law and EA Martin(eds)., *op cit*, p.554; MN Umenweke, *op cit*, p. 236.
[73]MN Umenweke, *op cit*, p. 236.
[74]*Rutledge v IRC,* (1929) 14 TC, 490.
[75]MT Abdulrazaq, *op cit*, p. 100.
[76]MN Umenweke,*op cit*, p. 236.
[77]1927) 13 TC 251.

(4) Adaptation, Processing or Supplementary work and Resale. It will amount to trading activity where the taxpayer alters the assets, either by processing or modifying it before selling it.[78]Thus, in *Cape Brandy Syndicate Ltd v Farmer*[79]where South African Brandy was blended with French Brandy before it was sold, it was held to constitute trading.

(5) The circumstances responsible for the realization. The circumstances that led to the sale of the assets will also be taken into consideration, in determining whether a transaction amounts to a trade. For instance, where a property is acquired for investment but is later sold because of sudden emergency or opportunity, this may not suggest trading.[80]

(6) Motive. Profit is the goal of most trading activities, thus the presence of the motive to make profit suggest there is trading.[81]It has been suggested that, profit motive alone is not conclusive, the transaction must be looked at objectively to determine whether there was trading. Also, the absence of profit motive does not automatically lead to the conclusion of none trading.[82]

The badges of trade did not define trade; it only highlighted certain elements that can constitute a trade. It is the researchers view that these badges of trade seems to be unnecessary in determining what constitutes trade for tax purposes. What the courts should look at for is whether there was exchange of goods and services for profit once that is established the transaction constitutes a trade for tax purposes.

2.1.3 Investment

[78] MT Abdulrazaq, *op cit*, p. 97.
[79](1910) 5 T C 658.
[80] MN Umenweke, *op cit*, 238.
[81]*Ibid.*
[82]*Ibid.*

Investment was defined by Section 31 of the Nigerian Investment Promotion Commission Act[83] as follows: investment' means 'investment made to acquire an interest in an enterprise operating within and outside the economy of Nigeria.' This definition is tautological in nature and is a simple circular definition. It falls short of the characteristics of a proper definition, as it repeated the word 'investment' in the definition.

In the Dictionary of Law, investment was defined as 'the laying out of money with a view to earning an income from it by way of investment dividend, rent etc.[84] This definition is also tautological as it repeated investment in the definition. Also, The Merriam Webster Dictionary defines investment as the outlay of money for income or profit.[85] This definition appears more comprehensive than the other definitions considered earlier and captures the essence of investment. The researcher therefore defines investment as the act of setting aside funds to promote transactions with the aim of making profit.

2.1.4 Foreign Investment.

Foreign investment has been defined as: '…involving the transfer of a package of resources including capital, technology, and management and marketing expertise.'[86] This definition would have been better if it had ended with from one country to another. It has also been defined as 'the movement of capital from one country known as the foreign base to another.'[87]This is a better definition. Thus, foreign investment can be defined as the transfer of resources from one country to another, with the aim of making profit.

2.1.5 Tax Incentives.

[83] Cap N117, LFN, 2004.
[84] LB Curzon, Cited in MN Umenweke, *op cit*, p.3.
[85]Merriam Webster, E-Dictionary, http://www.merriam-webster.com accessed on the 10th January, 2015.
[86] V Odozie, 'An Overview of Foreign Investment in Nigeria' cited in DA Guobadia, 'Issues in Facilitating Foreign Investment for National Development in Nigeria' in DA Guobadia and PT Akper (eds) *Foreign Investment Promotion in a Globalised World*, (Lagos: NIALS, 2006), p. 79.
[87] O David, 'Attracting Foreign Investment into Nigeria: Imperatives of the Local Capital Market' cited in MN

Incentive was defined by the Cambridge International Dictionary of English[88] as: 'something which encourages a person to do something'. According to Nlerum:Tax incentives, are usually a deliberate act of government established to reduce tax.[89]Tax incentive for the purpose of this discussion, are provisions in tax laws that reduces the tax liability of tax payers.

2.1.6 Policy.

A policy was defined by the Blacks Law Dictionary as 'the general principles by which a government is guided in its management of public affairs.'[90] Similarly, the Cambridge International Dictionary of English[91] defined a policy as 'a set of ideas or a plan of what to do in a particular situation that has been agreed officially by a group of people, a business organization, a government or a political party.' This is a better definition thus, the researcher therefore defines a policy as a set of rules or guidelines put in place as a framework to guide an organisation on a particular subject matter.

2.1.7 Difference between Taxation and other Government Receipts

Generally, it is not all payments made to the government that is a tax. Often times, there is the misconception that every form of revenue obtained from the public is tax.[92] It is therefore necessary to distinguish tax from other government receipts.

Umenweke, *op cit*, p. 286.
[88]*Op cit*.
[89] FE Nlerum 'Reflections on the Attitude of the Courts to Tax Incentive Mechanism in Nigeria,' *NIALS JBL* Maiden Edition, 2012, p. 111.
[90]*Op cit*, p.1276.
[91]*Op cit*, p.1091.
[92] National Tax Policy, adopted by the Federal Executive Council on the 20th of January, 2010.

There is a difference between tax and revenue. While revenue is the entire amount received by government from all activities and from both internal and external sources, tax is only one of the sources of revenue generated by the government.[93] For example, revenue includes proceeds from sale of crude oil, fines, profits from government investments and taxes.

Tax is also, different from a charge. A charge is an amount paid for the use of goods, services or infrastructures such as electricity provided by the government.[94] A charge is actually a payment for services or goods provided, unlike tax which is imposed by government to help raise revenue or stimulate the economy. Similarly, a fee is like a charge. It is different from a tax, as it is payment for services rendered by government. For instance, fees paid to government agencies to obtain certified true copies of documents.

On the other hand, fines and penalties are imposed as a form of punishment for contravening a law, or failure to comply with the provisions of a law. For instance, some offences under the Criminal Code Law[95] carry option of fine. Penalties are imposed for failure to do something within a stipulated time. For instance, failure to file annual returns of companies within the stipulated time.[96] Also, Rates are imposed on property and assets, taking into consideration the value of the property, examples are tenement rates.

Generally, the distinction between tax and other sources of internally generated revenue may not be so clear.[97] For instance, in Nigeria imposition of tenement rates is only justified on the grounds that government is imposing a financial burden on the people to generate revenue, which clearly brings it within the definition of tax. Often times, tax, charge, fee, fine, rate and

[93] *Ibid*.
[94] JAA Agbonika, *Problems of Personal Income Tax in Nigeria*, (Ibadan: Abuba Press Ltd, 2012)*p*. 25.

[95] For instance, Section 35 CCL of Delta State.
[96] Section 10 CAMA Cap, C20 LFN, 2004.
[97] NTP, *op cit*, paragraph 1.3.

penalties are used interchangeably, and sometimes they are used in a context that brings them within the definition of tax.

2.1.8 Objectives of Taxation.

Generally, the objectives of taxation can be summarized into three:[98]

a. Revenue generation: This is the objective that Government seems to emphasize. However, tax should be used to generate revenue in a manner that will not adversely affect the development of trade and investment.
b. Redistribution of wealth:
c. Management of the economy; Taxation is a fiscal policy measure and an effective economic management tool. Thus, a tax policy should not only be geared towards revenue generation alone, but must help to sustain the economic objectives of the nation.

Apart from these three objectives, Abdulrazaq has observed that the objective of a tax may be to discourage certain behaviours like smoking alcohol consumption.[99] While this assertion may seem attractive to the extent that an increase in the price of cigarette or alcohol due to high tax rate may reduce the quantity of cigarette bought in a day, it is doubtful, if it will discourage the smoking of cigarette. This is because cigarette smoking is addictive. It has an inelastic demand that may not be affected by the fluctuations in price. It is therefore arguable, that the taxation of cigarette may eventually lead to an increase in revenue generation rather than reduction in the smoking of cigarette.

Furthermore, the National Tax Policy[100] provides that the objective of taxation should be to promote fiscal responsibility and accountability, facilitate economic growth and development,

[98] MN Umenweke, *op cit,* pp. 6-8; see also, JAA Agbonika, *op cit*, pp. 17-19. MT Abdulrazaq, *op cit*, pp. 2-3.
[99] MT Abdulrazaq, *op cit,* p. 3.
[100] *Op cit,* at paragraph 1.7.

address inequalities in income distribution, provide economic stability, pursue fairness and equity, correct market failures or imperfections and provide the Government with stable resources. These objectives are quite laudable however; in practice Government at all levels seem to concentrate on using taxation as a revenue generation tool without considering other purpose of taxation.

A good tax system apart from revenue generation should be a catalyst for investment; itshould stimulate economic growth and encourage entrepreneurship and productivity. Unfortunately, taxation has not been able to achieve these objectives in Nigeria; rather it has been used principally as a tool for revenue generation only. Taxation is a fiscal policy instrument that government can use to regulate the economy. For instance, Government can introduce low taxes, as a strategy to encourage local production of goods and services or increase the tax rate on some imported products to encourage local production of that product. In this regard, the new automobile policy of imposing very high tax on the importation of new vehicles was introduced in furtherance of the policy of government to encourage the establishment of car plants in Nigeria.[101] The new automobile policy will help to create jobs and boost the Nigerian economy, if properly implemented.

2.1.9 Characteristics of a Good Tax System.

Over two hundred years ago, Adam Smith in his treatise, The Wealth of Nations, propounded the cannons of taxation. The cannons of taxation are generally used today as the criteria for judging a good tax system.[102] These cannons are:

a) Equity- A tax system must be fair and reflect the institutional horizontal and vertical equity. Horizontal equity requires that those with the same income pay the same rate of

[101] Nigeria's Automotive Policy attracts N25.6bn Investment www.venturesafrica.com/federal-government-policy-attracts-₦25.6bn-investment. Accessed on the 29th of May, 2015.

tax, while the vertical equity requires that those with different income pay different rate of tax. It is expected that those with higher income should pay higher rate of tax. Regrettably, in Nigeria, the rich hardly pay the correct taxes, as the actual value of their taxable income is hardly known. Recently, in the United States of America, President Obama tried to address a similar situation by advocating for a broad tax reform. The reform seeks to bridge the gap between the rich and the poor, and restore some fairness to a system where millionaires and billionaires pay lower taxes than middle class families.[103]

b) Neutrality- A tax system is expected to be neutral. It is said to be neutral if it does not discriminate between activities in the economy and avoids distortions in the economy. For a growing economy, it may not be wise to emphasis this principle of neutrality to the extreme. Hence, in Nigeria, our tax law recognises pioneer status, which is clearly a bias for investment in some sectors of the economy. This is in furtherance of the economic objective of the Nation.

c) Certainty- A tax must be certain; the taxpayer must know his liability. It must not be arbitrary, it should be simple and easy to understand. Tax laws and administration must be consistent and clear enough for stakeholders to understand the basis of its imposition.[104]

d) Administrative Efficiency- The collection and general administration of the tax system should be effective and efficient. Trained and experienced tax personnel should be engaged to handle tax administration matters. The cost of collection of the tax should not

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[102] JAA Agbonika, *op cit*, pp.19-21; MN Umenweke, *op cit*, pp.23-2; MT Abdulrazaq, *op cit*, pp.3- 4.

[103] F. Adekoya, 'Reforming Nigeria Tax System for Virile Development' *The Guardian*, November 30, 2011, p. 4.

[104]Paragraph 1.8.1.NTP, *op cit.*

be unreasonable, so that the cost of administration does not consume a large chunk of the revenue generated. It is suggested that tax authorities should not keep a large bureaucracy. The use of tax consultants should also, be discouraged. A detailed discussion of the negative impact of the use of tax consultants shall be undertaken in chapter three of this work.

These characteristics are similar to those set out by the Meades Committee Report in the United Kingdom.[105] The Meades Committee report among other things encourages a tax system to be Flexible and Stable. A flexible tax policy allows every successive Government the latitude to adjust the tax policy to meet its economic objectives. However, a tax system that is too flexible may not be good for a growing economy like Nigeria. This is because investors may not be comfortable with the uncertainties created by fluctuations in the tax system. Constant changes could create an unpredictable investment climate which could discourage investment. Nevertheless, it is necessary for a tax system to be flexible enough to respond to the prevailing economic situation.

2.1.10Classification of Taxes.

Taxes are generally classified as direct, indirect, proportional, progressive or regressive. The classification is either based on the mode of collection (that is direct or indirect) or by the structure of the rate (that is proportional, progressive or regressive). A brief discussion of these classifications is necessary.

2.1.11Direct Tax.

[105] A report of the committee set up in 1975 by the Institute of Fiscal Studies, UK on the Structure and Reform of Direct Taxation in UK. The Committee was chaired by Prof. James Meade, and its report was submitted on the 26th of January 1978. The Committee was set up as a result of the frustration at the ministerial rejection of calls to set up a Royal Commission on the taxation system in UK. www.ifs.org.uk/docs/meade accessed on the 1st of April, 2014. See M Chick, ' Reforming the Structure of Direct Taxation: The Political and Administrative Response to the Meade Report (1978). The University of Edinburgh, School of History, Classics and Archaeology, Working Paper Series, 22nd July, 2013. http/www.ed.ac.uk/schools-

A tax is said to be direct, if it is imposed on the person or company that will pay the tax. Direct taxes are demanded from the persons intended to pay it.[106] It is usually from salaries, income from business, or imposed on property

In Nigeria, there are several direct taxes imposed by various statutes. These include Personal Income Tax,[107] Capital Gains Tax,[108] Company Income Tax,[109] Petroleum Profit Tax[110] and Tertiary Education Trust Fund.[111]

2.1.12 Indirect Tax

Indirect taxes on the other hand are taxes that are collected from a person or company on behalf of the tax authority by a third party, usually the provider of goods and services. Umenweke described indirect taxes as follows: '…indirect taxes are those, which are demanded from one person, in the expectation and intention that he shall indemnify himself at the expense of another.'[112] Similarly, Agbonika stated that: 'indirect taxes on the other hand are demanded and collected from one person with the expectation that such a person will indemnify himself at the expense of another.'[113]

A good example of indirect tax is the value added tax.[114] It is a consumption or sales tax, which is imposed on the beneficiary of goods and services. It is usually added to the price of goods and services, and paid while the goods and services are being paid for. The distinction between a direct and indirect tax is not watertight. Sometimes, it is difficult to clearly identify the difference between them.

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[106] MNUmenweke, *op cit*, p. 26.
[107] Personal Income Tax Act (as amended) Cap P8 LFN, 2004.
[108] Capital Gains Tax Act, Cap C1 LFN, 2004.
[109] Company Income Tax Act (as amended) Cap C21 LFN, 2004.
[110] Petroleum Profit Tax Act Cap p.13 LFN, 2004.
[111] Tertiary Education Trust Fund (Establishment etc) Act. 2001.
[112] MN Umenweke, *op cit*, p. 27.
[113] JAA Agbonika, *op cit*, p.24.

There are arguments[115] as to whether a direct tax such as the company income tax does not fall within the definition of an indirect tax, if the companies simply shift the burden of paying the tax to the consumers by increasing the cost of their goods and services to defray the tax. With the greatest respect, while it is conceded that the distinction between a direct and indirect tax is not absolute, company income tax is clearly a direct tax. This is because the intendment of the Company Income Tax Act[116] is to impose it on the profit of the company. It will be overstretching our imagination to assume that a company can transfer its tax liability to the consumers at the point of providing goods or services. This will clearly offend the spirit and intendment of the law. Also, the company cannot predict its tax liability ahead, because, it is based on its profit. Thus, at the point of selling, the price will definitely be dictated by market forces rather than tax considerations.

2.1.13 Proportional Tax

A tax is proportional where the rate of tax is constant irrespective of the level of taxable income. A good example of proportional tax is the company income tax. Agbonika has stated that '…the aim of proportional tax is to redistribute income from rich to the poor; a possible effect is that it can discourage hard work and thereby become a disincentive.'[117] With the greatest respect, this view does not seem to reflect the reality in Nigeria. It is difficult to see how the tax paid by the rich affects the poor in any special way. The need for the rich to pay higher tax is predicated on the fact that they also need more social amenities than the poor. For instance, more than 50% of Nigerians may never have opportunity to use the airport in their

[114] Value Added Tax Act, Cap V1 LFN, 2004.
[115] MN Umenweke, *op cit*; p.27; JAA Agbonika, *op cit*, p. 24.
[116] *Op cit.*
[117] JAA Agbonika, *op cit*, 24.

lifetime due to their low level of income, but their tax was part of funds used to develop the Airport.

Proportional tax is a neutral tax; it seeks to treat everybody equally, whether rich or poor. It does not discourage hard work in anyway; neither does it encourage the poor to remain poor. Rather, it is based on the more income you earn, the higher your tax; and the more of public facilities you will need.

2.1.14 Progressive Tax

A tax is said to be progressive where the tax rates are calibrated. Thus, as income increases to a certain level the rate of tax also increases, a good example is the Personal Income Tax. Under the Personal Income Tax Act, there is a graduated tax rate.[118] A progressive tax is a tax that imposes a higher rate on taxpayers as their income increases.[119] That means the higher your income, the higher the tax rate. Agbonika has suggested that the objective of progressive tax is to redistribute wealth from the well to do to the less privilege.[120] With the greatest respect, this suggestion does not seem to be correct, in view of the fact that the less privileged do not in any way enjoy extra benefits because the rich pay higher taxes.

The purpose of progressive tax is more of a strategy to reduce the disparity between the low income earners and high income earners. Another reason could be that high income earners use more social amenities than low income earners. For instance, high income earners could have several cars, while a low income earner may not have any car. Therefore, the high income earners should pay more to provide and maintain public infrastructure like roads.

2.1.15 Regressive Tax

[118] Section 37, and the 6th Schedule of PITA.
[119] JAA Agbonika, *op cit*, p. 22.
[120] *Ibid* at p.23.

This is the reverse of progressive tax. The main feature of a regressive tax is that the rate falls as income increases. It is structured in a way that the tax liability becomes lesser as the income of the tax payer increases. It has been suggested that this type of tax is not suitable for a developing country like Nigeria.[121] This is based on the fact that a regressive tax generates very little revenue, and developing countries need a lot of revenue to meet their obligations.

It is the researcher's view that irrespective of the fact that regressive tax does not generate much revenue, there are situations where it could be suitable for a developing economy. Revenue generation is not the only objective of taxation. Thus, a regressive tax could be introduced in a developing economy as a form of incentive to specified business sectors with the attendant effect of wealth creation and employment generation. The government will at the end of the day, generate more revenue in the long run, because the money that will be saved from social security expenditures for the unemployed and the personal income tax from the newly employed will cover up for the revenue that would have been lost. In Nigeria, there is hardly any tax that can be termed as regressive. However in countries like the United States, regressive tax was used as a tool to encourage entrepreneurship and job creation until recent reforms by the Obama's administration.[122]

2.2Historical Development of Taxation in Nigeria.

The concept of taxation has existed in so many parts of the world for a very long time. It has been noted that taxes are as old as the history of organized human society.[123] In ancient Egypt, there were various types of taxes imposed by the *Pharaohs*.[124] Furthermore, in the ancient Greek city of Athens, taxes known as the *eisphora*tax were imposed during war. There was also a

[121]*Ibid*; MN Umenweke, *op cit*, p. 26.
[122] F. Adekoya, *loc cit.*
[123] 10 Okauru (ed) *A Comprehensive Tax History of Nigeria* (Abuja; FIRS, 2012) p.67.
[124]*Ibid.*

monthly poll tax imposed on foreigners known as *metoikion*.[125]In the ancient Roman Empire, there exist verifiable evidence of imposition and collection of taxes.[126]In the early times, taxation was perceived basically as a form of exploitation by oppressors or the ruling class;[127] this is because many kingdoms got to know of taxation for the first time after they were conquered by a more powerful kingdom. For instance, in England, the first known tax assessment was during the Roman occupation between 43AD and 410AD.[128]

In Nigeria, before the advent of colonialism, there were some forms of taxation by the various ethnic nationalities, but the tax system was not organized until the advent of colonialism. In Pre-colonial times, the northern part of the country which was dominated by strong Hausa city States and the *Kanem Bornu* Empire were involved in farming and several commercial activities. They played active roles in the trans Sahara trade route, which resulted in rapid economic development.[129]During these periods various taxes were imposed.[130]

As these empires continued to experience rapid development, various taxes were introduced. These included the *gandu*, which is an agricultural tax, usually ⅛ of every farmers harvest in Kano.[131]Also, the *Zakat,* which is prescribed by the Holy Quran for all Muslims. It was a tax levied to generate revenue for charitable, religious and educational purposes. There was also the *kudin-kasa*, a land tax, the *tangali*, a cattle tax and the plantation tax known as *shukka-shukka*. While the *kudinsaranto* was paid by people appointed to any office or chieftaincy, and the *gado* tax was paid to the *Emir* from the estate of a person who died without

[125]*Ibid.*
[126]*Ibid; The Holy Bible* ,Gospel of St. Luke Chapter 2 verses 1-5.
[127] JAA Agbonika, *op cit*, p.28.
[128] 10 Okauro *(ed) op cit*, p.67.
[129]*Ibid* at p. 69-70.
[130]*Ibid.*
[131] 10 Okauro (ed), *op cit*, pp.67-69.

an heir.[132] This was the position before the Sokoto*Jihad* which led to the islamisation of Northern Nigeria and consequently, the introduction of a *sharia* system of taxation.

Similarly, the Western part of Nigeria had some forms of taxation before the colonial era. Powerful kingdomslike Ife, Ibadan and the old Oyo empire were involved in a lot of trade in pre-colonial times. They generated a lot of revenue from trade tolls, levies[133] andtributes from conquered territories.[134]There was an organized system of annual levies, and special contributions which were collected on behalf of the king by each family head in Ife.[135]

Generally, there were three types of taxes enforced in almost all parts of *Yoruba* land.[136] Taxation was important and compulsory in *Yoruba* land, to the extent that there is a *Yoruba adage* '*dandan' i owo-ori'* which means head tax is compulsory.[137]

In the old Benin kingdom, taxes had been introduced as far back as the reign of *Ewuare*The Great (1440-1473AD). In this direction, Ryder had observed that '*Ewuare* had organized his enlarged State so that tribute came regularly into Benin City from all his subjects.'[138] The Benin Kingdom generated a lot of revenue from tributes paid by her conquered territories. She also generated revenue from tolls at different points.

In the Eastern part of Nigeria, taxation was generally an alien concept. The only financial contribution in the East which was close to taxation was the *egbunkwu*, which was paid by palm

[132]*Ibid* at p.69.
[133]*Ibid* at 72-74.
[134] IA Akinjogbi*n,* 'The Economic Foundation of the Oyo Empire in the Eighteen Century' in IA *Akinjogbin* and S *Osoba* (eds) *Topics on Nigerian Economic and Social History* (Ile-Ife: University of Ife Press, 1980) p.49.
[135]*Ibid*
[136]*Ibid*, also JAA Agbonika, *op cit*, p.32.
[137]*Ibid.*
[138] AFC Ryder, 'The Benin Kingdom' in O Ikime (ed), *Groundwork of Nigeria History* (Ibadan: Heinemann Educational Books Ltd, 1980) p.118.

tree owners to the village head before palm fruits are harvested. This was based on the belief that palm trees belong to the whole community.[139]

The factor that may have led to the none imposition of taxes among the Igbos is not apparent on the surface. However, it has been suggested by Okauru and Agbonika that the absence of a central traditional leadership structure as was obtainable in other parts of Nigeria, was responsible for the none imposition of tax among the Igbos.[140]With the greatest respect, It is doubtful if the conclusions of Okauru and Agbonika on taxation among the Igbo society is the correct reflection of the tax history of the Igbos. This is because; there are strong indications that the Igbos had a family unit structure of leadership, council of elders and in some places a general assembly. There is also, evidence that the *Aro* people had a political structure. The political structure of the *Aros* was completely different from the structure obtainable in other parts of Igbo land. They had a general council comprising of heads of the nine main quarters of the Aro clan. They were known as *Otuisi*.[141]

The researcher is of the view that,the reason for the none introduction of taxes in most places in Igbo land may be attributable to their cultural beliefs. The Igbos are averse to the concept of slavery. Thus, the idea of taxation in pre-colonial times will certainly be seen as a vestige of slavery, which will certainly be resented by an average Igbo man. Also, they were in small units, where they could easily contribute ideas and resources to address any communal problem that may arise. Consequently, there was little or no need to impose taxes.The coastal States had a similar history as the eastern part of Nigeria. Thus, they did not have an organized tax system in pre-colonial times.[142]

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[139] JAA Agbonika, *op cit,* p 33.
[140]*Ibid,* IO Okauru, (ed) *op cit,* p. 81.
[141] UJ Ukwe, 'The Development of Trade and Markets in Igbo Land' cited in IO Okauru, *op cit,* p.81.
[142]*Ibid* at p.83.

Taxation in pre-colonial times was not necessarily paid in monetary terms,most times it was through farm produce and obligatory community services in most cases.[143] It goes without saying that the concept of taxation clearly existed before the advent of colonialism in Nigeria.

Colonialism started in Nigeria with the annexation of Lagos in 1861, following the conquest of Lagos. Consequently, new taxes were introduced to replace the pre-colonial taxes[144]andcollection of custom duties and canoe license fee was introduced in 1866.[145] Direct taxation was introduced in Northern Nigeria by the Native Revenue Proclamation No. 2 of 1904.[146] However, several parts of the North, like the Tiv areas started paying taxes around 1920.[147]

Direct taxation was introduced by the colonial masters in the Western part of Nigeria by the Native Revenue Ordinance of 1918.[148] This ordinance extended taxation to most part of Western Nigeria including Benin, Ondo, Oyo, Abeokuta, Ilesha etc.[149] However, places without an organized political structure were avoided.[150] Generally, there was no problem with the collection of these taxes, which were basically an income tax, because people preferred it to the arbitrary taxes being imposed by their traditional rulers.[151] However, the *Egba* people resisted the tax, and declared war against the British, which was easily won by the British troops.[152] The *Egba's*revolted not because of the tax, but other issues, like the forestry law that restricted

[143] MN Umenweke, *op cit*, p. 9.
[144]*Ibid.*
[145] 10 Okauru (ed), *op cit*, p.84.
[146]MN Umenweke, *op cit*, p.10; JAA Agbonika, *op cit*, p.33.
[147] 10 Okauru, (ed) *op cit*, p.85.
[148] JAA Agbonika, *op cit*, p.34.
[149]*Ibid.*
[150]*Ibid.*
[151] 10 Okauro, (ed), *op cit*, p. 86.
[152]*Ibid* at p. 87.

hunters, free labour on construction sites inspite of the tax, and invading of their privacies, especially the quarters of their wives by sanitary inspectors.[153]

The colonial government hesitated in introducing taxation in the Eastern region because they had no centralized leadership.[154] However, in 1927, the Native Revenue (amendment) Ordinance extended taxation to the Eastern region.[155] This action, as anticipated, sparked off series of demonstration in Calabar and Owerri Provinces. These demonstrations eventually culminated in the biggest of all resistance, the Aba women riot of 1929,[156] which led to the destruction of lives and properties. The resistance was due to the tyrannical attitude of the paramount chiefs appointed by the colonial governments, coupled with the lack of education on the purpose of tax and the impression that women will be taxed.[157]

In 1940, there was a major change in the tax laws. The ordinances regulating taxation in all the parts of Nigeria were consolidated into two major legislations, and all previous laws were repealed.[158] The Legislations are:

1) The Direct Taxation Ordinance No. 4 of 1940, applicable to all Nigerians except those in the township of Lagos and
2) The Income Tax Ordinance No.3 of 1940, which is applicable to expatriates and Nigerians living in the township of Lagos.

These were the first legislations that covered the entire country. Under the Direct Taxation Ordinance No.4 of 1940, taxable persons included a community which was defined by section 2(1) to comprise of any town, village or settlement, or any locality therein, including a

[153] *Ibid* at pp.86-87.
[154] JAA Agbonika,*op cit*, p. 34.
[155] *Ibid* at p. 35; see also MN Umenweke,*op cit.*, p. 10.
[156] 10 Okauro, (ed), *op cit.* 88.
[157] JAA Agbonika,*op cit.*, p.35.
[158] *Ibid*; also, JAA Agbonika, *op cit.*, p.35.

band of nomadic herdsmen and individuals residing within a community.[159] The power to administer the tax under the Direct Tax Ordinance was vested in the resident.[160] The resident was required under the provisions of the law to consult with the chiefs and leaders in each district,[161] in the determination of the estimates of annual profits for assessment purposes, he was expected to take cognizance of the custom and tradition of a village as far as circumstances will permit.[162]

In spite of the consolidation of all the tax laws by the Direct Tax Ordinance, the assessment of the tax was purely at the discretion of the Resident. The ordinance failed to provide for a fixed tax rate throughout the country.[163] The Resident was empowered under the ordinance to determine the amount payable as tax based on the computation of the taxable gains and profits based on the recommendation of the tax committee set up by the Resident.[164] On the other hand, the administration of the Income Tax Ordinance No. 3 of 1940 was vested on the commissioner, appointed by the Governor.[165] The commissioner is empowered to assess and collect the tax. The commissioner can appoint or authorize any person to assist or perform any duty imposed on him by the ordinance.[166] Unlike the Direct Tax Ordinance No. 3 of 1940, the Income Tax Ordinance No 3 of 1940 had fixed tax rates. Tax rates were imposed on any person whose income exceeds 50 pounds.[167]The rate of tax payable by companies was two shillings and six pence of every pound of its chargeable income.[168]

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[159]*Ibid* at p.11 and p.36.
[160]By the provisions of section 3 of the Direct Taxation Ordinance N0.4 1940. 'A Resident is the officer appointed by the governor to be in administrative charge of the particular province in question and includes any other administrative officer authorized by the Resident to perform any duties imposed upon the Resident by this Ordinance.'
[161] IO Okauru (ed) *A Comprehensive History of Taxation in Nigeria*, *op cit*, pp. 142-143.
[162]*Ibid.*
[163]JAA Agbonika, op cit, p.36.
[164] Sections 6(1) and 4(2) of the Income Tax Ordinance N0 3 of 1940.
[165]Section 3 of the income Tax Ordinance No 3 of 1940.
[166]*Ibid* at subsections 2 and 3.
[167]Combined effect of section 22 and the schedule to the Income Tax Ordinance, No. 3 of 1940.
[168] IO Okauru, *A Comprehensive Tax History of Nigeria,op cit*, p. 172.

The major shortcoming of the Income Tax Ordinance was its restriction to only foreigners living in Lagos Township. It does not apply to foreigners living outside Lagos. Thus, they were free from the burden of tax.[169]In 1943, a more comprehensive legislation was enacted, it was known as the Income Tax Ordinance No.29 of 1943. It was more comprehensive than the Income Tax Ordinance No.3 of 1940. It extended taxation to all foreigners living in the country and also to natives living within Lagos, and it imposed higher rates of tax on certain incomes.[170]

In 1946, the Richards Constitution divided Nigeria into regions for administrative purposes, but did not actually introduce federalism into Nigeria. It was the LyttletonConstitution of 1954 that introduced federalism into Nigeria.[171] The implication of this is that, the issue of distributing taxing powers among the federating units became necessary. Thus, it was one of the major items for discussion at the 1957 Constitutional Conference, where the issue was referred to the Raisman Commission to address. The Commission among other things recommended:[172]

(i) that the federal government should have exclusive jurisdiction on corporations and limited liability companies, non-resident persons; import, export and excise duties.

(ii) that regional governments should have exclusive powers to legislate on personal income tax on individuals, sole traders, partnerships, clubs, trust and unincorporated bodies generally.

The commission also gave powers to impose personal income tax on individuals to the national government.[173] Unfortunately, the commission conferred concurrent legislative powers on personal income tax to both the regional and national governments.[174]The recommendations

[169]*Ibid.*
[170]*Ibid*;also MN Umenweke*op cit*, p.12.
[171] 10 Okauro, (ed) *op cit.*, p.44.
[172]JAA Agbonika, *op cit.*, p.37; MN Umenweke, *op cit*, p.12-13.
[173]*Ibid.*
[174]JAA Agbonika, *op cit*, p.37.

of the Raisman Commission were adopted and included in the 1960 Constitution as Section 70. This was the position of our tax system, before Nigeria attained independence in 1960.

The 1960 Constitution[175]came into effect at independence.Pursuant to Section 70 of the 1960 Constitution, the Income Tax Management Act of 1961 was enacted to regulate the general administration of personal income tax. Similarly,the Companies Income Tax Act No.22 of 1961 was enacted to regulate corporate taxation. The 1960 Constitution[176] confers concurrent powers on both the federal and regional parliaments to make laws for Nigeria or any part thereof with respect to personal income tax.[177]In 1963, Nigeria became a Republic, by the coming into force of the 1963 Republican Constitution.[178] The provision of Section 70 of the 1960 Constitution was re-enacted as Section 76 of the 1963 Republican Constitution, which also created the Midwest region. This new region adopted the tax laws of Western Region.

The 1963 Constitution reserved more taxing power for the Federal Government even residual matters was within their legislative competence.[179]Between 1966 and 1979, Nigeria was under military rule; during which the taxing powers of the federal government were widened. In 1979, democracy was restored and the 1979 Constitution[180] took effect. Under the 1979 Constitution, the Federal Government continued to wield more taxing powers. Thus, the combined effect of Sections 4(1-4) and items 15, 24, 37, 57, 58, 61, 67 of the exclusive legislative list of the 1979 Constitution[181] gave the federal government very wide taxing powers. It also, ended the era of concurrent taxing powers between the Federal and State government.

[175]*Ibid.*
[176]Section 70.
[177] JAA Agbonika, *op cit.*, p.38.
[178]Constitution of the Federal Republic of Nigeria, 1963.
[179] By virtue of section 69, items 10, 25, 38, 45 of the Exclusive Legislative list of the Constitution of the Federal Republic of Nigeria 1963.
[180]Constitution of the Federal Republic of Nigeria, 1979.
[181]O*p cit.*

Between 1984 and 1999 Nigeria was again under military rule; during which the taxing powers of the federal government were further widened.

In 1999, democracy was restored and the 1999 Constitution[182] came into force. This new constitution had no significant changes in the distribution of taxing powers between the Federal Government and the federating units. It retained most of the provisions of the 1979 Constitution relating to taxation. The 1999 Constitution[183] is the extant Constitution of Nigeria.

2.3 Sources of Tax Laws in Nigeria.

The laws regulating taxation in Nigeria are derived from several sources, which include the constitution, statutes, judicial precedent and international law. There is need to examine the various sources of tax laws.

2.3.1 The Constitution.

The 1999 Constitution[184]imposes a moral obligation on all citizen to pay tax promptly,[185] under the Fundamental Objectives and Directive Principles of State Policy,[186] but this obligation is non-justiciable.[187]However, all organs of Government have a responsibility to conform to, observe and apply the provisions of chapter two of the Constitution.[188] Thus, if the legislature enacts a law compelling a citizen to pay tax, that law will be enforceable,[189] but the citizens cannot compel the Government to comply with any of the provisions of Chapter two.[190]

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[182]O*p cit.*
[183]O*p cit.*
[184] The Constitution of the Federal Republic of Nigeria,1999, (as amended) (hereinafter referred to as the Constitution).
[185]Section 24(f) of the constitution, *op cit.*
[186]Chapter 2 of the 1999 Constitution, *op cit.*
[187]Section 6(6)c of the constitution, op cit.
[188]Section 13 of the Constitution.
[189]*AG Ondo v AG Federation &ors* (2002) 9 NWLR (pt 772) 273, particularly at 275.
[190] HO Chijioke*et al*, (eds) *Explaining the 1999 Constitution with Decided Cases,* (Port-Harcourt: Lawquest, 2007), p. 40.

The Constitution recognizes two legislative authorities for the purpose of taxation, which are the National Assembly and the State Houses of Assembly.[191] Thelegislative powers of the Federal Republic of Nigeria are vested in the National Assembly consisting of the Senate and the House of Representatives.[192]The National Assembly shall have power to make laws for the federation or any part thereof with respect to any matter in the Exclusive Legislative List or any matter in the Concurrent Legislative List to the extent prescribed in the second column opposite thereto; and any other matter with respect to which it is specifically empowered to legislate on in accordance with the provisions of the Constitution.[193]

The National Assembly has exclusive powers to legislate on the taxation of:

(a) Custom and Excise Duties.[194]

(b) Export Duties.[195]

(c) Mining, licenses, rents and royalties.[196]

(d) Incomes, profits and capital gains.[197]

(e) Stamp Duties.[198]

(f) Trade and Commerce.[199]

(g) Any matter incidental or supplementary to any matter mentioned elsewhere in the list.[200]

Furthermore, the National Assembly by virtue of item 7 of the Concurrent Legislative

[191]Section 4 of the Constitution, *op cit.*
[192]Section 4(1) of the Constitution (as amended) *op cit.*
[193]*Ibid*,Section 4 (1-4)
[194]Item 16 of the Exclusive Legislative List of the constitution (as amended), *op cit.*
[195]*Ibid*, item 25.
[196]*Ibid*, item 37.
[197]*Ibid*, item 58.
[198]*Ibid*, item 59.
[199]*Ibid*, item 62.
[200]*Ibid*, item 68.

List[201] in the exercise of the powers vested on it to impose tax on: stamp duties, capital gains, income or profits of persons other than companies; may provide subject to conditions it may prescribe, that a State government can administer and collect the tax. It is further provided in item 8 of the Concurrent Legislative List[202] that, the liability of persons to such tax, shall be regulated in a manner that such tax or duty is not levied on the same person by more than one State.

The wisdom of the drafters of items 7 and 8, of the Concurrent Legislative List of the Constitution in including them in the Concurrent Legislative List is questionable, as there is nothing concurrent about it. The provisions are to the effect that Federal Government can allow States to collect certain taxes it has powers to impose. The States have no say as to what to collect as they have no role in the making of the law on those issues. Items 7 and 8 of the Concurrent Legislative List of the Constitutionought to have properly been drafted as sub paragraphs of items 58 and 59 of the Exclusive Legislative List.[203] It is the researcher's considered view that the National Assembly has no concurrent legislative powers with the States Houses of Assembly on the issue of taxation. This is because there is no provision in the Concurrent Legislative List that givesconcurrent powers to the National Assembly and the State House of Assembly to legislate on any subject matter relating to taxation.

The House of Assembly of a State has powers to legislate for both the State and the Local Government Councils of that State.[204]The House of Assembly of a State shall have power to make laws for the State or any part thereof with respect to the following matters: Any matter not included in the Exclusive Legislative List of the Constitution, any matter included in the

[201]Part 2, 2nd Schedule to the Constituion, *op cit.*
[202]To the 1999 Constitution, *op cit.*

[203]*Ibid.*

Concurrent Legislative List of the Constitution to the extent prescribed in the second column opposite thereto; and any other matter with respect to which, it is empowered to make laws in accordance with the provisions of the Constitution.[205]

The combined effect of Section 4(7) b and items 9 of the Concurrent Legislative List[206]gives the House of Assembly powers to make provisions for the collection of any tax, fee, or rate. Thus, the State House of Assembly can legislate on the taxation of any item not included in the Exclusive Legislative List. In exercise of the powers to legislate on any matter not included in the Exclusive Legislative List, the state House of Assembly may provide that the laws be administered by a Local Government Council; in such case, it must ensure that the liability of persons to such tax, fee or rate is not levied in such a manner as to impose the liability on the same person by more than one Local Government Council.[207]

Item 9 of the Concurrent Legislative List to the Constitution[208] ought not to have been in the Concurrent Legislative List, as it is not a concurrent power shared with the National Assembly. It ought to have been properly situated in another schedule other than the 2nd Schedule, to the Constitution.

The State Houses of Assembly has powers to legislate on any other matter not included in the Exclusive Legislative List[209] or any other matter with respect to which it is specifically empowered to make laws in accordance with the provisions of this Constitution.[210]This is usually referred to as residual powers. Section 4(5) of the Constitution[211] provides to the effect that if any law enacted by the House of Assembly of a State is inconsistent with any law validly made

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[204]Section 4(6 and 7) of the Constitution *op cit.*
[205]*Ibid.*
[206]*Op cit.*
[207]Item 10 of the Concurrent legislative list of the Constitution, *op cit.*
[208]*Op cit.*
[209]*Ibid*, Section 4(7)a of the Constitution, *op cit.*
[210]*Ibid*, Section 4(7)c.

by the National Assembly, the law made by National Assembly shall prevail, and that other law shall to the extent of the inconsistency be void. However, for the law made by a State House of Assembly to be void, the law made by the National Assembly must have been validly made. In other words the law must be within the legislative competence of the National Assembly. In this direction Igwenyi stated that: 'Section 4(5) will only apply, where the law made by the National Assembly is strictly within its area of competence and not otherwise.'[212]This was also the position of the Supreme Court in the case of *AG Abia State & 35 ors. v AG of the Federation*.[213]

It follows that the National Assembly does not have the competence to legislate on residual matters. The powers of the National Assembly to make laws is limited by the provisions of Section 4 of the Constitution, it is not absolute. The Courts have long settled the issue that residual matters are within the legislative competence of States. Thus, the Federal government cannot legislate on residual matters.[214] In *AG Ogun State v Aberuagba*[215]the Supreme Court stated as follows: 'by residual legislative power…is meant what was left after the matter in the Exclusive and Concurrent Legislative, and those matters which, the constitution expressly empowered the Federation and States to legislate upon, had been subtracted from the totality of the inherent and unlimited powers of a sovereign legislature.'

The combined effect of section 4(7)c, section 7(5) of the Constitution and the Fourth Schedule to the Constitution,[216]gives the House of Assembly powers to legislate on taxation of Local Government Councils.The Fourth Schedule to the Constitution[217]contains the main functions of Local Government Councils, and the House of Assembly of a State is the competent

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[211]*Op cit.*
[212] BO Igwenyi, *Modern Constitutional Law in Nigeria*, (Abakaliki: Nwamazi Printing Publishing Co Ltd., 2006) p. 228.
[213](2002) 6 NWLR (Pt 764) 542.
[214]*Fawehinmi v Babangida* (2003) NWLR (pt) 623, *AG Ogun v A G Federation* (1982) 3 NCLR, 166.
[215]*Supra.*
[216]*Op cit.*

authority to legislate on it, by virtue of section 7(5) of the Constitution.[218] Thus, the House of Assembly of a State can enact a law for the imposition and collection of taxes, fees or rates by local Governments on the following:

(a) Collection of rates for radio and television licenses.[219]

(b) Licensing of bicycles, trucks, canoes, wheelbarrows and cars.[220]

(c) Collection of rates for use of public facilities like, cemeteries,[221] markets, motor parks, slaughter houses, public convenience.[222]Tenement rates.[223]

(d) Outdoor advertising.[224]

It is important to note that the National Assembly, sits as a State Legislature over issues affecting the Federal Capital Territory; thus all the powers of a State House of Assembly to make laws on issues of taxation, are vested in the National Assembly for purposes of making laws for the Federal Capital Territory.[225]

By the combined effect of sections 4(1-4), items 16, 25, 39, 58, 59, 62, 68 of the Exclusive Legislative List of the Constitution,[226] the National Assembly is vested with almost all the legislative powers on taxation. This is further expanded by item 68 of the Exclusive Legislative List[227]which gives the National Assembly powers to legislate on any issue incidental or supplementary to any of the 67 items in the Exclusive legislative list.[228]The States are just left with mainly powers to legislate on taxes for Local Government, and imposition of taxes, rates

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[217]*Op cit.*
[218]*Op cit.*
[219] Item 1(b) of the Fourth Schedule to the Constitution, *op cit.*
[220]*Ibid*, item 1(d).
[221]*Ibid*, item 1(c).
[222]*Ibid*, item 1(e).
[223]*Ibid*, item 1(j).
[224]*Ibid*, item 1(k).
[225]Section 299 of the Constitution, *op cit.*
[226]*Op cit.*
[227]*Op cit.*

and levies on residual matters. Unfortunately, most of the areas that revenue can be generated from are in the Exclusive Legislative List.[229] Thus, there is need to amend the constitution to give the States more taxing powers.

Over the years, several tax laws have been enacted. Prior to 2004, there existed at least 39 federal taxes, levies or fees statutorily recognized.[230]During the military rule, there was an unnecessary proliferation of tax laws, almost every budget speech either amended or repealed a tax law. This obviously led to multiplicity of taxes, and discouraged voluntary compliance and the development of a good tax system.[231]

In this Chapter, it is necessary to briefly discuss some of these tax laws, while in subsequent chapters of this dissertation, their impact on trade and investment will be examined in detail.

2.3.2 The Federal Inland Revenue Service (Establishment) Act[232]

This Act does not actually impose any tax or levy, the purpose of this law is to vest the collection and administration of all federal taxes on the Federal Inland Revenue Service. Section 1(3) of the Federal Inland Revenue Service (Establishment) Act (hereinafter referred to as the FIRS(E) Act)[233] provides that the Federal Inland Revenue Service (hereinafter referred to as FIRS) shall have such powers and duties as are conferred on it by this Act or by any other enactment or law on such matters on which the National Assembly has powers to make laws. While Section 2 of the FIRS(E) Act[234] provides that the object of the service shall be to control and administer the different taxes and laws specified in the First Schedule or other laws made or

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[228]*Op cit.*
[229]*Op cit.*
[230] IO Okauru, (ed) *FederaL Inland Revenue Service and Taxation Reforms in Democratic Nigeria*, (Abuja:FIRS, 2012) p. 101.
[231]*Ibid.*
[232] 2007.
[233]*Op cit.*

to be made from time to time, by the National Assembly or other regulations made there under by the Government of the Federation and to account for all taxes collected.

This law makes the Federal Inland Revenue Service the sole body, responsible for the administration and collection of all federal taxes.[235] Thus, any federal agency that has powers to collect taxes or levies, can only do so only on behalf of the Federal Inland Revenue Service, and must remit all such revenue collected to the Federal Inland Revenue Service. The FIRS(E)Act[236] also replaced the body of appeals commissioner,[237] and the Value Added Tax Tribunals with the Tax Appeal Tribunals.[238]

2.3.3 Taxes and Levies (Approved List for Collection) Act.[239]

This law was introduced during the military era. Before the promulgation of this law there was confusion as to what taxes, the various tiers of Government can collect. The confusion was created basically by the arbitrariness of the federal military authorities, who had no regard for the rule of law and had no limitations to their powersbecause their powers were above the constitution. They ruled the country like a military formation, to the extent that State Governments merely took instructions from the Federal Government, and the states were hardly recognized as a tier of Government in practice.

In trying to address this problem the Federal Military Government promulgated the Taxes and Levies (Approved List of Collection) Decree[240] to specifically demarcate the taxes collectible by each tier of government. With the coming into effect of the 1999 Constitution,[241] the Decree formed part of the existing laws and became an Act of the National Assembly by

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[234]*Ibid.*
[235]*Ibid*, Schedule 1.
[236]*Op cit.*
[237]Established by Section 60 of the Personal Income Tax Act, *op cit.*
[238]Section 59 and the Fifth Schedule to the FIRS (E) Act, *op cit.*
[239]*Op cit.*
[240] No 21 of 1998. now Cap T2, LFN, 2004.

virtue of Section 315 of the 1999 Constitution.[242]This Act was amended in 2015 by the Minister of Finance pursuant to powers conferred on her by virtue of section 1(2) of the Act.[243]The Courts have held on several occasions that no tier of Government should collect taxes outside what it has jurisdiction to collect under the Taxes and Levies Act.[244]For instance, in *Thompson & Grace Investment Ltd v Government of AkwaIbom state & 2 ors*,[245] the High Court of AkwaIbom State per Ekerete A. Ebienye J. held that:

> …the power of the State Government to make laws in tax matters is subject to the enabling law, which gives it the power to collect taxes. Any attempt to act outside the ambit of part II of the Taxes and Levies Act[246] will be futile. I therefore hold that the 1st and 2nd respondents have no power to impose, demand and collect whatever taxes and levies outside the provisions of the Taxes and Levies Act.[247]

With the greatest respect, the decision of the Court is a clear demonstration of a misunderstanding of the taxing powers of the various tiers of Government under the 1999 Constitution.[248] It created an erroneous impression that the powers of the State to collect taxes are based on the Taxes and Levies Act, and not on the Constitution, unfortunately the provisions of the Constitution were not considered in *AG Cross River State &Anor v Matthew Ojua*[249]the

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[241]*Op cit.*
[242]*Op cit.*
[243] Taxes and Levies (Approved List for Collection)(Act Amendment) Order, 2015.
[244]*EtinOsa Local Government v Jegede* (2007) 2 NWLR (pt 328) 568; *Bamidele v Commissioner for Local Government Lagos State &Anor* (1994) 2 NWLR (pt 328) 568.
[245] (2010) 3 TLRN, 94;see also the decision of Federal High Court in *Port Harcourt Fast Forward Sports Marketing Ltd v Port Harcourt, City Local Government Area Council*, (2011) 4 TLRN, 4.
[246]*Op cit.*
[247]Pp. at 99.
[248]*Op cit.*
[249](2011) 5 TLRN, 1.

Court of Appealwhile considering the status of the Taxes and Levies (Approved List of Collection) Act as an existing law under the 1999 Constitution, held per Kumai BayandAkaahs JCA, that:

> The Taxes and Levies (Approved List for Collection) Act, Cap T2, Laws of the Federation of Nigeria, 2004, was made during the period of Military Inter-regnum, when the 1979 Constitution was suspended and only such amendments that were introduced by the military was the ground norm. However, since the Act was not repealed after the coming into existence of the 1999 Constitution. It became an existing law which was deemed to have been made by the National Assembly. Unlike the time it was first promulgated in 1998 when the military held sway and Decrees took precedence over the suspended Sections of the 1979 Constitution, with the coming into being of the 1999 Constitution, any existing Acts of the National Assembly would be valid .subject to their being consistent with the Constitution.[250]

From this decision of the Court of Appeal it is clear that the Taxes and Levies Act is unconstitutional to the extent that it sought to make provisions on matters, which are outside the legislative competence of the National Assembly to impose taxes. It is the researcher considered view that the Taxes and Levies Act ought not to have been promulgated in the first instance, because what it sought to do was clearly taken care of in the 1979 Constitution.[251]A careful interpretation of the provisions of Section 4, Items 15, 24, 37, 57, 58, 61, 67 of the Exclusive

[250]Particular at 19.
[251]Constitution of the Federal Republic of Nigeria 1979.

Legislative List, Items 7, 8, 9, 10, of the Concurrent Legislative List and the Fourth Schedule to the 1979 Constitution,[252]which is *imparimateria* with sections. 4, items 16,25,39,58,59,62,68 of the Exclusive Legislative List, items 7,8 of the Concurrent Legislative List and the Fourth Schedule to the 1999 Constitution[253] had clearly stated which tier of government had jurisdiction over any tax issue.

Another problem created by this law is that, the National Assembly is deemed to have powers to enact a law that imposes obligation on States and Local Government council contrary to the provisions of the Constitution. The National Assembly clearly lacks the competence to enact such a law, which has the effect of imposing obligation on States and Local Government. A look at part II and III of the Schedule to the Taxes and Levies Act[254] reveal that apart from collection of personal income tax, withholding tax, capital gains tax and stamp duties tax, more than 80% of the enumerated items, are items within the legislative competence of the State Houses of Assembly. The amendment to the Taxes and Levies Act was done with the assumption that states cannot collect taxes outside what is stipulated in the Taxes and Levies Act thus; the amendment sought to recognize and include most of the arbitrary taxes imposed and collected by states Government in part 11 of the Act.

Furthermore, the Act is couched from a military perspective, Section 1 and 2, of the Taxes and Levies Act[255] started with the phrase 'Notwithstanding anything contained in the Constitution of the Federal Republic of Nigeria 1979, (as amended) which is now Constitution of the Federal Republic of Nigeria 1999(as amended), by necessary modification pursuant to

[252]*Op cit.*
[253]*Op cit.*
[254]*Op cit.*
[255]*Op cit.*

Section 315 of the 1999 Constitution'[256] This clearly shows that, the law was promulgated without the consciousness of the Constitution as the ground norm. It is therefore obvious that the law is unconstitutional and should be void to the extent of its inconsistency with the Constitution by virtue of Section 1(3) of the Constitution.[257]Also, the Taxes and Levies Act sought to fix specific amounts to be collected by State Governments and Local Governments, thus the State cannot even review the amount if it becomes unreasonable due to inflation.

From the forgoing, it is certain that the intendment of the Taxes and Levies Act[258] can be achieved, through the Joint Tax Board,[259] which comprises of the Federal and State Tax Authorities. The Joint Tax Board can issue a working paper on the various taxes; each tier of government can collectbased on the provisions of the constitution. This will afford the relevant stakeholders an opportunity to be part of the process of producing the paper.

2.3.4 Personal Income Tax Act (as amended) 2011.[260]

This Act regulates personal income tax in Nigeria. The first legislation on personal income tax was introduced in 1961 with the enactment of the Income Tax Management Act.[261] It imposed tax on individuals, itinerant workers, communities, families, trustees and executors.[262] Between 1961 and 1993, there were several amendments to the Income Tax Management Act[263] before it was repealed and replaced with the Personal Income Tax Decree No. 104 of 1993.[264]The Personal Income Tax Decree of 1993[265] adopted most of the provisions of the previous tax laws but there were some new provisions. Among the notable provisions was the

[256]*Op cit*.
[257]*Op cit*.
[258]*Op cit.*
[259] Established by Section 86 of the Personal Income Tax Act (as amended), *op cit.*
[260]*Op cit.*
[261] Act No 21 of 1961.
[262]*Ibid*, Section 3(1).
[263]*Op cit*, IO Okauru, (ed) *A Comprehensive Tax History of Nigeria* (Abuja: FIRS, 2012) pp. 201-222.
[264] Now Cap P8, *op cit*

reestablishment of the Joint Tax Board, States Boards of Internal Revenue and Local Government Revenue committees. It also, introduced the Tax Clearance Certificate and the Pay As You Earn Scheme.

The Personal Income Tax Decree[266]was also subjected to several amendments by virtue of the various Finance (Miscellaneous Taxation Provisions) Decrees.[267]With the coming into effect of the 1999 Constitution[268] the Personal Income Tax Decree by virtue of section 315 of the Constitution[269] became Personal Income Tax Act[270](hereinafter referred to as PITA). PITA was also amended by the National Assembly in 2011. This amendment affected 36 Sections of the principal Act, some sections were completely deleted, while the First, Second and Third Schedules of the Act were modified. According to Oluchi:

> The old Personal Income Tax reliefs to taxpayers were considered to be irrational, unfair and inequitable thereby inflicting an excessive and regressive taxation on Nigeria workers. This encouraged evasion and discouraged voluntary compliance. The amended Personal Income Tax (Amendment) Act 2011 improves on the provisions of the old Act as it has removed some obsolete, unrealistic and outdated provisions and provides a more realistic, simple and easy way to calculate the amount of tax due.[271]

Somenotable provision of the amendments are the introduction of a new subsection 6 to Section 36 of PITA, to empower the Minister of Finance to issue regulations to assess and tax the

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[265]*Op cit.*
[266]*Ibid.*
[267]Nos 30, 31 and 32 of 1996, 18 and 19 of 1998, and 30 of 1999.
[268]*Op cit.*
[269]*Op cit.*
[270]*Op cit.*
[271] M Oluchi, 'PITA key Benefits for Workers and the Economy' *Gauge,* January – March 2012, p.9.

informal sector under a presumptive tax regime. This provision will help to bring the informal sector within the tax net. Also, paragraphs 2 and 3 of the third schedule to the principal Act were deleted, to make the emoluments of the President, Vice President, Governors and Deputy Governor's taxable.This amendment is laudable and is a reflection of the practice in some other jurisdictions. For instance, in England, the Queen's income is not subject to tax, but she has voluntarily submitted herself to be taxed.[272]

It is important to note that, it is the National Assembly that has powers to legislate on Personal Income Tax[273] however; the 1999 Constitution[274] provides that, the National Assembly may give States the power to collect income tax.[275]Thus, in practice; the States collect personal income tax.[276]

2.3.5 Value Added Tax (Amendment) Act 2007[277]

Value added tax (hereinafter referred to as VAT) is a consumption tax on goods and services. Consumption tax is a tax imposed on the buyer of goods or the beneficiary of services, for the use of the goods or services. Although value added tax existed for several years in many countries, for instance, England since 1972,[278] it was introduced in Nigeria in 1993 to replace Sales Tax, by the enactment of the Value Added Tax Decree now Value Added Tax Act,[279] (hereinafter referred to as VAT Act).

The VAT Act[280] expanded the base of the sales tax, and brought in most of the professional and banking transactions, which were not covered by the Sales Tax Act.[281] Also,

[272] J Alder, *Constitutional and Administrative Law*, (8th edn., London: Palgrave Macmillan, 2001) p. 305.
[273]*Op cit.*
[274]*Op cit.*
[275]Items 7 and 8 of the Concurrent Legislative List of the Constitution, *op cit.*
[276]Section 88 of PITA, *op cit.*
[277]*Op cit.*
[278] CC Ohurugu, 'Value Added Tax & Administration in Nigeria,' *MILBQ*, Vol. 5, No. 2, p. 117.
[279]Now Cap VI, (as amended) *op cit.*
[280]*Op cit.*

while the sales tax only covered locally manufactured goods, the Value Added Tax covered imported goods and locally manufactured goods, as well as services.[282]

There has been a lot of controversy between the States and the Federal government on the power to impose and collect consumption tax in Nigeria. The issue has been whether States can validly legislate on consumption tax, with the enactment of VAT Act.[283]A detailed discussion of consumption tax is in chapter 5 of this dissertation.

There are several exemptions under the Value Added Tax Act,[284] aimed at encouraging investment in certain sectors of the economy; these exemptions will be discussed in chapter four of this work.

2.3.6Companies Income Tax Act (as amended) 2007[285]

This Act was first introduced in Nigeria in 1939[286] by the Companies Tax ordinance No. 4 of 1939. After independence, the Companies Income Tax Act 1961 was enacted to exclusively regulate the taxation of company's income. The Companies Income Tax Act 1961 was amended severally, before it was repealed in 1979 by Companies Income Tax Decree No. 28 of 1979.[287] The Companies Income Tax Act 1979[288]was amended severally by several Finance Miscellaneous (Taxation provision) Decrees,[289] before all the amendments were codified into the Companies Incomes Tax Act.[290]

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[281] Cap 399 LFN, 1990, promulgated by Decree No. 7, 1986.
[282] CC Ohurugu, *loc cit.*
[283]*Op cit.*
[284]First Schedule of the VAT Act, *op cit.*
[285] Cap C21, *op cit.*
[286] OI Okauru, (ed) *A Comprehensive Tax History of Nigeria*, *op cit.*
[287] Later Companies Income Tax Act, based on the provisions of Section 274 (1) of the 1979 Constitution.
[288] Formerly, Decree No 28 0f 1979.
[289] Decrees No.98 of 1979, No.4 of 1985, No.12 of 1987, No.30 of 1996, No.31 of 1989, and No.55 of 1989.
[290] Cap 60, Laws of the Federation of Nigeria, 1990.

The Companies Income Tax Act 1990 was also, amended severally[291] before it was codified as Cap C21, Laws of the Federation of Nigeria, 2004. In 2007 it was further amended by the Companies Income Tax (Amendment) Act 2007. The new amendments introduced notable changes, which affect trade and investment in Nigeria; some of the changes are:

(a) Section 5 of the amendment Act exempts profits of Companies operating in export processing zones or free trade zones. This exemption is only for profits from export.

(b) It increased allowable deductions from a limit of 10 percent of total profit excluding capital donations; to 15 percent of the total profits or 25 percent of payable tax whichever is higher and includes capital donations in the tax deductible expenses.

(c) Section 11 of the amendment Act increased the pre operation levy payable by any company requiring tax clearance to 20,000 Naira in the first year and 25,000 in every subsequent year.

The effect of the provisions of the Companies Income Tax Act[292] on trade and investment will be examined in detail in chapter four of this dissertation.

2.3.7 Petroleum profit Tax Act.[293]

The discovery of crude oil in Nigeria in 1956, and the commencement of operations by Shell Petroleum Development Company, made it expedient for the introduction of a tax for profit on petroleum operations.[294] Ordinarily, profits from petroleum operations could have been taxed under the Companies Income Tax Act,[295] but for the special role petroleum plays in our economy. Obviously, Petroleum is the number one energy source all over the world today, and is

[291] By Decrees No.21 of 1991, No.63 of 1991, No.3 of 1993, No.30 of 1996, No.31 of 1996, No.32 of 1996, Fiscal Policies of 1997, 1998 and 1999.
[292] *Op cit.*
[293] Cap P13, LFN, 2004.
[294] IO Okauru, *A Comprehensive Tax History of Nigeria, op cit,* p. 222.
[295] *Op cit.*

a strategic resource for many nations including Nigeria. Without doubt, petroleum, since the 1970's to date has been the single largest contributor to the country's GDP.[296]

Petroleum profit tax was first introduced in Nigeria as Petroleum Profit Tax Ordinance No.15 of 1959; it was amended about eight times before 1980.[297] The Act, together with its amendments were codified as Cap 354 Laws of the Federation of Nigeria, 1990. It was also, amended in 1993,[298] 1996 and 1999 by several Finance (Miscellaneous Taxation Provisions) Decrees;[299] all these amendments are now part of the present Act.

Since 2005, there has been attempt to reform the petroleum profit tax. The Petroleum Profit Tax (Amendment) Bill was sent to the national Assembly in 2005,[300] the bill among other things sought to:

(a) Provide a tidier procedure for granting of incentives under the Act.

(b) Remove restrictions on capital donations to educational and research institutions by petroleum companies.

At the time the bill got to the National, there was another bill sponsored by the private sector, the Petroleum Industry Bill, which sought to consolidate all legislations in the petroleum sector. At the public hearing, it became clear that to provide a better regulatory framework for the Oil and Gas Industry, there is need to consolidate all legislations; the Petroleum Profit Tax (Amendment) Act was collapsed into the Petroleum Industry Bill.[301] Unfortunately the bill was not passed before the end of that legislative session.

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[296] DC John 'A Critical Analysis of the Petroleum Profits Tax Act (PPTA) of 2004 And The Petroleum Industry Bill (PIB) of 2008' 2012 *1 TLJN*, 137.
[297] L Soyode and S O Kayola, *Taxation Principles and Practice in Nigeria,* (Ibadan: Silicon Publishing Company, 2006), p. 25.
[298] Decree No. 103 of 1993.
[299] Decrees No.30 of 1996, and No.30 of 1999.
[300] I0 Okauru, (ed) *Federal Inland Revenue Service and Taxation Reforms in Democratic Nigeria, op cit,* p. 129.
[301] *Ibid.*

Since 2005 to date, there have been several attempts to introduce a petroleum industry bill. In 2009, the Petroleum Industry Bill was introduced but not passed into law. In the last political dispensation it was introduced as the Petroleum Industry Bill, 2012. Unfortunately, the National Assembly could not pass the bill into law before the end of the dispensation in 2015. However, in this dispensation the bill has been reintroduced as the Petroleum Industry Governance Bill and it is at committee stage in the senate.[302]

2.3.8 Nigerian Export Processing Zones Act.[303]

This Act was established to promote investment in products that are meant for export. This is to attract direct foreign earnings, into the country and boost our economy. Under the Act, the President may on the recommendation of the Nigeria Export Processing Zones Authority, designate any area as an Export free zone.[304]

There are several incentives of doing business in a free trade zone[305] which are aimed at stimulating trade and investment. A more detailed discussion on free trade zones is in Chapter Four of this dissertation.

There is also, the Oil and Gas Export Free Zone Act,[306] which is aimed at promoting Export and Investment in the oil and gas sector by the provision of attractive incentives. The impact of this law on trade and investment will be examined in Chapter four of this dissertation.

2.3.9 Capital Gains Act.[307]

Taxation of capital gains was first introduced in Nigeria in 1967, by Capital Gains Tax Decree No.44 of 1976. The Capital Gains Decree was codified as Cap 42 Laws of the Federation of

[302] http//:www.petroleumindustrybill.com/. Accessed on the 3rd of November, 2016.
[303] Cap N107, LFN, 2004.
[304] Section 1(1).
[305] Section 18.
[306] Cap O5, LFN, 2004.
[307] CAP C1, Laws of the Federation, 2004.

Nigeria, 1990, and later re-codified as Cap C1, Laws of the Federation of Nigeria, 2004. The Act seeks to provide for the taxation of gains from disposal of assets. It fixed the rate at 10 percent of chargeable gains.[308]

Obaro defined capital gains as '…gains arising from increases in the market value of capital assets to a person or corporate body, who does not habitually offer them for sale and in whose hands they do not constitute stock in trade.'[309]Capital gains are profits from the sale of an asset, by a person or corporate body who does not usually trade on such assets.TheAct provides that all forms of property shall be assets for purposes of this Act whether situated in Nigeria or not.

Gains chargeable under the Act, subject to the exceptions include any capital sum derived from a sale, lease, transfer, an assignment, a compulsory acquisition or any other disposition of assets, notwithstanding that no asset is acquired by the person paying the capital sum and in particular:[310]

(a) Capital sums derived by way of compensation for any loss of office or employment;

(b) Capital sum received under an insurance policy, or as compensation for injury.

(c) Capital sums received for forfeiture, surrender or non-exercise of rights;

(d) Capital sums received as consideration for use or exploitation of any assets.

(e) Without prejudice to paragraph (a) any capital sum received in connection with or by virtue of trade, business, profession or vocation.

Capital sum is defined by the Act as 'any money or money's worth which is not excluded from the consideration taken into account in the computation under Section II of the Act.'[311]

[308]Section 2(1).
[309]F Obaro 'Essentials of Capital Gains Tax', *Vanguard'* November 4, 2013, p. 27.
[310]Section 6(i).
[311]*Ibid* , section 6(2).

The Act provides for several exemptions[312]which will be discussed in chapter four of this dissertation. This Act may impact negatively on long term investors in real property. This is because, in most cases the difference in the initial cost of the asset, and the price it is sold, may not be as a result of asset appreciation, but may be based on the impact of inflation thus, in economic terms there might not be capital gains, but increase in cost value due to inflation.

2.3.10 Stamp Duties Act.[313]

Stamp duties were first introduced in Nigeria by the Stamp Duties Proclamation No.8 of 1903, for the Protectorate of Northern Nigeria.[314] In 1916, the Stamp Duties Ordinance No.42modified the Stamp duties Proclamation of 1903, and extended its application to the whole Nigeria.[315] The Stamp Duties Ordinance No.5 of 1939 repealed the Stamp Ordinance of 1916 and all its amendments. Later, it was codified as Cap 411, Laws of the Federation of Nigeria, 1990, and now Cap S8 Laws of the Federation of Nigeria, 2004. The Stamp Duties Act was an adaptation of the Stamp Duties Act 1859 of the United Kingdom.

Stamp Duties are strictly taxes on instruments; it is not a tax on transaction or persons.[316] An instrument was defined by the Act to include any written document[317] thus, Ajayi and Adeoba observed that '…a transaction which is effected orally or which arises solely from the conduct of the parties so that there is no document to stamp will therefore attract no stamp duty.'[318] However, in certain situations the courts would regard an oral transaction and a written

[312]*Ibid*, sections 27 to 42.
[313] Cap S8, LFN, 2004.
[314] IO Okauru, (ed) *Comprehensive Tax History of Nigeria, op cit*, p. 247.
[315]*Ibid.*
[316]Section 23.
[317]Section 2.
[318]K Ajayi and K Adeoba 'Stamp Duties, Assessment & Payment in Nigeria' *MILBQ*, Vol 2 No. 4, p.113.

record as one whole transaction by a single instrument.[319] A stamp duty is either fixed or *ad volerem*.

An instrument is expected to be stamped within forty days of its execution.[320]An unstamped document is not void; rather it is inadmissible in evidence and attracts penalties and fines for late stamping.[321] Generally, documents transferring title to land requires the payment of Stamp Duties as one of the conditions for perfection of the transaction.[322] This has implication for trade and investment especially when a mortgage transaction needs to be perfected. A mortgage is the transfer of an interest in property as security for a loan.

A mortgage deed is an instrument that requires to be stamped as one of the requirements for perfection. The requirement for stamping of mortgages does not seem to serve any purpose other than revenue generation. A mortgage is security for a loan transaction, it is not an income or profit; taxation should be from income and profits thus, mortgage deeds should be exempted from stamp duties. This is because payment of stamp duties depletes the value of the loan secured by an investor to boost his trade and investment and increases the cost of doing business. Furthermore, it leads to double taxation, as the investor will still pay his income tax from the proceeds of the investment.

It is doubtful, if there is the need to still retain stamp duties in Nigeria, this is because it brings an unnecessary delay in the process of concluding business transactions, and does not in any way enhance the transaction. From the foregoing, it is submitted that stamp duties is anti-investment, and the Stamp Duties Act should therefore be repealed.

2.3.11 The Tertiary Education Trust Fund Act 2011.

[319]*Moore v IRC* (1973) 2 K.B 126.
[320]Section 23 of the Stamp Duties Act, *op cit.*
[321]*Ibid*, Section 80(3).

Education tax was first introduced into Nigeria by the promulgation of the Education Tax Decree[323] in 1993. It imposed a fixed tax rate of 2% on the assessable profits of all registered companies.[324]In 2011 however, the Education Tax Act[325] was repealed and the Tertiary Education Trust Fund Act, 2011 was enacted. The new Act did not abolish Education Tax, but it introduced significant changes in the administration of Education Tax in Nigeria.

The new Act created the Tertiary Education Trust Fund[326] to replace the Education Fund. Under the Education Fund, proceeds from tax were shared between tertiary education, secondary education and primary education. But under the tertiary education fund, the proceeds are solely for tertiary education,[376] and it is shared among universities, polytechnics and colleges of education at a ratio of 2:1:1 respectively.[327] The new Act did not change the rate of the tax; it retained the 2% fixed rate.[328]

This Act is aimed at generating resources for the funding of tertiary education. However, it imposes an additional tax burden on companies after paying their companies income tax or petroleum profit tax. Certainly, these will increase the cost of doing business in Nigeria by necessary implication. It is doubtful, if there is need for another law to establish an educational trust fund, rather relevant laws should be amended to provide that 2% of the proceeds from companies income tax and petroleum profit tax, be transferred to the tertiary education trust fund, to fund tertiary education.

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[322] U Jack – Osimiri and E Jack – Osimiri, 'Conveyance as a Tool for Effective Stamp Duties Operation' 24 *JPPL*, 1.
[323]Decree No.7 of 1993.
[324]Education Tax (Amendment) Act No.17 of 2003.
[325] Cap E4, LFN, 2004
[326]*Ibid*, Section 7(3).
[376]*Ibid.*
[327]*Ibid.*
[328]*Ibid*, Section 1(2).

2.3.12 Venture Capital (Incentives) Act.[329]

This Act was enacted to provide incentives for venture project companies. A venture project company is a company involved in a project for the commercialization of an innovative idea and process and also includes investment in the development of a local resource base.[330] The FIRS under this Act is empowered to certify if a company fulfills any of the objectives of a venture project as set out in the Act for purpose of the incentives.[331]The objectives include:

(a) The acceleration of industrialization by nurturing Innovative Ideas.

(b) The commercialization of research findings.

(c) The encouragement of indigenous processes and technologies.

(d) The promotion of small and medium scale industries with particular emphasis on the use of local raw materials.[332]

This law is targeted at the development of small and medium scale industries. It also, seeks to encourage the utilization of local raw materials in the manufacturing of Goods. The most attractive aspect of this Act is that it seeks to encourage investment in the development of research findings.

2.3.13 Custom and Excise Management ACT.[333]

This Act provides for the management of customs and excise duties. The Customs and Excise Management Board subject to the general control of the Minister of Finance is saddled with the responsibility to control and manage the administration of custom and excise and shall collect custom and excise duties.[334]Generally, the purpose of this Act is to regulate the imposition of

[329] Cap V2, LFN, 2004.
[330]Section 6.
[331]Section 2.
[332]Section 2.
[333] Cap C45 LFN, 2004.
[334]Section 4.

duties on imported goods and excise on goods for export. The board enforces the federal Government policy on import and export. The president of the Federal Republic of Nigeria may by order prohibit the importation of certain specified goods into the country.[335] The essence of this is to control the influx of goods that there are local alternative.

There is also, the Customs, Excise,Tarriff etc.(Consolidation) Act[336] that provides for the imposition of ad valorem customs duties on imported goods and excise duties on locally manufactured goods.[337] It also, sets out the goods liable to excise duties and the rate chargeable.[338] There are provisions for exemption and reliefs under the Custom and Excise Management Act[339] and the Customs, Excise, Tariff etc.(Consolidation) Act.[340]

2.4State Tax Laws.

The laws discussed earlier are basically federal tax laws. It has earlier been established that State Houses of Assembly pursuant to section 4(7), items 9 and 10 of the Concurrent Legislative List and the Fourth Schedule to the 1999 Constitution,[341] have powers to enact laws for the imposition and collection of taxes. Consequently, all the States in Nigeria have enacted tax laws, which form part of the tax laws in Nigeria. A detailed discussion of State Tax Laws and their impact on trade and investment will be done in chapter five of this work.

2.5 Subsidiary Legislation.

A subsidiary legislation arises where, the legislature in enacting a Law make's provisions empowering government officials or agencies to make rules or regulations for the effective

[335]Section 4.
[336] Cap C49 LFN, 2004.
[337]Section 21.
[338]*Ibid.*
[339]*Op cit,* see sections, 39,41,42,43,52,60,61.
[340]*Op cit,* 2nd schedule to the Act.
[341]*Op cit.*

administration of the law. When that power is exercised by that authority, the rules or regulations made pursuant thereto, form part of that law and carry the force of law.[342]

In several tax laws the FIRS, the Minister of Finance or the Ministry of Finance have powers to make regulations. For instance, section 61 of the Federal Inland Revenue Service (Establishment) Act[343]gives the FIRS Board, powers with the approval of the Minister of Finance to make rules and regulations he deems necessary for giving full effect to the provisions of the FIRS(E) Act and for due administration of its provisions.

Pursuant to section 61 of the Act, the FIRS Board, with the approval of the Minister of Finance made the Tax Administration (Self Assessment) Regulations, 2011.[344] This regulation provides standard guidelines for the implementation of the established self-assessment Regime in support of an efficient tax administration system in Nigeria. Also, pursuant to section 61 of the Act, and with the approval of the Minister of Finance; the Income Tax (Transfer Pricing) Regulations 2012[345] was made to give effect to section 17 of the Personal Income Act Tax (as amended),[346] Section 22 of the Companies Income Tax Act (as amended)[347] and Section 15 of the Petroleum Profits Tax Act.[348]These regulations have the force of law and form part of the body of laws on taxation.

[342] Section 18(1) of the Interpretations Act; *Amusa v State,*(2003) 1 S C (pt 111) 14; *Abubakar v Beberion and Amed Products Ltd &Ors*(2007) 2 S C 48; *AltimateInv Ltd v Castle &Cubules Ltd* (2008) All FWLR (Pt 417), 124, particular at 131.
[343]*Op cit.*
[344] Federal Republic of Nigeria, Official Gazette, No.117, Vol 98, Lagos, 19th December 2011.
[345]Federal Republic of Nigeria, Official Gazette, No.77, Vol 99, Lagos 21stSeteptember, 2012.
[346]*Op cit.*
[347]*Op cit.*
[348]*Op cit.*

2.6Decisions of the Courts

The judicial powers of the federation are vested in the Courts[349] and it extends to all matters between persons, or between government and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.[350] Furthermore, the exercise of legislative powers by the National and State Houses of Assembly are subject to the jurisdiction of the courts.[351]Thus, any Law or Act made by the National Assembly or State Houses of Assembly is subject to the interpretation of the Courts. The courts in the exercise of its powers to interpret a law can declare the whole law or part of the law unconstitutional.[352] Whatever interpretation the courts give to the provisions of a law becomes the extant position of that law. For instance, in *ISC Services Ltd v Genak Continental Ltd &Anor.*[353] The Court of Appeal was called upon to determine whether section 136(1) of the Customs and Excise Management Act is applicable to imported goods on which clear report of findings have been issued. The court held that, the section is inapplicable. This automatically is the position of the law on that issue, and that section must be read together with the interpretation of the courts.

However, the powers of the courts should not be exercised in a manner that will imply the exercise of legislative powers, but the courts are to give effect to the intentions of the legislature, based on the doctrine of separation of powers.[354]It is instructive to note that by the provisions of section 287 of the 1999 Constitution,[355]the decisions of the courts shall be enforced in any part of the federation by all authorities and persons.

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[349]Section 6 of the 1999 Constitution, *op cit.*
[350]*Ibid*, Section 6(6)b.
[351]Section 4(8) of the 1999 Constitution, o*p cit.*
[352]*AG Lagos State v Eko Hotels Limited and Anor.,supra.*
[353](2010) 2 TLRN, p. 183 particularly at 185.
[354] Pursuant to Sections 4, 5, and 6 of the 1999 Constitution, *op cit.*
[355]*Op cit.*

2.8 International Law.

The economies of countries all over the world are interlinked; any country desirous of economic growth and development must engage other countries in mutually beneficial economic ties.[356]In this direction,Nigeria has entered into several double taxation agreements and treaties with other countries on taxation. These agreements are either bilateral or multilateral.[357]

A tax treaty is a reciprocal arrangement between tax systems, where the countries involved; agree not to tax the income of individuals or companies brought into or received into their territory, if such individual or company had already paid tax on such income in the other country.[358]This is popularly called Double Taxation Agreements, and it is aimed at promoting international trade and commerce, by reducing the cost of doing business internationally.

Nigeria has signed a comprehensive avoidance of double taxation agreements with several countries, to wit United Kingdom, Pakistan, Belgium, France, The Netherlands, Romania, Canada, South Africa,and China.[359] Nigeria has also, signed a double taxation agreement relating to air and shipping with the Italian government.[360]

Nigeria is also, a party to the following multilateral treaties:[361] 1975 ECOWAS Treaty, 1931 League of Nations Motor Vehicle Convention and Final Protocol, 1961 Vienna Convention on Diplomatic Relations, 1969 Vienna Convention on the Law of Treaties, 1997 Draft Protocol on the ECOWAS Value Added Tax and 1997 Draft Protocol on the ECOWAS Community Levy.

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[356] IO Okauru (ed), *Federal Inland Revenue Service and Taxation Reforms in Democratic Nigeria, opcit,* p. 325.
[357]*Ibid*
[358]*Ibid*at 328 –329.
[359]*Ibid*.
[360]*Ibid* at 329.
[361] Nigerian Tax Card 2012/2013, PWC,www.pwc.com/ng accessed on the 20th of March, 2014.

Once a treaty is signed between the parties, and ratified by the National Assembly and the State Houses of Assembly where necessary, it becomes part of our domestic laws, and has the same effect as our domestic laws.[362] Thus, any treaty on taxation is automatically one of the sources of tax laws in Nigeria, immediately it is ratified.

There are several sources of tax laws in Nigeria; in this chapter, some of them, that are considered very important to our economy and this work, have been briefly discussed. In the cause of this work, the effect of these tax laws on trade and investment in Nigeria will be considered. Also, the issue of multiplicity of tax laws and double taxation will also be looked at critically in subsequent chapters of this dissertation.

[362]*Abacha v Fawehinmi*(2000) 6 NWLR (pt 660) 228.

CHAPTER THREE

TAX ADMINISTRATION IN NIGERIA AND ITS EFFECT ON TRADE AND INVESTMENT.

3.1 Powers to Impose and Collect Taxes in Nigeria.

In this Chapter, the taxing powers of all tiers of government under the Constitution of the Federal Republic of Nigeria, 1999[1] and relevant laws will be critically examined. Also, the role of relevant stakeholders in tax administration in Nigeria will be evaluated to identify its effect on trade and investment in Nigeria.

3.1.1 Powers to Impose and Collect Taxes by the Federal Government.

The legislative powers of the Federal Republic of Nigeria are vested in the National Assembly which consists of the Senate and House of Representatives.[2] The National Assembly has powers to make laws for the peace, order and good government of the federation or any part thereof with respect to any matter included in the exclusive legislative list.[3] The powers of the National Assembly under the exclusive legislative list are to the exclusion of the States Houses of Assembly.[4]

The provisions of Section 4(1-3) of the 1999 Constitution,[5] is not intended to give blanket powers to the National Assembly to legislate on all issues affecting the federation. Any matter that is not expressly included in the Exclusive Legislative List, the Concurrent Legislative List or specifically provided in the Constitution, as an item within the legislative competence of the

[1] (as amended) hereinafter referred to as the 1999 Constitution.
[2] *Ibid,* Section 4(1).
[3] *Ibid,* Section 4(2).
[4] *Ibid,* Section 4(3).
[5] *Op cit.*

National Assembly, is a residual matter,[6] which is clearly within the legislative competence of States Houses of Assembly.[7]

The National Assembly also has powers to legislate on any matter in the Concurrent Legislative List set out in the First Column of Part II of the Second Schedule to the Constitution, to the extent prescribed in the Second Column opposite thereto.[8] A careful perusal of the Concurrent Legislative List will lead to the irresistible conclusion, that there are no concurrent powers to impose tax between the Federal and State Governments in Nigeria. This conclusion is based on the fact, that the provisions on taxation in the concurrent legislative list are with respect to powers to collect taxes, which will be discussed, later in this chapter.

The provisions gave exclusive powers to both the National Assembly and the State Houses of Assembly and not concurrent powers. For instance, by virtue of item 7 and 8 of the Concurrent Legislative List,[9] the National Assembly is empowered to legislate on the collection of capital gains, incomes or profits and stamps duties. It also provides for the collection of such taxes by the States, and the regulation of the taxes in a manner that will not lead to double taxation. Item 9 and 10 of the concurrent legislative list[10] gives powers to the State House of Assembly to regulate the collection of taxes by local government councils, and the administration of the taxes should be done in such a manner that it will not lead to double taxation. It is important to note that although item 7, 8, 9 and 10 are in the concurrent legislative list,[11] they provide for exclusive powers for both the National Assembly and the State Houses of Assembly.

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[6]Section 4(7) a.
[7]*Fawehinmi v Babangida* (2003) 3 NWLR, 623.
[8]*Op cit,*Section 4(4)a.
[9]*Op cit.*
[10]*Op cit.*
[11]*Op cit.*

The National Assembly has powers to legislate on any other matter; it is empowered to make laws on by the Constitution.[12] This provision is not intended to give the National Assembly unrestricted powers, for the National Assembly to validly legislate under Section 4(4) b of the 1999 Constitution.[13] It must be clear that such power exist in relation to a particular matter, for instance, the National Assembly is empowered by virtue of Section 173(4) of the 1999 Constitution to make laws for the exemption of pensions of Federal Civil Servants from tax. Furthermore, by virtue of the provisions of Section 299(1) of the 1999 Constitution,[14] the National Assembly has legislative powers over the Federal Capital Territory, and in this regard, it is reposed with the powers of a State House of Assembly, over the Federal Capital Territory. This power is specifically given to the National Assembly and it is a clear example of any other matter under Section 4(4) b of the Constitution.[15]

Therefore, by virtue of Section 4(1-4), items 16, 25, 39, 58, 59, 62 and 68 of the Constitution,[16] the National Assembly has exclusive powers to impose taxes on customs and excise duties,[17] import duties[18] taxation of minerals and petroleum related business[19] stamp duties,[20] taxation of incomes, profits and capital gains[21] Trade and Commerce within States, and between Nigeria and other countries[22] and any other matter incidental or supplementary to any matter mentioned elsewhere in the Exclusive Legislative list.[23] Item 68 of the exclusive

[12]Section 4(4) b.
[13]*Op cit.*
[14]*Op cit.*
[15]*Op cit.*
[16]*Op cit.*
[17] Exclusive Legislative List of the Constitution, *op cit,* item 16.
[18]*Ibid,* item 25.
[19]*Ibid,* item 39.
[20]*Ibid,* item 58.
[21]*Ibid,* item 59
[22]*Ibid,* item 62.
[23]*Ibid,* item 68.

Legislative List of the 1999 Constitution[24] gives the National Assembly very wide powers to impose tax. The implication of this provision is that the National Assembly has the competence to impose tax on any matter it has powers to legislate on, thus it can impose tax on any matter in the Exclusive Legislative List of the 1999 Constitution.[25] For instance, it can impose special tax on Aviation,[26] Banks[27] Insurance Companies[28] and the Maritime Industry.[29]

Section 4(4) of the Constitution[30] provides to the effect, that where there is a conflict between a law made by a State House of Assembly and law validly made by the National Assembly, the law made by the National Assembly prevails.[31] This section relates to the exercise of legislative powers on any matter under the Concurrent Legislative List.[32] Thus, if it is a residual matter the doctrine of covering the field cannot apply, because a law made by the National Assembly on a residual matter except for the Federal Capital Territory,[33] cannot be said to have been validly made.

The National Assembly has powers to legislate on the collection of any tax it has powers to impose; this is because it has powers to legislate on any matter incidental or supplementary to any matter mentioned in the Exclusive Legislative List.[34] Thus, it has powers to determine the collection of petroleum profit tax, companies' income tax, personal income tax, stamp duties and import duties.

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[24] *Op cit.*
[25] *Op cit.*
[26] *Ibid*, item 3.
[27] *Ibid*, item 6.
[28] *Ibid*, item 33.
[29] *Ibid*, item 36.
[30] *Op cit.*
[31] Section 4(5) of the Constitution, *op cit*, based on the doctrine of covering the field.
[32] Part II, Second Schedule to the Constitution, *op cit.*
[33] under section 299(1) of the 1999 Conctitution, *op cit.*
[34] *Op cit*, item 68.

Furthermore, the National Assembly can in the exercise of it powers to impose any tax or duty on capital gains, incomes, or profits of person other than companies and documents or transactions by way of stamp duties[35] prescribe that such tax be collected by the State Government, subject to the conditions it may prescribe.[36] Provided that the liability of person to such tax or duty, is regulated in such a manner as to ensure that such tax or duty is not levied on the same person by more than one State.[37]

Pursuant to these powers the National Assembly, enacted the Personal Income Tax Act[38] and delegated the collection of the tax to the States.[39] Also, in the Stamp Duties Act,[40] the collection was delegated to the States, if the instrument is between persons or individuals.[41]The position of the law can be summarized thus, the National Assembly, on matters it has powers to impose tax, can also, delegate the collection of such tax to the States, subject to the provisions of the constitution.

In the United Kingdom and the Republic of Northern Ireland, parliament has the powers to impose tax on any subject. This is based on parliamentary supremacy. The parliament is sovereign, so can make or unmake any law in the United Kingdom.[42] According to Dicey:

> The principle of parliamentary sovereignty means neither more or less than this, namely that parliament thus defined has, under the English Constitution, the right to make or unmake any law whatever, and further

[35] Concurrent Legislative list of the Constitution,*op cit,* item 7.
[36]*Ibid.*
[37]*Ibid,* item 8.
[38] Cap P8 LFN, 2005.
[39] Section 2, and 88 of the Personal Income Tax Act, *op cit.*
[40] Cap S8, LFN, 2004.
[41] Section 4(2) of Stamp Duties Act, *op cit.*
[42]J Alder, *Constitutional and Administrative Law,* (8th edn.London: Palgrave Macmillan, 2011) pp.160-163.

that no person or body is recognized by the law of England as having the right to override or set aside the legislation of parliament.[43]

The United Kingdom operates a unitary system of government and uses an unwritten constitution. It appears the drafters of the Nigeria Constitution in the distribution of taxing powers among the federating units, adopted the United Kingdom's approach of concentrated taxing powers at the center. However, the fact that Nigeria is operating a federal system of government while the United Kingdom operates a unitary system of government seems not to have been taking into consideration. Thus there is over concentration of taxing powers at the federal level which does not reflect the principle of federalism.

In Australia, where they operate a federal system of government, Section 90 and 107 of the Australian Constitution grants powers to the Commonwealth Parliament of Australia (Federal Legislature) to impose taxes and levies on custom and excise, stamp duties among other things.[43] Similarly, section 122 of the Canadian Constitution grants powers to the Dominion Parliament of Canada (Federal Parliament) to make laws in relation to raising money by any mode or system of taxation.[44] In the United States, under Article 2, Section 8(2) and 10(2) of the United States Constitution, Congress (Federal Legislature) has powers to levy and collect taxes, on imports, excise, stamp duties etc.[45]The United States, Canadian and Australian Constitution are Federal constitutions like the Nigeria Constitution, and their constitutions gives considerable taxing powers to states .Thus, it is expected that taxing powers are distributed between the central government and the federating units in a manner that reflects the principles of federalism.

[43]*Ibid* at p. 160.
[43] Culled from U Jack-Osimiri and E Jack-Osimiri, 'Conveyance as a tool for effective Stamp Duties Operations' 24 *JPPL*, p. 1.
[44]*Ibid.*
[45]*Ibid.*

However, some federal constitutions like that of Nigeria did not really give the federating units much taxing powers as is obtainable in places like the United States where the States enjoy wide taxing powers.

3.1.2 Powers to Impose and Collect Taxes by State Governments.

The State Houses of Assemblies are vested with the legislative powers of their various States.[46] The State House of Assembly has powers to make laws for the peace, order and good government of the State or any part thereof with respect to the following matters.[47]

(a) Any matter not included in the exclusive legislative list set out in Part I of the Second Schedule to this Constitution.

(b) Any matter included in the concurrent legislative list set out in First Column of Part II of the Second Schedule to this Constitution to the extent prescribed in the Second Column opposite thereto and

(c) Any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.

Thus, from this provision, the State Houses of Assembly has powers to make laws on any matter not included in the Exclusive Legislative List,[48] any matter in the Concurrent Legislative List to the extent prescribed in the Second Column opposite thereto,[49] and any matter with respect to which it is specifically empowered to make laws in accordance with the provisions of this Constitution.[50] It is based on this position that State governments try to impose taxes from even areas that are not supposed to be taxed.For instance, environmental and agricultural taxes. It is obvious from the discussion on federal taxing powers that State

[46]Section 4(7) of the Constitution, *op cit.*
[47]*Ibid.*
[48]*Ibid,* Section 4(7) a, *op cit.*
[49]*Ibid,* Section 4(7) b.

governments have very narrow taxing powers under the 1999 Constitution.[51] This situation has forced several States into the habit of introducing arbitrary and unnecessary taxes. In chapter five this issue will be addressed extensively, however, it is suggested that the Constitution should be amended to give the states more taxing powers.

The State Houses of Assembly by the combined effect of Section 4(7) c and Section 7(5) of the Constitution, and the Fourth Schedule to the Constitution,[52] are empowered to legislate on the taxation for Local Government Councils. The Fourth Schedule to the Constitution contains the main functions of Local Government Councils, and the State House of Assembly by virtue of Section 7(5) of the Constitution[53] is the competent authority to legislate on matters concerning local government. Consequently, the State Houses of Assembly can enact laws for the imposition and collection of taxes, fees, or rates by local government in respect of the following matters:

(a) collection of rates, radio, and television licences[54]

(b) licensing fees for bicycles, trucks (other than mechanically propelled trucks), canoes, wheel barrows and carts;[55]

(c) Collection of rates for the use of public facilities like cemeteries,[56] slaughter houses, markets, motor parks and public conveniences.[57]

(d) Tenement rates[58]

(e) Outdoor advertising[59] etc.

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[50] *Ibid*, Section 4(7) c.
[51] *Op cit*.
[52] *Op cit*.
[53] *Op cit*.
[54] Item 1(b) of the Fourth Schedule to the Constitution, *op cit*.
[55] *Ibid*, Item 1(d).
[56] *Ibid*, Item 1(c).
[57] *Ibid*, Item 1(e).
[58] *Ibid*, Item 1(j).
[59] *Ibid*, Item 1(k)i.

Furthermore, by the combined effect of Section 4(7) b and items 9 and 10 of the Concurrent Legislative List of the Constitution,[60]A House of Assembly may, subject to such conditions as it may prescribe, make provisions for the collection of any tax, fee or rate or for the administration of the law providing for such collection by a local government council.[61] Provided that the liability of persons to the tax, fee, or rate, shall be regulated in such a manner as to ensure that such tax, fee or rate is not levied on the same person in respect of the same liability by more than one Local Government Councils.[62] The implication of this is that, the House of Assembly can delegate the collection of any tax, fee or rate it has powers to impose to the Local Government councils. This is further strengthened by the fact that, it has powers to confer such other functions on Local Government Councils.[63]

The State Houses of Assembly is the only competent authority to legislate on any matter not included in the exclusive and concurrent legislative list. By the provisions of Section 4(7)a of the Constitution,[64] the National Assembly cannot legislate on residual matters, only the State Houses of Assembly can legislate on it.[65] The courts have long settled this issue in *AG Ogun State v Aberuagba,*[66] the Supreme Court put the issue beyond doubt, where it stated per Bello JSC as follows:

> A careful perusal and proper construction of Section 4 would reveal that the residual legislative powers of government were vested in States. By residual legislative powers within the context of Section 4, is meant what was left after the matters in the

[60]*Op cit.*.
[61]Item 9 of the Concurrent legislative list.
[62]*Ibid*, Item 10.
[63] Item 2(d) of the Fourth Schedule.
[64]*Op cit.*
[65]*Fawehinmi v Babangida* (2003) 3 NWLR (Pt 824) 623.
[66] (2009) 1 TLRN, 82

> exclusive and concurrent legislative and those matters which the Constitution expressly empowered the Federation and States to legislate upon had been subtracted from the totality of the inherent and unlimited powers of a sovereign legislature. The federation had no power to make laws on residual matters.[67]

It is obvious, that a State has powers to impose tax on all matters in the Concurrent Legislative List and residual matters. However, the provision of Section 4(5) makes the taxing powers of the State on Concurrent matters subject to the inconsistency rule and doctrine of covering the field. For the inconsistency rule or the doctrine of covering the field to apply, the law made by the National Assembly must have been validly made. That is to say, it must be within the legislative competence of the National Assembly. If the National Assembly makes law on a residual matter, it cannot be said to have been validly made because the National Assembly has no competence to legislate on residual matters. In such circumstance, the law made by the State House of Assembly will stand.

It is doubtful, if the drafters of the Constitution intended to create any concurrent legislative powers on taxation, this is because items 7 and 8 of the Concurrent Legislative List of 1999 Conctitution,[68] only gave express powers to the National Assembly to delegate collection of taxes to the States, this provision did not give the State Houses of Assembly powers to impose tax on those matters. While item 9 and 10 of the Concurrent Legislative List,[69] gave express powers to the State Houses of Assembly to delegate collection of taxes to Local Government Councils, without giving any powers to the National Assembly on the same issue. Thus, under

[67]Particular at 97.
[68]*Op cit.*
[69]ofthe Constitution, *op cit*.

the Concurrent Legislative List, there are no concurrent taxing powers between the National Assembly and States. Item 7 and 8 of the Concurrent Legislative List[70] should have been sub paragraphs of item 59 and 60 of the Exclusive Legislative List,[71] respectively.

It is instructive to note that the National Assembly is vested with the legislative powers of the Federal Capital Territory, as if, it were one of the States of the Federation.[72] This implies that the National Assembly has all the powers of a State House of Assembly to impose and collect taxes, in respect of the Federal Capital Territory.

The combined effect of Sections 4(1-4), items 16, 25, 39, 58, 59, 62 and 68 of the Exclusive Legislative List of the Constitution,[73] leads to an irresistible conclusion that there is an over concentration of taxing powers on the federal government. Thus, there is need to amend the Constitution to give the States more taxing powers.

In some other jurisdictions that practice a federal system of government, taxing power as noted earlier is distributed between the Central and Federating Units. However, States in some countries have more taxing powers than states in Nigeria, for instance, in the United States of America, Section 10(2) of the United States Constitution grants each state powers to impose tax, duties, and excise on goods circulating inland or within the country.[74] Similarly, Section 92(2) of the Canadian Constitution vests each of the provinces with power to raise direct taxation within the province.[75]

It is hoped that, Nigeria will adopt the provisions of the United States of America's and Canada's constitution by amending the constitution to expand the taxing powers of states. It is

[70]*Op cit*.
[71]*Op cit*.
[72]Section 299 of the Constitution, *op cit*.
[73]*Op cit*.
[74]www.archives.gov, accessed on the 10TH OF October 2014.
[75] Constitutional Act ,1982 and includes the United Kingdom Constitutional Act, 1867 www.justice.gc.ca, accessed on the 10th 0f October, 2014.

expedient that the taxing powers of states be expanded, because the major challenge of investors in Nigeria is that they are made to pay similar taxes by State Governments after they have paid Federal taxes. State Governments are in the habit of imposing arbitrary and unnecessary taxes and in some cases unconstitutional taxes. This is because they have very limited taxing powers and they have an uncontrollable urge to generated revenue notwithstanding the impact it will have in our economy. Thus, state taxes are perceived in most cases as double or multiple taxation and impacts negatively on trade and investment in Nigeria. This practice of imposing unnecessary taxes increases the cost of doing business, discourages investment and contributes in no small measure in the rating of Nigeria as one of the worst places to do business in the world. A more detailed discussion of the impact of State tax laws is in Chapter five of this dissertation.

3.1.3 Powers to Impose and Collect Taxes by Local Governments.

The Local Government System though guaranteed by the Constitution,[76] their existence, establishment, structure, composition, finance and functions, depends on the State Government.[77] It seems the drafters of the Constitution never intended the local government system to be an independent tier of government. The local government system is weak under the 1999 Constitution[78] and does not enjoy the status of a federating unit with the Federal and State Government; they are like appendages of the State Governments. Thus, in the devolution of powers, the local government system was given little or no powers. For instance, the Constitution[79] did not give Local Government Councils legislative powers, rather the State Houses of Assembly are given powers to legislate for Local Government Councils.[80] Generally, local governments do not have powers to impose taxes under the Constitution, however, if the

[76]Section 7(1) of the Constitution, *op cit.*
[77]*Ibid.*
[78]*Op cit.*
[79]*Op cit.*

State House of Assembly, in the exercise of the powers vested on it by Section 7 of the Constitution, creates a legislative arm, and vest it with powers to make byelaws on any of the items listed in the Fourth Schedule of the Constitution,[81] the legislative arm can impose taxes.

The House of Assembly of a State by virtue of Section 7(5), the Fourth Schedule and items 9 and 10 of the Concurrent Legislative List of the Constitution,[82] can impose taxes and delegate the collection of such taxes to Local Government Councils. Furthermore, when the State House of Assembly imposes taxes based on the Fourth Schedule, those taxes are to be collected by the local government councils. The Court of Appeal in *AG Cross Rivers State &Anor v Matthew Ojua*[83]while recognizing that the State House of Assembly can legislate on the Fourth Schedule held that the State Government should not in the process usurp the taxing powers conferred on the Local Government Councils. In this case the Cross River State House of Assembly enacted an Urban Development Law which gave the Commissioner of Finance powers to collect tenement rates. The Court frowned at the law for usurping the powers and functions of local government on collection of tenement rates as provided in paragraph 1(1) of the Fourth Schedule to the Constitution.[84]It is suggested that, the existence of Local Government Councils be further strengthened, by giving them some legislative powers, at least to legislate on the items under the Fourth Schedule to the Constitution. The weak position of local government especially as regards taxation, has introduced an embarrassing dimension to collection of tax. Most local government revenue committees are made up of thugs who go about intimidating people to pay different types of taxes and levies. This is a serious disincentive to trade and investment in Nigeria.

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[80]Section 7 of the Constitution, *op cit.*
[81]*Op cit.*
[82]*Op cit.*
[83](2011) 5 TLRN, 1.

3.2 Stakeholders in the Administration and Collection of Taxes in Nigeria.

The National Assembly and the State Houses of Assembly, in exercise of their powers to legislate on the imposition and collection of taxes have established several statutory bodies for the efficient administration of the Nigeria Tax System. The role of each of these bodies shall be x-rayed hereunder.

3.2.1 Joint Tax Board.

The Joint Tax Board was established in 1961 by the provisions of Section 27 of the Income Tax Management Act.[85] Presently, its existence is guaranteed by the provisions of Section 86 of the Personal Income Tax Act (as amended).[86] The Board consists of the following members:[87]

(a) The Chairman of the Federal Board of Inland Revenue, who shall serve as the Chairman.

(b) One member from each State, usually the Chairman of the State Board of Inland Revenue. The Federal Capital Territory also has one representative.

(c) A Secretary who is an officer experienced in tax matters. Usually seconded from the Public Service. The Board appoints him, and he is not a member of the Board. He is responsible for maintaining records of the Boards proceedings.

(d) Legal Adviser to the Federal Inland Revenue Service, who serves as legal adviser to the board.

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[84] *Op cit*.
[85] Now Personal Income Tax Act (as amended)*op cit.*
[86] *Op cit.*
[87] Section 86 of Personal Income Tax Act (as amended)*op cit.*
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The board also allows some observers whose roles are connected to revenue generation to be admitted to the board. At present the Revenue Mobilization, Allocation and Fiscal Commission, and the Federal Road Safety Commission are admitted as observers.[88]

The mandate of the Joint Tax Board are among other things to:[89]

(b) Exercise the power or duties conferred on it by express provisions of this Act, and any other powers and duties arising under this Act, which may be agreed by the government of each territory to be exercised by the board.

(c) Exercise powers and perform duties conferred on it by any enactment of the federal government imposing tax on the income and profits of companies, or which may be agreed by the Minister to be exercised or performed by it under the enactment in place of the Federal Board of Inland Revenue (now Federal Inland Revenue Service).

(d) Advise the Federal Government, on request, in respect of double taxation arrangement concluded or under consideration with any other country, and in respect of rates of Capital allowances and other taxation matters having effect throughout Nigeria and in respect of any proposed amendment to this Act.

(e) Use its best endeavors to promote uniformity both in the application of this Act and in the imposition of tax on individuals throughout Nigeria.

(f) Impose its decisions on matters of procedure and interpretation of this Act on any State for purposes of conforming to agreed procedure or interpretation.

In the National Tax Policy,[90] the JTB is charged with the following functions:

(a) Harmonization of tax processes and administration in Nigeria.

(b) The provision of technical assistance and support to tax authorities.

[88]US Ida, *JTB News*, vol. 2, January 2011, 7.
[89]Section 86(9) of Personal Income Tax Act, *op cit.*

(c) The coordination of the nationwide introduction of the Unique Taxpayer Identification Number and other initiatives which may be introduced from time to time.

(d) The formation of standard processes and procedures for the activities of tax authorities.[91]

The vision and mission of the Joint Tax Board was summarized by Ida, as follows:

> The vision of the Board is to create a tax friendly environment in Nigeria and its mission is to promote uniformity in Nigeria, harmonity and efficiency in the administration of Personal Income Tax in Nigeria. Also, it has a mission to provide advice on general tax matters as may be required.[92]

It is doubtful if the Joint Tax Board can achieve the objective of creating a tax friendly society and promote uniformity. This is because as earlier noted the structure of the Constitution does not encourage a tax friendly society. The overconcentration of taxing powers on the federal government and the negative reaction of state governments has created a hostile tax environment characterized by multiple and double taxation.

Since the establishment of the Board, it has contributed immensely to the advancement of tax administration in Nigeria, and has maintained a key role in the development and administration of tax in Nigeria. In pursuance of its objectives to develop an efficient tax system that will invigorate the Nigerian economy in line with global best practices, it initiated a number of measures that will not only increase revenue generation through taxation, but promote confidence, competitiveness and a conducive environment for investors.[93]

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[90]Paragraph 2.10 of the National Tax Policy.
[91] IO Okauru (ed) *A Comprehensive Tax History of Nigeria*, (Abuja: FIRS, 2012) p. 320.
[92] US Ida, *op cit*,8.
[93]*Ibid*.

Some of the initiatives introduced by the Joint Tax Board include the introduction of the Unique Taxpayer Identification Number (UTIN), which is an electronic system of tax identification and registration for a tax payer for life. The Joint Tax Board recently took a decision to stop State governments from the detestable practice of using consultants to collect taxes, instead of the State Board of Internal Revenue.[94] This step was taken to check the ugly tide of multiple taxation in States, which is a serious disincentive to investors. The consultants are usually paid on percentage, so they encourage the proliferation of taxes to increase their profit margin to the detriment of the State economy.

No doubt a body like the Joint Tax Board is necessary in the administration of tax in Nigeria. However, the board cannot do much in the area of curtailing multiple taxation and abuse of taxing powers by State Governments; this is because the board is merely an advisory body and does not have powers to effectively enforce its decisions. For instance if a State tax authority disregards a directive of the Joint Tax Board, the board is handicapped, this is more so as the state tax authorities are more inclined to follow the instructions of the State Government. One area the Joint Tax Board has a vital role to play is in the area of addressing administrative bottle necks in the enforcement of tax laws. For instance, the board can help to discourage the practice of compelling people to show evidence of tax payment before services are rendered by government agencies even when the person has already paid his tax in another state. In such situations the Joint Tax Board should impress it on State Revenue Boards to discourage such practice, as it clearly amounts to double taxation.

3.2.2 The Federal Inland Revenue Service.

[94]M Okwe, 'Govt. Bans Tax Contractors in States, IGP to Enforce Policy' *The Guardian*, October 22, 2013, p 1.

The history of the Federal Inland Revenue Service dates back to 1935 with the appointment of Frank G. Loyd as Commissioner of Income Tax for the colony and protectorate of Nigeria.[95] In 1943, the Nigerian Inland Revenue Department was established as an autonomous body, haven been carved out from the Anglo-phone Inland Revenue Department of West Africa.[96] In 1958, the then Federal Board of Inland Revenue was established by Section 3 of the Income Tax Ordinance of 1958[97] and was reestablished by Section 4 of the Companies Income Tax Act of 1961.[98] The Federal Board of Inland Revenue operated as a department in the Federal Ministry of Finance.[99]

The Federal Board of Inland Revenue went through several process of re-organization firstly in 1977, which changed the designation of the Chairman and Deputy Chairman to Director and Deputy Director of the department, also the membership of the board was increased from seven to ten.[100] Another major re-organization of the board was by the promulgation of the Finance (Miscellaneous Taxation Provisions) Amendment Decree No. 3 of 1993, which further expanded the board's membership.[101]

The Finance (Miscellaneous Taxation Provisions) Decree No. 3 of 1993, was an adoption of the recommendations of the 1991 Study Group headed by Professor Emmanuel Edozien, which was set up to review the tax system.[102] The decree created the Federal Revenue Service as

[95] IO Okauro, *A Comprehensive Tax History of Nigeria*, *op cit, p.* 121.
[96]*Ibid.*
[97]*Ibid* at 122.
[98]*Ibid.*
[99] IO Okauro (ed), *Federal Inland Revenue Service and Taxation Reforms in Democratic Nigeria* (Abuja: FIRS, 2012) p. 25.
[100]IO Okauro (ed), *A Comprehensive Tax History of Nigeria*, *op cit*, p. 122.
[101]*Ibid*.
[102] IO Okauro (ed), *Federal Inland Revenue Service and Taxation Reforms in Democratic Nigeria*, *opcit*, p. 9.

an operational arm of the Federal Board of Inland Revenue. The decree also created the office of Executive Chairman.[103]

The most fundamental of the reforms was the enactment of the Federal Inland Revenue Service (Establishment) Act[104] (hereinafter referred to as the FIRS(E) Act). The Act created the Federal Inland Revenue Service (hereinafter referred to as FIRS) as an autonomous body,[105] thus it ceased to be an operational arm of the Federal Board of Inland Revenue. The Board of the Service consists of [106]

(a) The Executive Chairman

(b) Six members, who are experienced in taxation

(c) A representative of the Attorney General of the Federation

(d) The Governor of the Central Bank or his representative

(e) A representative of the Minister of Finance not below the rank of a director

(f) The Chairman of the Revenue Mobilisation, Allocation, and Fiscal Commission or his representative, who shall be any of the commissioners representing the 36 States of the federation.

(g) The Group Managing Director of the Nigerian National Petroleum Corporation or his representative who shall not be below the rank of a Group Executive Director of the corporation or its equivalent.

(h) The Controller General of the Nigerian Customs Service or representative not below the rank of Deputy Controller General.

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[103]*Ibid*.
[104] Cap F36, LFN, 2004.
[105]Section 1 of the FIRS (E) Act, *op cit.*
[106]Section 3 of the FIRS (E) Act.

(i) The Registrar General of the Corporate Affairs Commission or his representative not below the rank of a director, and

(j) The Chief Executive Officer of the National Planning Commission or his representative, not below the rank of a director.

The members of the board, except the executive chairman are to serve on part time basis.

The object of the service shall be to control and administer the different taxes and laws specified in the First Schedule or other laws made or to be made from time to time, by the National Assembly or other regulations made there under by the Government of the federation and to account for all taxes collected.[107]

The taxes and levies listed in the First Schedule are:

(1) Companies Income Tax Act[108]

(2) Petroleum Profits Tax[109]

(3) Personal Income Tax Act[110]

(4) Capital Gains Tax Act[111]

(5) Value Added Tax Act[112]

(6) Stamp Duties Act[113]

(7) Taxes and Levies (Approved List for Collection) Act[114]

(8) All regulations, proclamations, Government notices or rules issued in terms of these legislation.

[107]Sections 2 and 25 of the FIRS (E) Act.
[108] Cap 60 LFN, 1990 Now Cap C21 LFN, 2004.
[109] Cap 354, LFN, 1990 Now Cap P 13 LFN, 2004.
[110] No. 104 of 1993 Now Cap P 8 LFN, 2004.
[111] Cap 42, LFN, 1990, Now Cap C1 LFN, 2004.
[112]No. 102 of 1993, Now Cap, V1 LFN, 2004.
[113] Cap 411 LFN 1990, Now Cap, 58 LFN, 2004
[114] No. 2 of 1998 Now Cap T2 LFN, 2004.

(9) Any other law for the assessment, collection and accounting of revenue accruable to the Government of the federation as may be made by the National Assembly from time to time or regulation incidental to those laws, conferring any power, duty and obligation on the service.

(10) Enactment or laws imposing taxes and levies within the Federal Capital Territory.

(11) Enactment of laws imposing collection of taxes, fees and levies collected by other government agencies including signature bonus, pipeline fees, penalty for gas flared, depot levies and licenses, fees for Oil Exploration Licence (OEL), Oil Mining Licence (OML), Oil Production Licence (OPL), royalties, rents (productive and non-productive) fees for licenses, haulage fees and all such fees prevalent in the Oil Industry but not limited to the above listed.

Furthermore, Section 8(1)b of the FIRS(E) Act[363] among other things provides that the service shall have powers to:

(a) Assess persons including companies chargeable with tax

(b) Assess, collect, account and enforce payment of taxes as may be due to the government or any of its agencies;

(c) Collect, recover and pay to the designated account, any tax under any provisions of this Act or any other enactment or law.

Government referred to in Section 8(1)b of the Act, was defined under Section 69 of the Act to include the Government of the federation and shall include the Federal Capital Territory or as the case may be, a Government of a State.

[363] *Op cit.*

The objective of the FIRS (E) Act has generated a lot of concerns, as it appears to have given too much power to the Federal Inland Revenue Service, beyond what was contemplated by the Constitution. In this direction Ibraheem and Jegede have argued that:

> A study of the above list leaves no one in doubt as to the intention of the Act which is nothing but unification of tax administration in Nigeria albeit through the back door. The Act has completely wiped out the division of tax administrative responsibilities that hitherto existed between the FIRS and SBIR. Unlike the previous tax legislations that clearly specified responsibilities of the FIRS or SBIR as the case May be, the new Act does not even recognize the existence of the SBIR as a revenue collection agency not to talk of identifying where they belong in tax administration under the new dispensation.[364]

Similarly, Atilola, stated as follows:

> A critical study of the above provisions leaves no one in doubt as to the intention of the Act which is nothing but unification of tax administration in Nigeria. There are however some fundamental constitutional questions raised by these provisions of the Act (Sections 2 and 25). The Act seems to be taking away the residual tax powers of the State governments. That is, the Act seems to be eroding the jurisdiction of the States to legislate on certain tax

[364] A Ibraheem and RO Jegede, 'Federal Inland Revenue Service (Establishment) Act 2007: Centralisation of Tax Administation in Nigeria through the Back Door' http://ww.icmaservice.com accessed on the 20th of October , 2015.

species not falling within the Exclusive and Concurrent Legislative List.[365]

With the greatest respect it is difficult to agree with the position ofAtilola,[366]Ibraheem and Jegede[367]that the Act seeks to unify the administration of tax laws through the back door and erode the powers of State boards of Internal Revenue. It is obvious, that the intendment of the legislature, as from the clear wordings of Section 2 and 25 of the FIRS(E) Act, is to give the Federal Inland Revenue Service powers to administer and collect taxes on behalf of the Federal Government in line with the provisions of the Constitution. Section 2(3) of the FIRS(E) Act specifically stated that: 'The service shall have such powers and duties as are conferred on it by this Act or by any other enactment or law on such matters on which the National Assembly has power to make law'. There is no where the Act suggested that the FIRS will administer state taxes. Also, the argument that State boards of internal revenue were not recognized in the Act appears to be baseless, this is because the Act is specifically for the administration of Federal taxes. Furthermore, the submission of Atilola[368] that sections 2 and 25 of the FIRS(E) Act seems to have eroded the jurisdiction of State Government's to legislate on certain tax species not falling within the Exclusive and Concurrent Legislative List with the greatest respect does not seem to hold much water. This is because the emphasis of sections 2 and 25 of the FIRS(E) Act was on laws made by the National Assembly. It is difficult to infer the removal of state taxing powers on residual matters from those provisions. Section 25(1) of the FIRS(E) provides that: 'The service shall have power to administer all the enactments listed in the first schedule to

[365] B Atilola, 'Reflections on the Federal Inland Service (Establishment) Act 2007' *NJBCL*, Vol 1, No. 4, 2010, 10.

[366]*Op cit.*
[367]*Op cit.*
[368]*Op cit.*

this Act and any other enactment or law on taxation in respect of which the National Assembly may confer power on the service'. There is no where it precluded states from legislating on residual matters. However, their conclusions may have been informed by the wordings of the provisions of the First Schedule to the Act. It is suggested, that item 1-7 of the First Schedule of the Act should be deleted, in its place; a new item 1 should be inserted to read thus: 'all enactments and laws imposing taxes and levies by the National Assembly, provided that the FIRS shall not have powers to administer any law specifically intended to be administered by a State based on the provisions of the constitution.' This is necessary because the FIRS does not have powers to collect all the taxes listed in item 1-7 of the first schedule to the FIRS(E) Act. However, the problem will still be there because taxes like Personal Income Tax are collected by States but it is imposed by the Personal Income Tax Act which is an Act of the National Assembly. Thus, the FIRS(E) Act must be interpreted bearing in mind these peculiarities. The definition of Government in Section 69 of the FIRS(E) Act should also, be amended to exclude State Government.

More worrisome is the fact that the FIRS is given powers to administer the Taxes and Levies Act,[369] this has been adjudge to be ridiculous, considering the fact that it is not a tax law and the main objective of this legislation is to eliminate multiple taxations by specifying the relevant tax authority that can collect specified types of taxes and levies.[370] The danger in including this legislation among the legislation to be administered by the FIRS is that some of the taxes under the Taxes and Levies Act are State taxes. In this direction Atilola stated as follows:

[369]*Op cit.*
[370]AIbraheem, and RO Jegede, *op cit*, 3.

> The service has no Constitutional powers whatsoever to administer the whole of the taxes and levies enumerated under the Taxes and Levies (Approved List for Collection) Act especially those taxes and levies listed in Part II to the Act such as pools belting and lotteries, Gaming and Casino Taxes, Road Taxes, Business Premises Registration and Renewal levy, Development levy (individuals only), Naming of street Registration fee in State Capitals and Rates in markets where State Finances are involved. These are taxes that fall within the residuary power of States and usually administered by their respective State Board of Inland Revenue.[371]

However, the inclusion of the Taxes and Levies Act among the tax laws to be administered by the FIRS is because the Act is an Act of the National Assembly it is by no stretch of imagination intended to confer the powers of administering State taxes on the FIRS. Thus, it is clear that the service by the provisions of the Constitution does not have the powers to administer all the taxes and levies listed in the Taxes and Levies (Approved List for Collection) Act.[372] The FIRS cannot administer State and Local Government taxes. Thus, in situations where a tax collected by the State Government is imposed by an Act of the National Assembly, the FIRS(E) Act must be read in conjunction with the provisions of those law, for instance, the Personal Income Tax Act. This is because the FIRS(E) Act is subject to the provisions of the Constitution,

[371] B Atilola, *op cit*, 10.
[372] *Op cit.*

and if any provisions of the Act is inconsistent with the Constitution, it is void to the extent of its inconsistency.[373]

The FIRS Board may with the approval of the Minister, make rules and regulations, as in its opinion are necessary or expedient for giving full effect to the provisions of the FIRS (E) Act. The implication of this is that the FIRS with the approval of the Minister have powers to make rules and regulations for the administration and collection of any tax within its jurisdiction. Pursuant to Section 61 of the FIRS(E) Act, the FIRS have made several regulations; for instance, the Tax Administration (Self Assessment) Regulations, 2011[126] and The Income Tax (Transfer Pricing) Regulations, 2012.[127]

It is instructive to note that by the provisions of Section 68 of the FIRS (E) Act,[128] the FIRS is the sole authority to collect and administer all federal taxes, irrespective of the provisions of any other law. This is because Section 68(1) specifically provides that the relevant provisions of all existing enactments shall be read with such modifications as to bring them into conformity with the provisions of this Act. While Section 68(2) provides that if the provisions of any other law is inconsistent with the provisions of this Act. That provision is void to the extent of its inconsistency.

The implication of this, is that Ministries and agencies of the Federal Government that were saddled with the responsibility of administering any tax under any other law before the enactment of the FIRS (E) Act, have lost such powers, and can only collect taxes, if the FIRS delegates such powers to them.

3.2.3 The Minister of Finance

[373]Section 1(3) of the 1999 Constitution, *op cit.*

[126] Federal Republic of Nigeria, Official Gazette, No.117, Vol 98, Lagos, 19th December, 2011.
[127] Federal Republic of Nigeria, Official Gazette, No. 77, Vol 99, Lagos September 21st, 2012.

The Minister of Finance is a major stakeholder in tax administration in Nigeria; he is vested with supervisory powers over the Federal Inland Revenue Service. The powers and duties conferred on the FIRS are subject to the general direction of the Minister of Finance. Section 51(1) of the Federal Inland Revenue Service (Establishment) Act[129] provides as follows:

(1) In the exercise of the powers and duties conferred upon the Board by this Act, the Board shall be subject to the general direction of the Minister[130] and any written direction, order or instruction given by him after consultation with the Executive chairman shall be carried out by the Board.

(2) Provided that the Minister shall not give any directive, order or instruction in respect of any particular person, which would have the effect of requiring the Board to increase or decrease any assessment of tax made or to be made or any relief given or to be given or to defer the collection of any tax or judgment debt due, or which would have the effect of initiating, forbidding the initiation of withdrawing or altering the normal course of any proceeding whether civil or criminal, relating either to the recovery of any tax or to any offence under any of the laws listed in the First Schedule.

This provision gives wide powers to the Minister, as the entire powers of the board is subject to the directives of the minister. However, the minister can only give general directives. This may be necessary where there is a lacuna in the law. Thus, he cannot give a directive that is contrary to the express provisions of the Act. Furthermore, his power to give directives was

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[128] *Op cit.*
[129] *Op cit.*
[130] Sections 69 defines Minister in the Act to mean the Minister Charged with responsibility for matters relating to Finance.

circumscribed by the proviso to Section 51(1) of the FIRS (E) Act[131] which provides for situations where the Minister of Finance cannot give directives to the FIRS Board.

By the proviso to Section 51(1) of the FIRS(E) Act,[132] the Minister cannot give a directive to the board in the following circumstances.

(a) If it seems to increase or decrease an assessment of tax made or to be made.

(b) If it relates to any relief given or to be given

(c) If it seeks to deter the collection of any tax or judgment debt due.

(d) If it has to do with any matter in court for the recovery of any tax, or relating to any offence under any of the laws listed in the First Schedule to the FIRS (E) Act.[133]

The restriction on the powers of the Minister is necessary to reduce political interference in the collection of tax and enforcement of tax laws, considering the level of corruption in Nigeria, and likely abuse of the powers of the Minister by powerful Nigerians. Sections 60 of the FIRS (E) Act[134] is similar to Section 51(1) of the FIRS (E) Act,[135] it provides to the effect that:

The Minister may give to the service or the Executive Chairman such directives of a general nature or relatinggenerally to matters of policy in the exercise of its or his functions as he may consider necessaryand the service or the Executive Chairman shall comply with the directives or cause them to be complied with.

The directives under Section 60[136] must be of a general nature, or must relate to matters of policy. The service or the executive chairman must comply with the directives, because the operative word is 'shall'. This provision is necessary, to enable the Minister of Finance guide

[131]*Op cit.*
[132]*Op cit.*
[133]*Op cit.*
[134]*Op cit.*
[135]*Op cit.*
[136]of the FIRS (E) Act, *op cit*, The Minister cannot give directives of a specific nature.of the FIRS (E) Act, *op cit*, The Minister cannot give directives of a specific nature.

the FIRS on the policy and economic thrust of the Government as approved by the Federal Executive Council, especially where there is a major twist in the economic policy of the federation. This will enable the FIRS adjust its strategies to fit into the economic policy thrust of the government of the day.

The Board of the FIRS needs the approval of the Minister before it can make rules and regulations under the provisions of Section 61 of the FIRS (E) Act.[137]

The Minister has exercised this power severally for instance, he gave his approval for the making of the Tax Administration (Self Assessment) Regulations, 2011[138] and the Income Tax (Transfer pricing) Regulations 2012.[139]

3.2.4 State Boards of Internal Revenue

The State Board of Internal Revenue is the body charged with the responsibility of tax administration in the States. Sections 87(1) of the Personal Income Tax Act (as amended)[140] provides to the effect that: there shall be established for each State, a Board to be known as the State Board of Internal Revenue, whose operational arm shall be known as the State Internal Revenue Service. The functions of the board are to among other things administer and collect taxes on behalf of the State Governments.[141]

One issue that raises concern is whether the National Assembly can establish a statutory body for the States? The answer is clearly no. The Personal Income Tax Act (as amended)[142] is a Federal Legislation; there is no constitutional provision that enables the National Assembly to create statutory bodies for States. Items 7 and 8 of the Concurrent Legislative List of the

[137] *Op cit.*
[138] *Op cit.*
[139] *Op cit.*
[140] *Op cit.*
[141] Section 88 of the Personal Income Tax Act (as amended), *op cit*.
[142] *Op cit*.

Constitution,[143] only allows the National Assembly to delegate the collection of some specified taxes to states. The Constitution never envisaged that those provisions should be stretched to the extent of creating statutory bodies for States, which is clearly a responsibility of the State Houses of Assembly.

This is clearly against the spirit of federalism, and is an infringement on the Constitutional powers vested on State Houses of Assembly by virtue of Section 4(7) of the 1999 Constitution.[144] The Personal Income Tax Act, (as amended)[145] went further to establish a Joint State Revenue Committee[146] between States and Local Governments, to among other things harmonize tax administration in the State, and implement the decisions of the Joint Tax Board.[147] This is clearly outside the constitutional powers of the National Assembly. It is the researcher's view that Section 88–93 of the Personal Income Tax Act (as amended)[148] is unconstitutional and should be expunged.

In some States, the House of Assembly has gone ahead to establish their State Board of Internal Revenue. For instance, in Delta State, the Delta State Internal Revenue Board is established by Section 3(1) of Delta State Internal Revenue Consolidation, Law, 2009, while in AkwaIbom State, the AkwaIbom State Internal Revenue Service was established by the AkwaIbom State Finance (Control and Management) Law, 1987. Unfortunately, in the Service Charter of the AkwaIbom State Internal Revenue Service, the service claimed that, the service was created by the Personal Income Tax Act.[149] The Delta State Internal Revenue Consolidation

[143] *Op cit.*
[144] *Op cit.*
[145] *Op cit.*
[146] Section 92.
[147] Section 93.
[148] *Op cit.*
[149] Annual Report of AkwaIbom State, Revenue Service, 2010, p. 10.

Law is commendable; it created the Board, provided for its composition and functions,[150]and also created the Joint State Revenue Committee,[151] without reference to the provisions of the Personal Income Tax Act.[152]

In most States the state revenue services or boards are redundant. Their functions have been hijacked by tax consultants, a deliberate policy by the political class, which has encouraged corruption in the administration tax in the States.

3.2.5 Legality of the Use of Tax Consultants.

In a bid to boost internally generated revenues, most States have engaged private consultants to collect taxes on behalf of the State Government. This role is statutorily the role of the States Internal Revenue Service. This practice is to a large extent motivated by political considerations, and has in most cases rendered the States Internal Revenue Service redundant and incompetent.

The pertinent question to ask at this point is whether the State Boards of Internal Revenue have the powers to delegate the collection of taxes to Private Consultants? Sections 88(3) and 4 of the Personal Income Tax Act[374] provides that the State Board may, by notice in the gazette or in writing, authorize any person to perform or exercise on behalf of the State Board, any function, duty or power conferred on the State Board. However, the State Board shall not delegate any power conferred on it under sections 2, 6, 7, 17, 46, 47, 50, 53, 54, 55, 57, 78, 86, 99, 102, 103, 104, of this Act to any person[375]

This section clearly allows the State Internal Revenue Service's to delegate their functions. However, as we argued earlier it is unconstitutional for the Personal Income Tax

[150] Section 3-7.
[151]Section 17.
[152]*Op cit.*
[374]*Op cit.*
[375] These sections relates to assessment of tax, call for returns and documents, action to recover tax in court, prosecution of tax offenders, power to enter search or distrainetc and not the power to collect tax.

Act[376] to provide for the administration of State taxes. Sections 3(1)e of the Petroleum Profit Tax Act[377]authorises the Federal Inland Revenue Service to delegate its powers to any person within or outside Nigeria except its powers under the First Schedule.[378]There was a similar provision in Section 3(4) (a) and (b) of the Companies Income Tax Act[379] (hereinafter referred to as CITA) but it was repealed by section 2(1) of the 2007 amendment to CITA.[380] On the other hand section 2(1) of the Taxes and Levies (Approved List for Collection) Act[381] provides as follows:

> (1) Notwithstanding anything contained in the Constitution of the Federal Republic of Nigeria 1979[382] as amended, or in any other enactment or law, no person, other than the appropriate tax authority, shall assess or collect, on behalf of the Government any tax or levy listed in the Schedule to this Act, and members of the Nigeria Police Force shall only be used in accordance with the provisions of the tax laws.

Umenweke has suggested that this section has resolved the conflict on whether the powers to collect taxes can be delegated.[383] He stated further that based on the doctrine of repealed by implication,[384] this provision has repealed the provisions of any other law inconsistent with it especially as it used the words 'notwithstanding anything contained in any

[376]*Op cit.*
[377] Cap P13, LFN, 2004.
[378] The First Schedule provides for administrative and Assessment powers. Section 3(1) a that has to do with collection of tax, is not in the First Schedule.
[379]*Op cit.*
[380]*Op cit.*
[381]*Op cit.*
[382]Now 1999 Constitution (as amended), *op cit*.
[383] MN Umenweke, *Tax Law and its Implications for Foreign Investments in Nigeria* (Enugu: Nolix Educational Publications, 2008) p. 76.
[384] By this doctrine where the provision of a later statute is inconsistent with provision of an earlier statute, there is a presumption that the later has modified or amended the earlier statute. See *Abacha v Fawehinmi (2000) FWLR* (pt 4) 533 at 600, *NPASF v Fasel Services ltd (2002) FWLR*Pt 97) 719 at 736.

other law.'[385] With the greatest respect section 2(1) of the Taxes and Levies Act[386] can at best be said to have resolved the conflict as to whether the FIRS can delegate its powers to consultant; but the provisions of the Taxes and Levies Act[387] cannot resolve the issue, as to whether States Revenue Services can delegate their powers. This is because; an act of the National Assembly cannot restrict the powers of a statutory body of a State.

The Taxes and Levies Act[388] is to a large extent unconstitutional. The Act in Section 2(1) under consideration had used the word 'notwithstanding anything contained in the Constitution.' This is a military heritage that cannot be sustained in our present democratic experience. The Taxes and Levies Act is an act of the National Assembly subject to necessary modifications to bring it in conformity with the 1999 Constitution as contemplated by section 315 of the 1999 constitution.

Furthermore, section 2(1) and particularly the Schedule to the Taxes and Levies Act[389] are unconstitutional because the National Assembly lacks the competence to determine the taxes collectable by the State and Local government councils, and how it will be collected.[390] It is therefore difficult with the greatest respect to agree with Umenweke's[391] view that section 2(1) of the Taxes and Levies Act[392] is not inconsistent with the provisions of the Constitution.[393] It is clear that by the provisions of the Taxes and Levies Act[394] the Federal Inland Revenue Service cannot delegate the collection of taxes. However, the provisions of the Act are unconstitutional

[385]MN umenweke, *op cit*, pp. 76-77.
[386]*Op cit.*
[387]*Op cit.*
[388]*Op cit.*
[389]*Op cit.*
[390] By the combined effect of Section 1(3) , 4 and item 9 and 10 of Part 2, 2nd Schedule, and the Fourth Schedule to the Constitution. Also the decision of the Court of Appeal in *A G Cross Rivers State &Anor v matthewOjua (2011) 5 TLRN*, 1 pp. at 19.
[391] MN Umenweke, *op cit*, p. 76.
[392]*Op cit*
[393]*Op cit*

to the extent that it seeks to make provisions for the collection of taxes by State and Local Government Councils. Thus, the State Inland Revenue Service or Local Government Revenue committees can engage consultants if they so wish, except where there are statutory restrictions in any extant State Tax Laws.

In most States the Governors prefer to use consultants, however, the Governors cannot on their own delegate the functions of the State Inland Revenue Service, except it is expressly permitted by statute. This was the decision in *IBL v MILAD Osun State*[395] where the then Military Administrator of Osun State sought to delegate the function of the State Internal Revenue Service, it was held that, he cannot delegate powers expressly given by statute to the board.

To a large extent, the use of consultants and agents to collect taxes has been abused by States and Local Government Councils. For instance, in major roads across the country, you will see agents of States and Local Governments barricading roads, and harassing motorist in the name of collection of taxes.[396]This is the most barbaric way to collect tax anywhere in the world. This ugly trend attracted the attention of the Joint Tax Board recently, following complaints by the Manufacturers Association of Nigeria on the negative impact of this ugly trend on businesses.[397] Consequent upon this complaint, the Joint Tax Board brought out a policy banning States from delegating the collecting of taxes to consultants by State Governments. The Board stressed that based on Section 2(1) of the Taxes and Levies Act;[398] it is illegal to engage contractors and agents to collect taxes. State tax authorities are therefore advised to desist from

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[394]*Op cit*
[395](2000) 1 NRLR 86, particular at 107 –108.
[396]J Onoyume 'Ministry of Works Tasks Governments on Illegal Highway Revenue Collector's Vanguard, August 3, 2013, p. 39.
[397] M Okwe 'Govt. Ban Tax Contractors in State, IGP to enforce policy' *The Guardian*, October 22 2013, p.1.
[398]*Op cit.*

this practice.[399] Unfortunately, the Joint Tax Board is just an advisory body; it lacks the capacity to enforce its decisions especially against states.

In a swift reaction to this policy, the Lagos State Government alleged that banning of the use of tax consultants and agents will lead to a loss of over 6.25 Billion Naira monthly, and these will negatively impact on the revenue generation profile of the State.[400] Thus, the States are most likely not going to comply. They may challenge the policy in Court, and it appears they have likelihood to succeed based on our earlier position on the constitutionality of the Taxes and Levies Act.

The use of tax consultants has a lot of negative effect, some of which are:

(a) The functions of the State's tax authorities are hijacked by consultants.

(b) The consultants sometimes use uncivilized methods to collect taxes.

(c) The cost of collection of the revenue in the States where consultants are engaged are higher, because the consultants collect a percentage of the tax collected

The negative effect of the use of tax consultants cannot be overemphasized; most State Revenue Service's are redundant, as their functions are now being carried out by consultants. It is therefore suggested that rather than engage consultants, the government should reorganize and strengthen their tax administration agencies. The exorbitant fees paid to the consultants should be used to provide infrastructural facilities, recruit personnel, train revenue service staffs and provide incentives to the staffs of the Revenue Service.There is no justification for the inability of State Revenue Service to effectively carry out their functions. The staffs of the revenue service need to be exposed to regular trainings. A major advantage of using the revenue service

[399] M Okwe, *op cit.*
[400] M Eboh, 'New Tax Law: Lagos to lose N6.25bn Monthly' *Vanguard* October 25, 2013, p. 9.

to collect taxes is that there is transfer of institutional memory from older generation of staffs to younger generation. Thus, institutional memory is preserved and improved upon.

The blocking of roads by the tax consultants and agents is barbaric. The Taxes and Levies Act envisaged this ugly trend and prohibited the mounting of road block for the purpose of collecting taxes. It is obvious, that the practice of blocking roads, and the imposition of multiple taxes by State governments, will serve as a great disincentive to the development of trade and investment within the State. It is therefore suggested that State governments should review their strategies and policy on the use of tax consultants for the collection of taxes.

3.2.6 Local Government Revenue Committee

The Local Government Councils do not have tax authorities like FIRS or the State Board of Internal Revenue. The collection of tax by the councils is administered by a Revenue Committee. Section 90 of the Personal Income Tax Act (as amended)[401] created local Government Revenue Committees. Again, this is unconstitutional, as the constitution did not give the National Assembly powers to legislate for Local Government Councils, except with respect to Area Councils of the Federal Capital Territory, in exercise of their powers as a State House of Assembly over the Federal Capital Territory.[402]

The Constitution unequivocally vest the powers of legislating for Local Governments on the State Houses of Assembly, in furtherance of this, the Delta State Internal Revenue Consolidation Law established the Local Government Revenue Committee.[403] Under this law the functions of the Local Government Revenue Committee shall be to assess and collect taxes,

[401]*Op cit.*
[402]Section 299 of the 1999 Constitution, *op cit*.
[403]Section 13.

fines, rates, charges or other revenues under its jurisdiction, and account for all such revenues collected in a manner to be prescribed by the chairman of the Local Government Council.[404]

It is obvious, that Section 90 of the Personal Income Tax Act (as amended)[405] is unconstitutional. Sections 88-93 of the Personal Income Tax Act are reflections of the unlimited powers of Military administrations, and ought to be amended to conform to the present day democratic realities, as enshrined in the 1999 constitution.[406] In practice State Governments hardly allow the Local Government Revenue Committees[407] to function, they compel them to delegate their functions to the state Governments.

3.3TaxAssessment in Nigeria.

Tax assessment is the process by which the tax liability of a person or company is quantified or determined.[187] In this sub Chapter, the procedure for ascertaining the taxable income from trade and investment will be examined.

3.3.1 Types of Assessment.

There are basically three types of assessment; the ordinary assessment or self Assessment, the best of judgment assessment and additional assessment.

(a) Self Assessment.

Self assessment has been defined as '… a system of tax administration whereby the taxpayer is granted the right by law to compute his tax liability, pay the tax due and produce evidence of tax paid at the time of filing his/her tax return at the tax office.'[188]Thus, it is an assessment done by the tax payer, in which case the tax payer determines his tax liability himself subject

[404]Section 15.
[405]*Op cit.*
[406]*Op cit.*
[407] Created under section 90 of PITA(as amended) *op cit*.
[187]JM Elegido, 'Void Assessments to Income Tax in Nigeria' (1988) *JAL*Vol 32, N0. 1, p. 45.
[188] FIRS Handbook on the implementation of Self Assessment Tax Regime in Nigeria, 2011, p. 5; see also, section 2 of Self Assessment Regulation.

to the acceptance by the tax authority.Self assessment was introduced into Nigeria in 1992 by the Finance Miscellaneous Taxation Degree N0. 2 of 1991, which empowered companies to self assess.[189] Despite the introduction of Self Assessment, there has been an inclination to Government Assessment.[190] This is because, the tax culture is poor and there is general apathy towards payment of tax in Nigeria. Nigerians see tax as a burden; this is due to the fact that Government has not been able to provide the needed infrastructure for businesses to thrive. In most cases, taxes are paid out of compulsionthus,taxpayers wait for notice of assessment from tax authorities before they pay their tax. This leads to unnecessary delay and impedes the free flow of revenue to government.[191]

The growing concern of tax administration throughout the world is how to simplify the tax assessment system to encourage voluntary compliance.[192] Many tax jurisdiction, have adopted the self-assessment tax regime, and there has been a recent shift by many developing countries from government assessment to self-assessment.[193] Developed countries like the United States of America and Japan have adopted Self Assessment for a long time. In the United States, the level of voluntary compliance is as high as 81% while in Japan the level of corporate compliance is above 90%. This is obviously not the case in many developing countries.[194] In developing countries, tax payer hardly get any value added to their lives by reason of the taxes they pay. There is high level of corruption in the utilization of revenue generated from taxes hence, the people are unwillingly to pay taxes because, there are strong indications that the revenue generated may not be used for the benefit of the society at large.

[189] *Ibid*.
[190] Under Section 65(1) of CITA.
[191] FIRS Handbook on Self Assessment, *loc cit*.
[192] O Deji and V Onja ' Self Assessment Regime: Towards Voluntary Compliance in Nigeria' *Gauge*, April – June 2011, p. 8.
[193] *Ibid*.
[194] *Ibid*.

Furthermore, the Government has not been able to provide a conducive environment for business, neither have they been able to provide necessary infrastructure. Thus, there is a general perception that Government does not deserve to collect taxes, because it has not lived up to the reasonable expectation of the citizens.

Nigeria, since 1992 has made frantic efforts to encourage the Self Assessment tax regime. Apart from its introduction in 1992 by the Finance (Miscellaneous Provisions) Taxation Degree of 1991, in the amendments to the Companies Income Tax Act[195] in 1996 and 2007, provision was made for the filing of self assessment returns.[196] Also, in exercise of the powers conferred on the Federal Inland Revenue Service[197] and with the approval of the Minister, the service made the Tax Administration (Self Assessment) Regulation, 2001[198] to regulate the Self Assessment regime.

The Self Assessment method has not been successful as envisaged in Nigeria.[199]This is largely attributed to the fact that there is a general apathy towards the payment of taxes in Nigeria. Also, because Nigeria is basically a cash society and most of the transactions are not done electronically, most companies like to declare low profit or loss. So in most cases the Federal Inland Revenue Service rejects such assessment and may review the books of the company to arrive at an assessment. Furthermore, a high percentage of the people are not experienced in computing their profit and loss, to enable them arrive at the taxable profit. However, the FIRS are making frantic efforts to see that more tax payers will adopt this method of assessment. Self assessment ultimately reduces administrative costs for tax authorities; it also reduces the discretionary powers of tax officials and reduces opportunities

[195]*Op cit.*
[196] Section 53–55 of CITA, there is a similar provision for Self Assessment by individuals in Section 44 of PITA.
[197] By Section 61 of the FIRS (E) Act.
[198]Federal Republic of Nigeria, Official Gazette, Lagos, N0. 117, Vol 98, 19th December, 2011.

for corruption.[200]Self assessment will help to curb excesses of tax authorities and will eliminate the need for tax consultants. It is therefore hoped that the Nigerian tax payer will become more inclined to the self assessment regime than the government assessment regime.

(b) Best of Judgment Assessment

This is also known as estimated assessment. This arises where the revenue authority makes an assessment base on its best of judgment. The best of judgment can arise in two ways.

(1) Where a company subject to tax has delivered its returns, but the tax authorities rejects it[201] or

(2) Where a company subject to tax fails or refuses to deliver a return, and the board is of the opinion that such company is liable to pay tax.[202]

It is important to note that the best of judgment assessment does not absolve a company of the penalties attached to its failure or neglect to deliver returns.[203]The essence of the Best of Judgment Assessment is to prevent a taxpayer from avoiding or evading tax by not filing its returns as at when due, or from filing underestimated returns.[204] Thus, a company must have failed to file its returns within six months after the end of its accounting period,[205] before the authorities can proceed to do a best of judgment assessment.[206]

The Best of Judgment Assessment is a veritable tool in the hands of the tax authorities. However, it should not be abused by the tax authorities and should not be used as a punitive

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[199] F Obaro, 'Self Assessment Can Drive Tax Growth in 2013' *Gauge,* January–March, 2013, p. 29.
[200]*Ibid* at p. 43.
[201]Section 65(2)b of CITA, similar provision in Section 54(2)n of PITA.
[202] Section 65(3) of CITA, similar provision in S54(3) PITA.
[203]*Ibid*.
[204]B Atilola, 'Best of Judgment (BOJ) Assessment: A Synoptic Guide to Tax Officers and Practitioners.'*NTN*Vol 15, N0.11, 2010, p.2.also*NJBCL*, Vol 1 N0. 3, 2010, p. 30.
[205]Section 55 of CITA.
[206]B Atilola, *op cit*, p. 3 and 30.

measure or a penalty against a tax payer.[207] It should not be arbitrary, excessive or unreasonable; it must not be done dishonestly, vindictively or capriciously. The assessment must therefore reflect a fair estimate of the tax payer's profit.[208] Thus, in *FBIR v Omotesho*[209]Belgore J as he then was, observed as follows:

> For a man to pay a tax of ₦52 on an annual income of ₦2000, and the same man to pay a tax of ₦200 naira on the same income of ₦2000 the following year, under the same conditions sound not only capricious and vindictive but oppressive. A Court should not be made to enforce such a manifestly unreasonable tax irrespective of whether the assessee disputes it or not.[210]

A Best of Judgment Assessment must not be done prematurely, thus, the authorities must wait for the expiration of the time for the delivery of returns before a best of judgement assessment. In *Commissioner of Revenue v Attah,*[211] the Court set aside a Best of Judgment Assessment because it was not satisfied, that the time for filling of the return has elapsed before the authorities raised the Best of Judgment Assessment. Also, in *Nigerian Breweries Plc v Lagos State Board of Internal Revenue*,[212] The Court of Appeal noted that the tax authorities must act reasonably and *bonafide* in the determination of the Best of Judgment Assessment. Thus, where different reliefs are granted between two years in similar circumstances, the tax authorities should be able to adduce reasons for such action.

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[207]*Ibid*.

[208]*Ibid*.
[209]I NTC, 57; also in (2012) 8 TLRN, 88.
[210]Particular at 92;particular at 90.
[211]I NTC 190.
[212] (2001) FWLR Pt. 72, p. 1974, 5 NWLR Pt. 759, p. 1.

The Court may not enforce a manifestly unreasonable assessment even if the taxpayer does not challenge it. Where the tax authority decides to reject the returns of a tax payer, it must inform the tax payer in writing before it proceeds to raise a Best of Judgment Assessment.[213] It has been held that a formal rejection of the tax payer's return is a condition precedent to raising a valid Best of Judgement assessment.[214]

Best of Judgment assessment is a useful tool to the tax authorities. However, the tax authorities must use this tool in a manner that will give rise to a fair estimate of the tax payer's profit. In *Lagos State Internal Revenue Board v Odusemi*,[215]Omotosho J, on the issue of Best of Judgment stated as follows:

> All that is required by this Court in deciding whether the assessment was to the best of the boards judgment is to adjudge, on the facts submitted, whether or not the board could honestly have believed that the taxpayer was chargeable to the extent indicated in the notices of additional assessment.[216]

It has also been held that the Best of Judgment assessments do not generally apply to tax payers subject to pay as you Earn (PAYE).[217] This is because; the assessment is usually done by the government.

(c) Additional Assessment.

The board may make additional assessment where a taxable person or firm has been assessed at a lesser amount of income than he ought to have been assessed, or there is an under

[213]B Atilola, *op cit*, pp. 6 and 33.
[214]*Reiss & Co Nig. Ltd. v FBIR* (1977) 3 FRCR, 251.
[215](1979) 3 LRN 119.
[216]Particular at 124.
[217]*Nigerian Breweries Plc v Lagos State Board of Internal Revenue, supra.*

assessment due to fraud or willful default or neglect on the part of the tax payer.[218] Section 65(1) of CITA[219] provide to the effect that if the board discovers at any time that any company liable to tax has not been assessed or has been assessed at less amount than that which ought to have been charged, the board may, within the year of assessment or within six years after the expiration thereof and as often as may be necessary, assess such company at such amount or additional amount, as ought to have been charged, and the provisions of this Act, as to notice of assessment, appeal and other proceedings shall apply to such assessment or additional assessment and to the tax charged there under: provided that where any form of fraud, willful default or neglect has been committed by or on behalf of any company in connection with any tax imposed under this Act, the Board may at any time and as often as may be necessary, assess such company at such amount or additional amount as may be necessary, for the purpose of making good any loss of tax attributable to the fraud, willful default or neglect.[220]

From this provision, it is clear that additional assessment is at the discretion of the tax authority, and the tax authority can exercise this discretion within six years. The objective of additional assessment is to prevent loss of revenue to the government by tax evasion or tax avoidance.

3.3.2 Procedure for Assessment.

The provisions of CITA and PITA clearly stipulate the procedure for assessment. The procedure is as follows:

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[218]SM Adesola, *Income Tax Law and Administration in Nigeria,* (Ife: University of Ife Press Ltd., 1986) p.33.
[219]*Op cit.*
[220] There is a similar provision in Section 55 of PITA, for the taxation of individuals.

(1) Where a company or taxable person has filed its return to the FIRS, without notice or demand, in accordance with Section 55 of CITA,[221] the Board may accept the audited accounts and returns and make an assessment accordingly or refuse to accept the return, and to the best of its judgment determine the amount of the total profits of the company and make an assessment accordingly.[222]

(2) The service shall cause to be served on or sent by registered post to each company, or person in whose name a company is chargeable, whose name appears on the assessment list, a notice, stating the amount of the total profits, the tax payable, the place at which such payment should be made, and setting out the rights of the company to object within 30 days.[223]

If any company or person disputes the assessment, he may file a notice of objection to the FIRS in writing to review and to revise the assessment.[224]The application shall contain the ground of objection to the assessment, particularly the amount of assessable and total profits of the company, for the relevant year of assessment and the amount of tax payable for the year which the company claims should be stated on the notice of assessment.[225]The FIRS can extend the time for filing a notice of objection, if it is satisfied that owing to absence from Nigeria, the person in whose name an assessment is made is unable to make an application within 30 days.[226]

On receipt of the notice of objection, the service may require the company to furnish such particulars it deems necessary, and to produce all books or other documents relating to the profits of the company, and may summon any person who can give evidence relating to the assessment.[227] If the company and the service agrees to the amount liable to be assessed, the

[221]Also, Section 44 of PITA.
[222]Also, Section 44 of PITA.
[223] Section 68 CITA, Section 57 PITA.
[224] Section 69 CITA, Section 58 PITA.
[225] Section 69(2) CITA.
[226] Section 69(3) CITA.
[227] Section 69(4) CITA, Section 58(2) PITA.

assessment shall be amended accordingly and notice of the tax payable shall be served upon the company, provided that where they fail to agree, the service shall give notice of refusal to amend the assessment as desired by the company and may revise the assessment to such amount as the Board may, according to the best of judgment, determine and give notice of the revised assessment, together with notice of refusal to amend the revised assessment.[228]

Any company aggrieved by an assessment, and has failed to agree with the FIRS, may appeal to the Tax Appeal Tribunal.[229] An assessment is said to be final and conclusive, where no valid objection or appeal has been lodged within the stipulated time.[230]

3.3.3 Basis of Taxation.

The liability to pay tax, in Nigeria, must be based on a statutory provision. The Section of any statute that creates a liability to pay tax is known as the charging provisions. Section 9(1) CITA[231] provides that tax shall, for each year of assessment, be payable at the rate specified in subsection (1) of Section 40, of this Act upon the profits of any company accruing in, derived from, brought into or received in Nigeria in respect of:

(a) Any trade or business for whatever period of time such trade, or business may have been carried on;

(b) Rent or any premium arising from a right granted to any other person for the use or occupation of any property; and where any payment on account of such a rent as is mentioned in this paragraph is made before the expiration of the period to which it relates and is included for the purposes of this paragraph in the profits of a company, then, so

[228] Section 69(5) CITA, Section 58(3) PITA.
[229] Section 59 FIRS(E) Act. The provisions of Section 71-75, PITA on Appeal Commissioners are no longer applicable.
[230] Section 76 CITA.
[231] Similar provision on taxation of individual is in Section 3 of PITA.

much of the payment as relates to any period beginning with the date on which the payment is made shall be treated for these purposes as accruing to the company proportionally from day to day over the last mentioned period or over the five years beginning with that date, whichever is the shortest.

(c) Dividends, interest, royalties, discounts, charges or annuities.

(d) Any source of annual profits or gains not falling within the preceding categories.

(e) Any amount deemed to be income or profit under a provision of this Act, or, with respect to any benefit arising from a pension or provident fund, of the Personal Income Tax Act.

(f) Any amount of profits or gains arising from acquisition and disposal of short term money instruments like Federal Government securities, treasury bills, treasury or savings certificates, debenture certificates, or treasury bonds.

From the forgoing, a taxpayer is liable to pay tax, only when he is in receipt of an income chargeable, as against capital receipt.[232] Generally, every income is chargeable, except it falls into any of the allowable deductions or exemptions provided under any statute.

The Company Income Tax Act[233] did not define the word income, however the Personal Income Tax Act[234] defines income as follows: 'income includes any amount deemed to be income under the Act' this definition falls short of a definition, at best it is a tautological definition, and does not serve the purpose of a definition. The Webster Dictionary defines income as 'whatever is received as gain e.g. wages or salary, receipts from business, dividends from investment etc.'[235] It was also defined by the Chambers 21st Century Dictionary as 'money received over a period of

[232] MN Umenweke, *op cit*, p. 99.
[233] *Op cit*
[234] Section 3(2) b.
[235] LT Lorimer, *The New Webster's Dictionary of the English Language* (Int. Ed.)(New York: Lexicon Publications Inc., 1995) p. 489.

time as payment for work etc; or as interest or profit from shares or investment.'[236]Adeshola defined income as 'the amount of an individual's consumption outlays plus the increase or minus the decrease in his net worth during a particular time period.'[237] Income was defined by Somolu J. in *Williams v Reginal Tax Board*[238]as follows: 'Income means gains, or profit from any trade, business, profession or vocation. It is excess of returns over outlay and the gains as profits.'From the above definitions, it is clear that an income implies a gain or profit from a business, capital investment or wages.

It is also important to define the word profit. The Cambridge International Dictionary of English defines profit as 'money that is earned in trade or business especially after paying the cost of producing and selling goods and services.'[239]

Similarly the Dictionary of English Law defines profit as 'advantage or gain in money or in money's worth.'[240] Nigerian statutes did not define profits; also the UK Taxes Act does not clearly specify what constitutes profit.[241] In the UK, the earliest judicial pronouncement as to what constitutes profit was given in 1888 by Lord Herschell in *Russell v Aberdeen Town and Country Bank,*[242] he stated that: '…the profit of a trade or business is the surplus by which the receipts from the trade or business exceed the expenditure.'

Gains on the other hand have been defined by the Chambers 21st Century Dictionary in the verb form to mean 'to get, obtain or earn (something desirable), to win (especially a victory or prize) to have or experience an increase in something.[243]It appears that from the definitions above income, profit and gains are similarly and can be used interchangeably. Thus, it has been

[236] M Robbison, *Chambers 21st Century Dictionary* (London: Chambers Harrap Publishers Ltd, 2001)
[237] DM Adesola, Income Tax Law and Administration in Nigeria, culled from MN Umenweke, *op cit,* p. 91.
[238]2012, 6 TLRN, 130, pp at 132.
[239] P. Procter (ed.) *op cit*.
[240] J Earl, *TheDictionary of English Law*, (London: Sweet and Maxwell Ltd.,) Vol 1.
[241] J Law and EA Martins (eds), *Oxford Dictionary of Law*, 7th ed. *Op cit*. p. 430.
[242](1888) 13 AC 418.

observed that 'a thorough examination of the above definitions of income, profit, and gain will reveal that they all boil down to the same meaning, income, profit or gain means an increase in worth or spending power.'[245]

Section 9 of the Companies Income Tax Act, places a liability to tax on the profits of any company accruing in, derived from, brought into, or received in. These words were also used in the Income Tax Management Act,[246]but were not retained in the Personal Income Tax Act (as amended).[247]Instead the charging provisions of PITA[248] uses the words 'from a source inside or outside Nigeria' which is easier to construe.

The charging provisions of the tax statutes of many Commonwealth countries also have similar provisions.[249] For instance, Section 51 of the New Zealand Land Income Tax Assessment Act 1900, charges tax on 'all profits derived from and / or received in New Zealand.' Also, Section 42 of the Victoria Income Tax Act charges profits earned in or derived from Victoria. Similarly, Section 5 of the Trinidad and Tobago Income Tax Ordinance 1940, charges any income 'accruing in, derived from or received in the colony. Section 10(1) of the Singapore's Income Tax Act imposes tax on income 'accruing in or derived from Singapore or received in Singapore from outside Singapore.[250]

The meaning of the words 'accruing in, derived from, brought into or received in' needs to be further examined.Accruing in is a combination of the words "Accrue' and 'in." The words accrued in and derived from does not seem to have the same meaning, however in *CT v Kirk*,[251] the word derived was treated as synonymous with the word arising or accruing. This was

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[243]*Opcit*.
[245] MN Umenweke, *op cit*, p. 93.
[246] 1961
[247]*Op cit.*
[248]Section 3.
[249] MN Umenweke, *op cit*, p. 112.
[250] Cap 134 Laws of Singapore www.singaporelaw.sg Accessed on the 1st may, 2016.

followed in the Nigerian case of *Offshore International SA v FBIR*.[252]Clearly to derive and to accrue cannot mean the same thing. The Merriam Webster Dictionary[253] defines derive as follows: 'to take, receive, or obtain especially from a specified source' while accrue is defined as 'to accumulate or be added periodically'[254] Therefore derived from is targeting tax from income earned outside Nigeria while accrue in is targeting tax from income earned within Nigeria. In this direction ithas been observed, that:

> It would seem clear that 'accruing in' was intended to cover gains or profits arising in Nigeria, while 'derived from' is charged to tax gains or profits that had their source in Nigeria even if they became due and payable elsewhere.[255]

The arguments on the difference between accruing in and derived from could have been avoided by simply stating that any income from any source is deemed to have accrued in Nigeria and are taxable subject to the exceptions provided by extant tax laws and double taxation agreements. This will help to achieve the intendment of the Legislature to bring every income within the tax net, irrespective of where it is earned.

The words 'Brought into or Received in', used in Section 9 of CITA[256] appears to have the same import with the words accruing in and derived from. It is something that is brought into that you receive in, in other words you can only receive in what is brought into. Whether it is necessary to use these words in the Act is another subject of debate. It has been argued that the words appears unnecessary and of no effect,[257] because Section 13 of CITA[258] provides to the

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[251](1900) A C 588 at 592.
[252]Unreported FHC decision, cited in MN Umenweke, *op cit*, p. 123.
[253] Merriam Webstar E-Dictonary, *op cit*.
[254]*Ibid.*
[255]MN Umenweke, *op cit*, p. 125
[256]*Op cit*.
[257]*Ibid* at 140.

effect that the profit of a Nigerian company shall be deemed to accrue in Nigeria wherever they have arisen and whether or not they have been brought into or received in Nigeria.[259] It further provides that the profits of a company other than a Nigerian company from any trade or business shall be deemed to be derived from Nigeria;[260]if that company has a fixed base in Nigeria. Thus, it was further noted that: '…as there is no alternative to a company being either Nigerian company or a company other than a Nigerian company, the fact of any company profits having been brought into or received in Nigeria or not is irrelevant for taxation purposes.[261] While this argument seems tenable, it is my position that the real issue is whether the words 'brought into or received in' in both section 9 and 13 of CITA[262] are the most appropriate words to convey the intendment of the Legislature. It is obvious that they are not, it is therefore suggested that in place of the words 'brought into or received in' the words 'from any source inside or outside Nigeria should be used. This is easier to construe, thus, Section 9 and 13 of CITA[263] should be amended by substituting the words 'accruing in, derived from, brought into or received,' with the words, 'from any source inside or outside Nigeria.'

As a general rule, every income is subject to tax, however, there are exemptions, reliefs, allowable deductions, provided by the relevant statutes. These exemptions and reliefs are intended to stimulate and encourage investment in certain sectors of the economy. In chapter four of this dissertation the researcher shall examine whether tax incentives have been able to create the necessary impact on trade and investment in Nigeria.

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[258]*Op cit.*
[259]*Ibid*.
[260]*Ibid*.
[261]MN Umenweke, *op cit*, p. 40.
[262]*Op cit.*
[263]*Op cit.*

In this chapter, an attempt was made to look at the devolution of taxing powers in Nigeria. Also, the structure for the administration of tax laws in Nigeria was examined. It was necessary to undertake these analyses to lay a proper foundation for further discussions in chapter 4 and 5 of this work. In subsequent chapters, I shall demonstrate how the structure of tax administration in Nigeria, encourages multiple taxation with the attendant negative impact on trade and investment.

CHAPTER FOUR

IMPACT OF TAXES ON TRADE AND INVESTMENT IN NIGERIA.

4.1 Relationship between Taxation and Investment.

Any nation desirous of developing economically must initiate fiscal policy measures geared towards making it easy to do business in that country. One critical policy measure that has direct implication for trade and investment is taxation. In the international economic community, Nigeria is not considered as a very favourable place to do business. Thus, Nigeria has consistentlybeen rated low on the ease of doing business index survey by the World Bank.[408] For instance, Nigeria was ranked 175 out of 188 economies surveyed in 2014,[409]170 out of 189 economies surveyedin 2015 in the ease of doing business report and in the 2016 report Nigeria ranked 169 out of 189 economies surveyed.[410]In arriving at their conclusions one of the indices used was paying taxes.[411] The annual paying taxes report by the World Bank and PricewaterhouseCoopers (hereinafter referred to as PWC) shows that Nigeria does not have an investment friendly tax system. In the paying taxes index survey 2014, Nigeria ranked 170 out of 189 economies surveyed,[412] in 2015Nigerian's ranking decreased to 179[413] and dropped further

[408] Ease of Doing Business in Nigeria http//:www.tradingeconomics.com/Nigeria/ease-of-business. The ease of doing business index is a survey by the World Bank where countries are ranked against each other based on how the regulatory environment is conducive to business operations

[409] World Bank, doing business in Nigeria 2014, 'Understanding Regulations for small and medium size Enterprises' www.doingbusiness.org/data/Nigeria accessed 14th of www.doingbusiness.org/data/Nigeria accessed October, 2015.

[410] World Bank , Doing Business 2016 in Nigeria: 'Measuring Regulatory Quality and Efficiency' www.doingbusiness.org/data/Nigeria accessed on the 10th of May, 2016.

[411] World Bank , Doing Business 2016 in Nigeria *op cit*, p.5.

[412] PricewaterhouseCoopers & World Bank, 'Paying Taxes 2014: The Global Picture. A Comparison of Tax System in 189 Economies Worldwide,' https://www.pwc.com/paying-taxes/2014. p.166. accessed on the 10th of May, 2016.

[413] PricewaterhouseCoopers & World Bank, 'Paying Taxes 2015: 'The Global Picture. A Comparison of Tax System in 189 Economies Worldwide,' Worldwide,' https://www.pwc..com/paying-taxes/2015. p.153. accessed on the 10th of May, 20 16.

to181 in 2016.[414] These rankings clearly show that there has not been considerable improvement in our tax system in the last few years.

Taxation has considerable influence on how investment decisions are reached. According to the world bank 'the design of a tax system can influence firm's decisions on whether to operate in the formal sector as well as have other important economic effects'[415]Similarly, the PWC noted that 'tax remains in the top five of the perceived issues for businesses, with seven in ten CEOs (70%) somewhat or extremely concerned about the increasing tax levied on their businesses'[416]Thus, taxation is one of the major factors that determine whether a nation's fiscal policy is investment friendly or not. Shoyele and Asada illustrated the relationship between taxation and investment as follows:

> …taxation has since been recognized as a tool for the deliberate manipulation of social and economic phenomena. Thus, in line with this, taxation is a means not only for maximization of revenue but also the instrument for the deliberate encouragement of production through the diversion of expenditure from consumption to expenditure to investment.[417]

Investment is critical to the development of any nation, and Governments at all levels try to create a conducive investment climate to woo investors. In most cases this is done by introducing fiscal policy measures which include taxation. Unfortunately,Government at all levels in Nigeria seem to see taxation as principally a tool forrevenue generation, thereby neglecting other roles

[414] PricewaterhouseCoopers & World Bank Paying Taxes 2016: 'The Global Picture. A Comparison of Tax System in 189 Economies Worldwide,' https://www.pwc..com/paying-taxes/2015 p.131; World Bank , Doing Business 2016 in Nigeria *op cit, p.* 92 accessed on the 10th of May, 2016.
[415]*Ibid*, p.12.
[416]*Ibid*, p. 24.
[417] O Shoyele and D Asada, 'The Legal Regime of Corporate Taxation in Nigeria: An Appraisal for Management' (1996) *CJLJ*, Vol 2, No. 2, 67.

taxation could play in an economy. Thus, the Nigeria tax system contributed considerably to the low ranking of Nigeria in the ease of doing business index. The Nigerian tax system appears not to fully appreciate the role taxation plays in the stimulation of trade and investment in the economy of any nation. Hence, it is characterized by multiple taxes, double taxation, high tax rates, high compliance time and cost and abuse of taxing powers by State Governments.An excessive and arbitrary tax regime can inhibit the growth of investment and discourage investors.In this chapter, the researcher shall undertake an examination of the impact of high tax rates, multiple taxation and tax incentives on trade and investment in Nigeria.

4.2Types of Investment.

Generally, investments can be classified into direct investment and portfolio investment. Direct investment entails investors mobilizing funds to set up a business, while portfolio investment involves buying of stocks in existing companies or buying of Government bonds. Direct investments are either local direct investments or foreign direct investment. Local direct investment refers to investments by Nigerians in Nigeria. There are generally three ways, foreign investors can participate in business in Nigeria, they are:

(1) Foreign Direct Investment.

Foreign Direct Investment (hereinafter referred to as FDI)is direct investment byinvestors, who invest in Nigeria through registered companies. Even if a company is registered in the country of its origin, a new company must be formed and registered in Nigeria before it can do business in Nigeria.[418] This is the most popular mode of foreign participation in business in Nigeria.

[418] Section 54 and 56 of the Companies and Allied Matters Act,(hereinafter referred to as CAMA) Cap C 20 LFN, 2004..

Foreign direct investment is critical to the economic growth of any nation unfortunately; Nigeria is not one of the very attractive destinations for foreign investors. [419]African countries have been making frantic efforts to attract foreign direct investment, but her share of foreign direct investment flow has been low, compared to some other countries. While more developing countries are becoming significant host to foreign direct investment, foreign direct investmentflowsremain heavily concentrated in few countries.The top ten recipients are China, Brazil, Singapore, Indonesia, Mexico, Malaysia, Argentina, Peru, Chile and Colombia. Unfortunately none of these countries are in Africa.[420]

Althoughin Nigeria, efforts to attract foreign direct investment, has led to a marginal increase of foreign direct investment flows from $8,600,000.00 (Eight million, Six Hundred Thousand Dollars) in 1996,[421] to foreign direct investment flow worth more than $5,800,000,000.00 (Five Billion, Eight Hundred MillionDollars) in 2014.[422]

(2) Portfolio Investment.

This is done by the purchase of shares in a quoted company in the Nigerian Stock Exchange. Between 2008-2011, there was considerable rise in investors'confidence in the Nigerian Stock Exchange, which saw a consistent inflow of fresh portfolio investment into Nigeria until the Global Economic Meltdown hit the market.[423] Consequently, there has been a steady decline in portfolio investment as investors' confidence in the market has declined drastically.

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[419] NCS Ogbuanya, *Essentials of Corporate Law Practice in Nigeria*, (Lagos: Novena Publishers Ltd, 2010) p. 207.
[420] AO Popoola, 'Security, Stability, Foreign Investment and Economic Development in an Emerging Democracy: The imperative of Good Governance' in DA Guobadia and PT Akper (eds), *Foreign Investment Promotion in a Globalised World*, (Lagos: NIALS, 2006) p.30-31.
[421]*Ibid* at 33.
[422] B Idowu 'Nigerian Economy Attracts ₦ 1.5trn Foreign Investment in H1 2014' *Leadership Newspapers*, September 15, 2014, p. 1.
[423]AO Popoola, *op cit*, pp 33-34.

The major difference between foreign direct investment and Portfolio Investment is that the portfolio investor targets earnings through dividends, and he is not involved in the management and control of the company.[424]

(2) Exempted Unregistered Companies.

The general rule is that, any foreign company that wants to do business in Nigeriamust form and register a company in Nigeria.[425]However, there are certainsituations, where a company can be exempted from registration.[426] Section 56(1)of CAMA[427] provides to the effect that, a foreign company may apply to theFederalExecutive Council for exemption from the provisions of Section 54 of CAMA,[428]if theybelong to one of the following categories:

(a) Foreign companies (other than those specified in paragraph (d) of this subsection) invited to Nigeria by or with the approval of the Federal Government to execute any specified individual project.

(b) Foreign companies which are in Nigeria for the execution of specific individual loan project on behalf of a donor country or international organization.

(c) Foreign Government owned companies engaged solely in export promotion activities and

(d) Engineering consultants and technical experts engaged on any individual specialist project under contract with any of the governments in the federation or any of their agencies or with any other body or person, where such contract has been approved by the federal Government.

The resolve of the Government to attract foreign investment was strengthened by the enactment of the Nigeria Investment Promotion Commission Act[429](hereinafter referred to as

[424] MN Umenweke, *Tax Law and Its Implications for Foreign Investment in Nigeria*, (Enugu Nolix Educational Publications, 2008), p 287.
[425] Section 54 CAMA.
[426]Section 56(1), CAMA.
[427]*Op cit.*
[428]*Op cit.*
[429]*Op cit.*

NIPC Act). The Act applies to the totality of the economy and is intended to encourage inflow of foreign investment into Nigeria. Prior to the enactment of the Act, Nigeria operated a regulated economy.[430] This protected the local marketfrom international competitors.[431]

The objective of the NIPC Act was to provide an investment climate suitable for foreign investors.[432]To this end the Act established the Nigerian Investment Promotion Commission.[433]The commission has a mandate to among other things encourage, promote and co-ordinate investment in the Nigerian economy, initiate and support measures which shall enhance the investment climate in Nigeria for both Nigerian and non-Nigerian investors; assist incoming and existing investors by providing support services, identify specific projects and invite interested investors for participation in those projects.[434]

The functions of the Commission are all embracing thus, it has been described as a 'one stop shop for investors.'[435]One notable provision of the NIPC Act is Section 17, which provides to the effect that a non-Nigerian may invest and participate in the operation of any enterprise in Nigeria, except on items in the prohibited negative list.[436]

The Commission is empowered in consultation with relevant Government agencies, to negotiate incentives for special investment.[437]The Act provides for guarantees against expropriation of any enterprise by the Government.[438]Also, a foreign investor shall be guaranteed

[430] OA Odiase-Alegimenlen, 'An Appraisal of the legal and Institutional Regime for Foreign Investment Promotion and Protection in Nigeria' in DA Guobadia and PT Akper (eds) *op cit,* 8.
[431]*Ibid.*
[432]*Ibid* at 9.
[433]Section 1(1) of the NIPC Act.
[434]*Ibid*, Section 4.
[435] OA Odiase–Alegimenlen, *op cit*, p. 9.
[436]Section 31 of the NIPC, Act.For instance, production of arms and ammunitions.
[437]*Ibid*, Section 22.
[438]*Ibid*, Section 25.

an unconditional transferability of funds through an authorized dealer, in freely convertible currency.[439]

The Commission has a mandate to see that our investment climate is liberalized, and attractive to investors. In furtherance of this, the Commission has been organising investment promotion workshops/seminars locally and international to showcase the investment potentials in Nigeria. However, it has not been able to achieve much in this direction because,there are inhibiting factors, discouraging investment in Nigeria.Some of the factors are political unrest, armed conflict, low domestic investment levels, and frequent changes in economic policies that affect business evaluation of expected risks and returns, high tax rates and multiplicity of tax payments.[440]Until these issues are addressed, the commission may not be able to achieve much in its quest to attract investors.

The relationship between taxation and investment is the essence of this research, and particularly in this chapter, it shall be discussed extensively.

4.3 Impact of High Tax Rateson Trade andInvestment in Nigeria.

Taxation is a fiscal policy measure thus;tax rates should be competitive to woo investors.Unfortunately, corporate tax rates in Nigeria are relatively high and uncompetitive. This is becauseGovernment at all levels in Nigeria seem to see taxation as principally a tool forrevenue generation for the government, thereby neglecting other roles taxation could play in an economy.

In Nigeria, the average tax rate is put at 33.3%;[441]this is relatively high compared to other developing countries. Globally, the lowest total tax rate is found in Vanuatu with an average of

[439]*Ibid*, Section 24.
[440]AO Popoola, *op cit*, p. 31.
[441]Paying Taxes 2016: pp. 135 *op cit.*

8.5%, while the highest tax rate is in Tajikistan with an average of 81.8%.[442]Africa has the highest average total tax rate of 46.9%[443]and also the highest average number of taxes of 36.6%.[444]

In Nigeria the corporate tax rate is 30%.[445]There is also,provision for additional 15% for excess profit;[446] this provision is unnecessary and should be expunged, because it is difficult to determine excess profit and no company will voluntarily declare excess profit. The corporate tax rate in Nigeria is relatively high and is not responsive to the fiscal and economic objectives of Nigeria. Investors expect corporate tax ratesto be low; this is because other types of taxes like labour taxes and value added tax depend on subsisting business to a large extent. Businesses need to grow bigger and employ more people to enable the Government generate more personal income tax and value added tax.

The impact of high corporate tax rate on trade and investment of a nation cannot be overemphasized. Investor's especially foreign direct investors will consider the tax system of country particularly the tax rate before bringing in their funds. According to a World Bank Enterprises Survey in 21 economies, 'majority of these economies consider tax rates to be among the top five constraints to their businesses.'Also, the survey revealed that 'high corporate tax rates are negatively associated with the level of corporate investment and entrepreneurship. Moreover, economies with high tax rates like Nigeria have large informal sectors and high corporate tax rates have negative impact on economic growth.'[447]Studies by the Organization for Economic Cooperation and Development (OECD) corroborate the position of the World Bank

[442]:*Ibid*, pp.135-136.
[443]*Ibid* at p. 112.
[444]*Ibid* at p.114.
[445] Section 40(1) and 40(2) of the Companies Income Tax Act, Cap C21 LFN, 2004.
[446]*Ibid*, Section 40(2).
[447]Paying Taxes 2014, *op cit*at 12.

Enterprise Survey.[448] It is the researcher view thathigh tax rates lead to an increase in the cost of doing business and makes an economy uncompetitive for doing business.

A recent study of global corporate tax rates between 2006-2014, shows that several countries have reduced their corporate taxes. For instance, the United Kingdom reduced corporate taxes from 30% in 2006 to 21% in 2014, Sweden reduced from 28% to 22%, Germany from 38.34% to 29.58, Italy from 37.25% to 31.4%. South Africa reduced from 36.89 to 28%. Mauritius reduced from 25% to 15%.[449] The researcher is therefore suggesting that the corporate tax rate in Nigeria should be reduced to 20%. Furthermore,rather than have a high corporate tax rate, the rate of Value Added Tax should be increased for some selected goods and services.

4.4 Impact of Multiplicity of Taxes and Double Taxationon Trade and Investment in Nigeria.

There is a strong relationship between taxation and the development of trade and investment. One of the issues that investors consider is the number of tax payments in an economy unfortunately, in Nigeria there is the challenge of multiplicity of taxes. Thus, it has been observed that Nigeria has an average of 47 tax payments,[450] which is too many for a developing country. While it is regrettable that Nigeria has too many taxes, it is doubtful if Nigeria has up to 47 payments. The report seems to be premised on an erroneous assumption that an investor is expected to pay all the taxes in our tax laws at the same time. For instance, a company paying company's income tax is not expected to pay petroleum profit tax.

Nigeria imposes taxes for almost every issue taxable. In most cases rather than amend existing tax laws to incorporate a new issue sought to be taxed, the Government prefers to

[448] *Ibid* at p. 25.
[449] Corporate Tax Rates between 2006 and 2014, Table provided by KPMG International. http://www.KPMG.com. Accessed on the 1May, 2014.
[450] *Ibid* at p. 168.

impose a new tax law entirely. It is expected that with the enactment of the Companies Income Tax Act[451] and the Personal Income Tax Act[452] there should not be more than 5 additional tax payments investors will be subjected to. This is because all taxes target the income of tax payers and every direct tax can conveniently be taxed under the Companies Income Tax Act[453] or the Personal Income Tax Act.[454] Unfortunately, this is not the case in Nigeria, as almost every issue is taxed separately. For instance there is no need to have a special law to tax capital gains as it can conveniently be taxed under any of the Income tax Act; all that the legislature need to do in that situation is to simply amend the relevant sections of the Companies Income Tax Act[455] and the Personal Income Tax Act[456] tomake provision for the taxation of capital gains instead of enacting the Capital Gains Act.[457] Nigeria quest to attract investors will be boosted if she repeals the Capital Gains Tax Act.[458] Capital gains is not a major source of revenue for the Government, often times there is hardly gains from disposal of assets because the difference between the cost of assets when it was bought and when it was sold in most cases is not due to asset appreciation but inflation.Also, it is unnecessary to have the Tertiary Education Trust Fund (Establishment ETC.) Act,[459] the Act seeks to provide for the mandatory payment of 2% of the profits of any registered company in Nigeria[460] in addition to the 30% Companies Income Tax the company is expected to pay under the Companies Income Tax Act,[461] this is clearly double taxation and an attempt by the Government to shift her responsibility of funding education to Investors.

[451] *Op cit.*
[452] Cap P8 LFN, 2004.
[453] *Op cit.*
[454] *Op cit.*
[455] *Op cit.*
[456] Cap C1 LFN, 2004.
[457] *Op cit.*
[458] *Op cit.*
[459] 2011.
[460] *Ibid*, Section 1(2).
[461] *Op cit.*

Stamp duties is another example of multiple taxation and affects the development of trade and investment adversely in Nigeria.For instance, under the Stamp Duties Act[462] a mortgage is expected to be stamped.[463]The requirement for stamping of mortgages as one of the requirements for perfection does not seem to serve any purpose other than revenue generation. A mortgage is security for a loan transaction, it is not an income or profit; taxation should be from income and profits thus, mortgage deeds should be exempted from stamp duties. This is because payment of stamp duties depletes the value of the loan secured by an investor to boost his trade and investment and increases the cost of doing business. Furthermore, it leads to double taxation, as the investor will still pay his income tax from the proceeds of the investment.

Another Act that needs consideration is the Taxes and Levies (Approved List for Collection) Act.[464] This Actwas amended in 2015 by the Minister of Finance[465]to include most of the arbitrary taxes by State Governments. Part 11 of the Act which is on taxes collectable by State Governments was amended to include the following class of taxes: Business Premises Registration Fees of Urban and Rural areas of each State renewable annually, Land Use Charge, Hotel, Restaurant or Event Centre Consumption tax, Entertainment tax, Environmental Tax, Mining, Milling and Quarrying Fee, Animal trade Tax, Produce Sales Tax, Slaughter or Abattoir Fees, Infrastructural Maintenance Charge or Levy, Fire Service Charge, Property Tax, Economic Development Levy, Social Services Contribution Levy, where applicable and Signages and Mobile Advertisement jointly collected by State and Local Governments. Also, Part 111, which is on taxes collected by Local Governments was amended to include Wharf Landing Charge.[466]

[462] Cap S8 LFN, 2004.
[463]Section 80.
[464] Cap T2 LFN, 2004.
[465] Taxes and Levies (Approved List for Collection) (Act Amendment) Order, 2015.
[466]*Ibid*, section 3 and 4.

The Federal Government in reaction to the observation that taxing powers are over concentrated at the Federal level amended this Act to expand the no of taxes the States can collect. Although, it is arguable that an Act of the National Assembly cannot determine the taxing powers of States and Local Governments.Clearly this amendment seeks to institutionalise double and multiple taxation in Nigeria. For instance, Hotel, Restaurant or Event Centre Consumption tax and Entertainment tax are not different from Value Added Tax, thus it clearly amounts to double taxation to expect investors to pay Value Added Tax to the Federal Government and Hotel, Restaurant or Event Centre Consumption tax and Entertainment tax to the States. Furthermore, the inclusion ofMining, Milling and Quarrying Fee may expose investors to double taxation as they will still be liable to pay federal mining fees after paying state mining fees. Furthermore, the payment of business premises registration fees is targeted at generating revenue for the Government but it amounts to double taxation and is another example of multiplicity of taxes. This is because businesses are already subject to several taxes which includes companies income tax, personal income tax and tertiary education tax. Registration of business ought to be for the purpose of data collection to aid Government agencies in planning.This amendment will surely discourage investment and will not serve any purposes other than to expose investors to multiple taxes. It is the researcher's view that an Amendment of an Act of the National Assembly cannot address the imbalance in the distribution of taxing powers between the Federal and State Government; it is only a constitutional amendment that can effectively address this issue. A more detailed discussion on the effect of these state taxes on trade and investment is in chapter 5 of this dissertation.

The researcher is of the view that there is need to reduce the number of taxes and discourage multiplicity of taxes in Nigeria, if she wants to be considered an investor friendly

Nation. A comparison between Nigeria and Mauritius which is ranked no.1 in Africa and 32 in the world by the World Bank on the ease of doing business index[467] will clearly demonstrate this. Mauritius has an average total of 8 tax payments[468] compared to Nigerian's 47. The Nigerian tax system presently cannot stimulate thedevelopmentof trade and investment in Nigeria; this is further compounded by the multiplicity of taxes. In this direction, it has beenobserved that 'multiple taxation hinders economic development because it is a disincentive to foreign direct investment.'[469]The issue of multiplicity of taxes is compounded by the lack of fiscal federalism in the Nigerian Constitution, which has led to the proliferation of State taxes. Most of these state taxes amount to double taxation and in most cases are duplications of existing federal taxes.The abuse of State taxing powers will be discussed in detail in the next chapter. There is an urgent need to reduce theno of tax payments in Nigeria;the National Tax Policy clearly recognizes these challenges and proposes that there should be a reduction in the number of effective taxes.[470]

Furthermore, Nigeria has a relatively high compliance time in the payment of taxes. Studies indicate that it takes an average of 956 hours to pay tax in Nigeria. Whereas, in United Arab Emirates, it takes just 12 hours, 110 hours in the United Kingdom, United States 175 hours, Mauritius 152 hours, Malawi 175 hours, South Africa 200 hours.[471]The long time it takes in complying with payments of taxes in Nigeria and most African countries is largely due to lack of effective electronic filing system. Thus, there is an urgent need to improve on the Electronic Tax

[467] Mauritius Ease of Doing Business in Mauritius www.doingbusiness.org/data/exploreeconomics/mauritius/ accessed on the 4th of june, 2016.
[468]Paying Taxes 2016, *op cit*at 142.
[469] O Abioye 'Multiple Taxation Hinders Foreign Direct Investment' *The Punch*, March 28, 2014, 28.
[470] The National Tax Policy Document, Paragraph 3.4 D(i).
[471]Paying Taxes 2016, p. 137-140.

System. This will help to reduce the cost of compliance in addition to making payment of tax faster.

Most Countries in Africa have not fully embraced the electronic tax system. In the regional analyses for Africa by the Paying Taxes 2014 Survey, it was noted that only 3 out of 53 African countries effectively use electronic filing for all major taxes.[472]For instance, in Kenya the introduction of online filling, led to a considerable improvement in the processing time to pay taxes. It led to a reduction in the time required to comply with payment of taxes from 340 hours to 308 hours.[473] Nigeria is trying to embrace the electronic tax system by the introduction of the Integrated Tax Administrative System (ITAS), an electronic platform for filing returns and assessment.[474]

There is a relationship between an effective tax system and economic development of a nation. Thus, for Nigeria to develop into a major economic hub there is need to reduce compliance time and the number of tax payments.

4.5 Impact of Tax Incentives on Trade and Investment in Nigeria.

Revenue generation as earlier stated is not the only objective of taxation; taxation plays other key roles in the economy of a nation. For instance, it is an effective fiscal policy strategy, which can be used to stimulate the development of trade and investment. A conducive business environment is also, a tax friendly environment and even tax authorities benefit from such environment.Thus, Okauru noted as follows: 'Revenue generating agencies are usually major

[472]Paying Taxes 2014,at p. 34.
[473]*Ibid* at p. 16.
[474]*Ibid* at p. 45.

beneficiaries of a conducive investment and business climate as this greatly enhances their ability to discharge their primary responsibility of revenue generation.'[475]

The legislature, in line with Governments deliberate policy to stimulate investment into the economy, made copious provisions for tax incentives in the tax laws. In general terms, tax incentives can be used to attract local or foreign investment capital to certain sectors of the economy.[476]All over the world, tax incentives in the nature of tax reliefs/allowances, tax exemptions and deductions are provided in tax laws, to boost trade and investment.[477] Nigeria is not left out in this regard, our tax laws provide for various kinds of tax incentives, including tax relief/allowances, tax exemptions and allowable deductions.

A detailed examination of these incentives and their effectiveness as catalyst for economic development in Nigeria is the major focus of this dissertation.The impact of the various tax incentives on trade and investment in Nigeriawill be examined hereunder.

4.5.1 Tax Exemptions

Generally, the profits of any company accruing in, derived from, brought into, or received in Nigeria is taxable.[478]However, the various tax laws provide exemption from the liability to pay tax in certain circumstances or for certain sectors of the economy.The Companies Income Tax Act[479] did not define exempt income, however, in *Northern Nigeria Investment Ltd v FBIR*[480]Belgore J. (as he then was), defined the phrase 'exempt income' as '…income primarily subject to tax but exempt under another provision of the law.'According to Umenweke:

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[475] IO Okauru, 'Effective and Efficient Tax Collection and Administration in Nigeria in the three tiers of Government' A paper delivered at the retreat for members of the Revenue Mobilisation and Fiscal Commission on 15th February 2011, p.8.
[476]MA Popoola 'Taxation As an incentive for the Inflow of Foreign Investment to Nigeria' (1999) 1 *MILBQ*, p. 106.
[477] FE Nlerum, 'Reflections on the Attitude of the Courts to Tax Incentive Mechanism in Nigeria,' *NIALS JBL* p. 156.
[478]Section 9 of CITA.
[479]*Op cit.*
[480](1976) FRCR 93.

'…exempt income is therefore, income liable to be taxed by law but expressly excluded by another provision of the law.'[481]Thus, the researcher hereby defines: 'exempt income'as a profit subject to tax under the provisions of the law but immune from taxation by another provision of the law.

There are tax exemptions; in almost all the tax laws in force in Nigeria, in this research,some of the exemptions shall be discussed. Also, the impact of these tax exemptions on trade and investment shall be examined.

Generally, the exemptions under CITA[482] cannot play a significant role in the development of trade and investment in Nigeria. For instance, Section 23 (1) (o) of CITA[483]provides that dividends received from small companies in the manufacturing industry in the first five years are exempted. This provision is meant to encourage the growth of small scale industries;however, it is not adequate to encourage investment in small scale industries. The researcher is therefore suggesting that this provision should be amended to exempt small scale industries from tax for the first five years.Similarly, Section 23 (1) (p), (q), (r) (s) of CITA[484]exempts the profit from export oriented businesses also, the profit of any company, operating in the Export processing zone, whose production is 100% for export are exempted. These provisionsare meant to attract investment in the manufacturing of products for export. This provision is good and can stimulate the growth of trade and investment especially for export oriented products.

Furthermore, section 23 1(c) of CITA[485]exempts ecclesiastical, charitable or educational activities, however, the profit to be exempted are profits not derived from trade or business. It appears that our tax authorities are not mindful of this provision. Some religious organizations in

[481] MN Umenweke, *op cit*, p. 362.
[482]*Op cit.*see section 23(1).
[483]*Op cit.*
[484]*Op cit*

Nigeria engage in different forms of trading. Most of them have established educational institutions were they charge excessive fees amounting to profits in billions. Some of these organizations have established business plazas, water factories; eateries and even guesthouses, for profit purpose. It is clear that these activities constitute trading and by virtue of Section 23(1)c of CITA,[486] proceeds from these activities ought to be taxed. Only the proceeds from activities directly related to their ecclesiastical activities should not be taxed.

Also, there is the need for tax authorities to take a closer look at the activities ofcharitable organizations. In Nigeria today, politically exposed persons hide under various Non-GovernmentalOrganisations (hereinafter referred to as NGO) to amass wealth, for instance, most Governors wives establish NGO's with which they engage in activities that yield very high profit. A recent example is the launch of a book published by the foundation of the wife of President Buhari. It is reported that a copy of the book sold for a minimum of ₦10,000.00 (Ten Thousand Naira) and over ₦55, 000,000.00 (fifty five million naira) has been realized.[487]Another good example is the Police Officers Wives Association (POWA), an NGO established for the welfare of police officers wives. The NGO is in the business of building shopping malls all over the country, whichare rented to anybody that is interested. Proceeds from these ventures falls within the definition of trading and ought to be taxed.

In the United States, to be exempt, the charitable organization must be organized and operated exclusively for charitable purpose, its earnings, shall not be for the benefit of any private shareholder or individuals. It must also, not be involved in any campaign activity for or

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[485]*Op cit*
[486]*Op cit*
[487] E Achibong 'Guest Conceal Donations at Aisha Buhari's Book Launch' *Businessday Online,* http:www,businessdayonline.com., accessed on the 5th of June 2016.

against political candidates.[488] In this direction, Hansmann has observed that; in the US profit oriented organizations are complaining that the nonprofit organizations, which enjoy tax exemption, enjoy an unfair competitive advantage. This is because some of them are not running the firms as charitable organisations in the strict sense of it; as they charge fees for service, e.g. some Nursing homes.[489]This seems to be the situation in Nigeria, and there is need to enforce our tax laws in this regard[490]

It is the researcher's position that, no serious investor will find the tax exemptions under the provisions of CITA[491] as a motivator to invest in Nigeria. Most of the exemptions are to encourage social and religious activities. For tax exemptions to have considerable impact on trade and investment it must be relevant to the needs of investors. Nigeria needs more proactive tax exemptions if it is to develop. Thus, the researcher is therefore suggesting that section 23(1) of CITA[492] should be amended to provide five years tax moratorium for any new company in Nigeria that employs more than 20 people. This will give the companies the opportunity to stabilize, grow capacity and invest more in their development. On the other hand the Government will have a steadier source of tax revenue after the company has stabilized.

The Value Added Tax Act[493](hereinafter referred to as VAT Act.) also provides for some very important exemptions in Sections 3 and the First Schedule to the Act. They are:

(1) Fertilizer,locally produced agricultural and veterinary medicine, farming machinery and farming transportation equipment.[494]

[488] Section 501 (c,13) of the Internal Revenue Code of the United States of America.
[489] H Hansmann, 'The Effect of Tax Exemption and Other Factors on the Market Share of Non Profits Versus for Profit Firms' *National Tax Journal*, Vol XL p. 71. http://www.law.yale.edu. Accessed on the 1/5/2014.
[490] Section 23(1)(1)(c) of CITA, *op cit.*
[491]*Op cit.*
[492]*Op cit.*
[493] Cap VI LFN, 2004.
[494]Part 1 of the First Schedule of the VAT Act, item 5.

(2) Plant, machinery and goods imported for use in Export processing zones or free trade zones provided that 100 percent production is for export, otherwise tax shall accrue proportionately on the profits of the company.[495]

(3) Plant, machinery and equipment purchase for utilization of gas in downstream petroleum operation.[496]Tractors, ploughs and agricultural equipment and implements purchased for agricultural purposes.[497]

(4) All exports.[498]

Also, Services rendered by community Banks and Mortgage institutions[499]and all exported services.[500]

These exemptions are necessary to boost the agricultural and manufacturing sector. It is also, intended to make exports goods competitive, asimporting nations will prefer to buy from countries where products of the same quality are cheaper. Also, the exemption of all products for export is logical, because VAT is a tax on the consumption of goods or services; export products are not expected to be consumed in Nigeria and therefore, should not be subject to VAT.In this direction Ohurogo stated thus: 'the current regime exempting all exports is in order, and tallies with the practice in several other countries, and also will ensure that our exports are not too expensive for competition.'[501]The exemptions also seek to encourage local manufacturing of fertilizer, which is why the exemption does not apply to imported fertilizer.[502]

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[495]*Ibid*, item 7.
[496]*Ibid*, item 8.
[497]*Ibid*, item 9.
[498]*Ibid*, item 6.
[499] Part II of the First Schedule to VAT Act, item 2.
[500]*Ibid*, item 4.
[501]*Ibid*, item 4.
[502]*Ibid*.

Nigeria currently has one of the lowest Value Added Taxrate in the world, currently it is 5%.[503]In some other jurisdiction, it is higher, for instance, in UK it is 17.5%, Argentina 21%, Bolivia 13%, Mexico 15%, in Netherlands 17.5%, in Nicaragua 125%, Poland 21%, South Africa 14%,[504] in Ghana 17.5%.[505] The administration of President OlusegunObasanjo tried to increase Value Added Tax from 5% to 10% in 2007.[506] This led to wide spread protest that forced the government to reverse its decision. However,it is better to reduce Company Income Tax and increase VAT because, companies do not bear the direct burden of paying value added tax, except for raw materials and equipments some of which are exempted. In this direction,Ohurogu has noted that:

> … it may be necessary to charge a higher percentage of VAT on the consumption of some goods and services especially those considered medically harmful, so that people may be discouraged from the consumption of such goods. In some jurisdictions, there exist different categories of goods and services. For example in Ireland, the rate of VAT ranges from 3.6% to 21%, with the standard rate of 12.5% applying to a wide range of goods and services.In Italy, the rate of Value Added Tax is 20% reduced to 10% or 4% for most food, agricultural products, houses in certain circumstances and other essential items, while in Luxembourg the rate of VAT varies

[503]Section 4 of the VAT Act.
[504] CC Ohurogo, 'Value Added Tax & Administration in Nigeria,' *MILBQ*, Vol. 5, No. 2., p. 120.
[505] Ghana VAT Act, 870, 2013, httt://www.gra.gov.gh. Accessed on 1st of May, 2014.
[506] T Raheem 'Whoever Says Fuel is being subsidized is a Poor Economist' *The Sun,* July 2 2007, p. 10.

from 3 to 15%, while in Sweden VAT rates are 6%, 12% and 25% depending on the nature of goods and services.[507]

This suggestion has some merits; however, the increase of VAT on medically harmful products in actual fact may not discourage the use of such products as suggested by ohurogu.[508]For instance,the increase of VAT on cigarettes may not discourage smoking, because cigarette smoking is addictive and an inelastic demand, thus Government may end up just generating more revenue.

The researcher therefore opines that there is need to increase the rate of Value Added Tax in Nigeria. Furthermore,Nigeria should adopt the practice in Ireland, Italy, Sweden and Luxembourg of imposing different rates for different categories of goods and services. One quick way to do this in Nigeria is to impose a high VAT rate for imported goods and services that local alternatives are available in Nigeria. This will lead to anincrease in the prices of such products and may lead to a reduction in the demand for such goods and services and help our local industries to grow. Also, locally produced goods should be exempted from VAT for the first five years. This will allow the product time to grow and penetrate the market. This will also, encourage consumers to take advantage of the low price of the products rather than their imported alternatives. For instance, Value Added Tax for imported processed foods, imported drinks, cigarettes, imported clothes, imported shoes and bags should be increased. This will make these items very expensive, and reduce demand for them. The effect will be an increase in the demand for locally produced goods with the attendant effect of boosting trade and investment in Nigeria, reduction in capital flight and unemployment. It will also, make some of the foreign companies manufacturing those products to consider the option of setting up plants in Nigeria.

[507] CC Ohurogo, *op cit*, pp. 119-120.
[508]*Op cit.*

Thus, foreign direct investment can be attracted through an increase in Value Added Tax rate for some goods.

Another law that needs to be examined is the Stamp Duties Act.[509] Stamp duty is a means of generating revenue for the government by requiring that stamp duties should be paid to perfect certain documents.[510] It is a tax on document not transaction, and apart from increasingthe tax burden on investors it also, leads to an unnecessary delay in the completion of commercial transactions. The Stamp Duties Act[511] among other things exempts the Government and her agencies,[512] transfer of interest in a ship[513] and also, the transfer of interest in land in rural Areas.[514] From the foregoing, none of the exemptions have any relevance to trade and investment. This Act seems to be an anti-investment Act, and has negative impact on trade and investment in Nigeria. A typical example of the negative effect of stamp duties on business is the requirement of stamping for perfecting of a mortgage transaction,[515] and up stamping where additional loan is secured with the same property.[516] It is unnecessary to impose stamp duty on mortgages. A mortgage is the use of land as security for a loan, thus, it is a loan transaction. Tax should be paid from profits and not loans. Stamp duty on mortgages, increases the cost of doing business in Nigeria. Recently the Federal Government imposed a ₦50.00 (Fifty Naira) stamp duties on any bank transaction that is up to ₦1000.00 (One Thousand Naira)[517] pursuant to the provisions of section 33 and 115 of the Stamp Duties Act.[518] However, transfer from self to self

[509] Cap S8 LFN, 2004.
[510]Section 3(1) of the Stamp Duties Act, *op cit.*
[511]*Op cit.*
[512]General Exemptions to Stamp Duties, Schedule to the Stamp Duties Act, *op cit.*
[513]*Ibid.*
[514]*Ibid.*
[515]Section 80(3) of the Stamp Duties Act, *op cit.*
[516]*Owoniboys Technical Services Ltd v UBN Ltd.* (2003) 7 S C, 165 at 189, (2003) 15 NWLR (Pt 844) 545.
[517] B Komolafe 'FG Imposes N50 Stamp Duty on Bank Customers' *Vanguard*, January 20, 2016,p.21.
[518]*Op cit.*

and transactions on savings accounts are exempted.[519]This new policy is meant to generate revenue for Government, but will automatically lead to an increase in the cost of doing business in Nigeria.

The Stamp Duties Act[520] was developed from the UK Stamp Duties Act 1859. Interestingly, most parts of the Stamp Duties Act still retained in Nigeria have been done away with in England.[521]In some State in Australia, stamp duty has been abolished.[522]In this directionAjayi and Adeoba have suggested that there may be need to do away with the Stamp Duties as a means of revenue generation.[523]This is based on the fact that potential investors will be attracted to an economy with reduced business costs and lower taxes.They further opined that, stamp duties payment delays the perfection of agreements and is therefore a clog in the wheel of entrepreneurial progress and economic development.[524]

It seems that stamp duties are a form of double taxation. This is because tax is based on income; the income from any transaction subject to stamp duties is liable to personal income tax, companies' income tax or capital gains tax. Also, where it is not a transaction that generates income, like a mortgage transaction, then there will be no basis to charge stamp duties as tax should be based on income earned. The researcher is therefore suggesting that stamp duties should be abolished in Nigeria. It generates very little revenue, creates unnecessary delay for investors and increases the cost of doing business in Nigeria.

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[519] B Komolafe, *loc cit.*
[520]*Op cit.*
[521] K Ajayi and K Adeoba, 'Stamp Duties Assessment and Payment in Nigeria' (1999) 2 *MILBQ*,113.
[522] R King, 'Australian Mortgage Stamp Duty'(2000) *JIBL* 145; also, P Harbaum 'Australia Significant Changes to Stamp Duty Law' 1 *BFL* 1995, 64.
[523]K Ajayi and K Adeoba, *loc cit.*
[524]*Ibid* at 124.

There are also, tax exemptions under the Capital Gains Tax Act.[525] The exemptions are for charities,[526] statutory bodies,[527] retirement benefits,[528] decorations,[529] stocks and shares,[530]replacement of business assets,[531] gains arising from the acquisition of shares from a company either taken over or merged,[532] and reinvested proceeds from unit trust schemes.[533]Most of these exemptions are irrelevant to trade and investment, except the last three. The issue is whether it is still relevant to have capital gains tax in Nigeria? Capital gains tax is charged on the gains accruing to a person or company from the disposal of an asset. It is arguable that there is no need for a special law to charge the gains arising from the disposal of assets. Any gain can be taxed under personal income or companies' income. Thus, Capital Gains Tax, Act[534] should be abolished. They constitute an unnecessary burden on investors. The capital market operators have been advocating, the abolishment of Capital gains tax for dealings in securities.[535] There is need to make the Nigerian tax system capital market friendly, like Egypt, where there is neither withholding tax nor capital gains tax, and equity investment is exempted from stamp duty.[536] Furthermore, when China wanted to stimulate more activities in the capital market in 2011, she reduced the taxes on capital market operations. This led to an unprecedented increase in the volume of transaction and attracted foreign direct investment in the china capital market.[537]

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[525] Cap C1 LFN, 2004.s
[526]Section 26 of the Capital Gains Tax Act, *op cit.*
[527]*Ibid*section 27.
[528]*Ibid*section 28.
[529]*Ibid*section 29.
[530]*Ibid*section 30.
[531]*Ibid*section 31.
[532]*Ibid*section 32.
[533]*Ibid*section 33.
[534]*Op cit.*
[535] N Okereke-Onyiuke,'Taxation and Capital market Operations in the New Millennium' (1999) 4 *MILBQ* p.120.
[536] SA Ndanusa 'Taxation and Capital market Operations in the new Millennium' (2000) 1 *MILBQ* p. 111.
[537] Tax Issues and The Capital Market www.myfinancialintelligence.com accessed on 5th December, 2015.

The Tax exemptions have not been able to make much impact in the development of trade and investment in Nigeria. This is because tax exemptions alone are not sufficient to encourage the growth of trade and investment;investors expect corporate tax rate to be low and a conducive environment.Thus, Government should provide necessary infrastructure and sound economic policies to encourage investment. Mauritius for several years has maintained the No.1 ranking as the most attractive place for investment in Africa.[538]This is attributable to a number of factors, which include availability of necessary infrastructure and a competitive tax system. Nigeria should emulate Mauritius in this regard.

4.5.2 Tax Reliefs and Allowances.

The fiscal policy of a nation is critical to the growth and development of trade and investment in that nation. In Nigeria, the fiscal policy on taxation is geared towards stimulating investment by the provision of tax concessions. Thus,there are provisions for tax reliefs in our tax laws.

Relief has been defined by the Oxford Dictionary of Law as 'a tax concession.'[539] A tax relief is the reduction of the tax liabilityof a tax payer under the provisions of the law.There are several reliefs and allowances, which can encourage trade and investment in Nigeria. Section 31(2)(a) 3 and 4 of CITA,[540] grants relief to a company for losses incurred in the preceding year. This allows a company to deduct the losses it incurred in any trade or business during any year of assessment, provided that the deduction for any particular year of assessment shall not exceed the amount if any, of the assessable profits from the trade or business of the assessment year.

[538] Kyle Kim 'Best and Worst Countries to do business in Africa' http://www.globalpost.com. Accessed on the 1st May, 2014.
[539] *Op cit.*
[540] *Op cit.*

Under PITA[541] there is relief for trading losses incurred by a tax payer in the carrying on of a trade or business.[542] The relief from trading losses can be obtained in either of the following ways:

(a) Against the total assessable income of the tax payer for the year of assessment in which the loss was incurred.[543]This is otherwise known as current year loss relief.'[544]

(b) These losses can be carried forward and deducted from future assessable income; from the particular trade the losses were incurred.[545]

A taxpayer, who wishes to enjoy this relief, must apply within a period of 12 months after the end of the year of assessment.[546]

Where a company has incurred expenditure for the replacement of an obsolete plant and machinery, there shall be allowed to that company, 15% investment tax credits.[547] Also, where a company has incurred an expenditure on plant and equipment, there shall be allowed to that company an investment allowance of 10% of the actual expenditure incurred on such plant and equipment in addition to an initial allowance under the Second Schedule to CITA.[548]

There is also, the rural investment allowance. Where a company incurs capital expenditure on the provisions of facilities such as electricity, water or tarred road for the purpose of a trade or business which is located at least 20 kilometers away from such facilities provided by the government, there shall be allowed to the company in addition to an initial allowance under the Second Schedule to this Act, an allowance (in this Act called 'rural investment

[541]*Op cit*.
[542]Section 36(2) of PITA,*op cit*.
[543] Section 36(2)a of PITA,*op cit*.
[544] MN Umenweke, *op cit*, p. 382.
[545] Section 36(2)b of PITA, *op cit*.
[546] IA Ayua*The Nigerian Tax Law*, (Ibadan: Spectrum Law Publishing, 1996) p. 142.
[547] Section 41 CITA, *op cit*.
[548]*Ibid*, Section 32(1 and 2).

allowance') at the appropriate percent set out in subsection (2) of this Section of the amount of such expenditure.[549]

The rate of the rural allowance, for the purpose of this section shall be as follows:[550]

(a) Where there are no facilities 100%

(b) Where there is no electricity 50%

(c) Where there is no water 30%

(d) Where there is no tarred road 15%

Provided that where any allowance has been given in pursuance of this section, no investment allowance under section 32 of this Act shall be due or be given in respect of the same asset or in addition to the allowance given under this section.[551]

There is also, relief for foreign and agricultural loans. Interest payable on any foreign loan granted on or after 1 April 1978 shall be exempted from tax as prescribed in Table 1 of the third schedule of CITA.[552]Interest on any loan granted by a bank on or after 1st January, 1977 to a company engaged in any of the under listed businesses shall be exempted from tax.

(a) Agricultural trade or business or

(b) The fabrication of any local plant and machinery or

(c) Working capital for any cottage industry established by the company. Provided the moratorium is not less than eighteen months and the rate of interest ontheloan is not more than the base lending rate of the time the loan was granted.[553]

The purpose of these reliefs is to encourage local investment and attract foreign direct investment. It is also, intended to stimulate rural investment and agricultural

[549]*Ibid,*Section 34(1).
[550]*Ibid,*Section 34(2).
[551] Proviso to Section 34(1) of CITA*, op cit.*
[552]*Ibid,* Section 11(1) of CITA.

developmental.However, these reliefs may not excite investors when they consider other provisions of the law that are arbitrary. For instance,under the provisions of Section 33(1) of CITA[554] there is the payment of minimum tax. Thus, where in any year of assessment a company results in a loss, or where a company's ascertained total profits results in no tax payable, or tax payable which is less than the minimum tax, there shall be levied and paid by the company, the minimum tax as prescribed by Section 33(2) of CITA.[555]

Umenweke described this provision as minimum tax relief [556] with the greatest respect this provision appears not to be a relief even though it seeks to reduce the tax burden of the company. This is because tax should be based on profit thus, where a company suffers a loss; the appropriate relief should be exemption from tax for that year of assessment. This provision appears to be arbitrary; it is aimed at ensuring that a company pays tax even when it has no taxable income. It is not a relief but a burden on tax payers, it is therefore suggested, that the section be expunged from the law.

4.5.3 Pioneer Status and Tax Holidays.

The president has powers to designate certain industries as pioneer industries and certain products as pioneer products.By the provisions of Section 1(1) of The Industrial Development (Income Tax Relief) Act,[557](hereinafter referred to as ID (ITR) the President if he is satisfied that:

(a) any industry is not being carried on in Nigeria on a scale suitable to the economic requirements of Nigeria or at all, or there are favorable prospects of further development in Nigeria of any industry or

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[553]*Ibid,* Section 11(2) of CITA.
[554]*Op cit.*
[555]*Op cit.*
[556] MN Umenweke, *op cit.* p.389.

(b) it is expedient in the public interest to encourage the development or establishment of any industry in Nigeria by declaring the industry to be a pioneer industry and any product of the industry to be a pioneer product.

An application may also, be made at any time for any industry to be included in the list of pioneer industries or products.[558] The President may from time to time, on any ground which appears sufficient, amend the list of pioneer industries and pioneer products.[559]Provided that when an industry or product is deleted from the list, pioneer certificate shall no longer be granted to any industry or product related to the deleted industry or product.[560]Pioneer status is a tax holiday granted to qualified or eligible industries anywhere in the Federation.[561]At the moment there are several approved industries and products declared pioneer industries and products.[562]

The listing of these industries and products as pioneer status and products, is to encourage local production of importedgoods in Nigeria. It is also, targeted at attracting foreign investors, to establish manufacturing industries in Nigeria.

Application for a pioneer certificate is addressed to the Minister of Industry,[563]and shall state the grounds on which the applicant relies on.[564]If the Minister is satisfied with the application, he shall submit the application to the President for approval.[565]A company cannot apply for a pioneer certificate unless the estimated cost of qualifying capital expenditure to be incurred by the company on or before production day (if the application is approved) is an amount which-

(a) In the case of an indigenous controlled company, is not less than N50, 000 or

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[557]Cap 17, LFN 2004.
[558]Section 1(2).
[559]Section 1(2).
[560]Section 1(6).
[561]Investment Incentives, www.nipc.gov.ng/.Accessed on 5th May, 2014.
[562] See *Ibid*, for the list of approved products and industries.
[563]Section 22(1) of the ID (ITR) Act. Presently, it is the Minister of Trade and Investment.
[564]*Ibid*, Section 2(2).
[565]*Ibid*, Section 2(6).

(b) In the case of any other company is not less than N150, 000.[566]

There appears to be a conflict between the provisions of Section 1(4) of the ID (ITR) Act[567] and the provisions of Section 3 of the Pioneer Status Incentive Regulation 2014 (hereinafter referred to as PSIR 2014) made pursuant to Section 30 of the NIPC Act.[568]The dichotomy between an indigenous controlled company and a foreign controlled company under the ID (ITR) Act[569]is done away with under the PSIR 2014also, the qualifying capital expenditure is increased from ₦50,000.00 (Fifty Thousand Naira) for indigenous controlled company and ₦150,000.00(One Hundred and Fifty Thousand Naira) for other companies was increased to ₦1,000,000.00 (One million naira). The qualifying capital under the ID(ITR) Act[570] appears to be too low, considering present day realities.

The problem is which of this law is applicable. Section 23 of the NIPC Act[571] gives the Nigerian Investment Promotion Commission powers to issue guidelines and procedures, which specify priority areas of investment and prescribe applicable incentives and benefits, which are in conformity with government policy. Also, Section 30 of the NIPC Act[572] gives the NIPC powers to make regulations. The combined effect of Section 23 and 30 of the NIPC Act[573] clearly empowers the NIPC to make the Pioneer Status Incentives Regulations 2014.

It is the researcher's position that the provisions of the ID (ITR) Act[574] should prevail. This is because; the ID (ITR) Act[575] is the specific legislation on tax incentives and issuing of pioneer

[566]*Ibid,* Section 1(4).
[567]*Op cit.*
[568] Cap N 117, LFN 2004.
[569]*Op cit.*
[570]*Op cit.*
[571]*Op cit.*
[572]*Op cit.*
[573]*Op cit.*
[574]*Op cit.*
[575]*Op cit.*

certificate. The NIPC Act[576] is on investment promotion generally; it is not a specific legislation on tax incentives. This submission, finds support in *Oando v FBIR*[577] where there was a conflict between the provisions of the Companies Income Tax Act[578] and the Companies and Allied Matters Act[579] on the issue of capital allowances the Appellant was entitled to. The Federal High Court held per Mustapha CJ. As follows:

> It is pertinent to say it is indeed CITA that is specific legislation on Taxation of Companies and not Companies and Allied Matters Act which has general provision on dividends and profits in its Part XII. It is the provision of CITA on Taxation that should prevail over that of the Companies Act on Dividends and Profits.[580]

It is further opined that Section 1(4) of ID(ITR) Act[581] should be amended to give powers to NIPC to review the qualification for pioneer status whenever necessary. Also, Section 2(1) of the ID (ITR) Act[582] should be amended to the effect that application for pioneer certificate should be made to the NIPC.

A pioneer company enjoys a tax relief for a period of three years in the first instance,[583] which can be extended for a period of one year and thereafter another period of one year or for straight period of two years.[584]The tax holiday period of maximum of 5 years was reviewed to 7

[576]*Op cit.*
[577](2009) 1 TLRN, 61 pp at 81.
[578]*Op cit.*
[579]*Op cit.*
[580]*Op cit.*
[581]*Op cit.*
[582]*Op cit.*
[583]Section 10(1) of ID (ITR) Act, *op cit.*
[584]*Ibid* ,Section 10(2).

years for pioneer industries located in economically disadvantaged Local Government Areas of the Federation.[585]

A pioneer company enjoys capital allowances and losses incurred before the end of the pioneer period. Such allowances shall be deemed to have been incurred by the company on the day on which its' new trade or business commenced for the purpose of computing total profit.[586]Also, dividends declared out of pioneer profits are not taxable in the hands of the shareholder.[587] Furthermore, the net qualifying expenditure during the pioneer period is accumulated and isqualified for both initial and annual allowances in the new business.[588]These benefits of a pioneer company will certainly aid the growth of trade and investments in certain key sectors of the economy. However, there are some restrictions on the operations of a pioneer company. Some of them are:

(a) A pioneer company during the period of the tax holiday shall not carry on any trade or business other than a trade or business, the whole of the profits of which are derived from its pioneer enterprises.[589]

(b) Also, it cannot distribute dividends in excess of the amount by which the profit and loss account is in credit at the date of any such distribution.[590]

(c) A pioneer company shall not grant any loan without first obtaining adequate security and a reasonable rate of interest for any such loan.[591]A pioneer company shall not be

[585]Section 16 of ID (ITR) Act, *op cit.*
[586]*Ibid*, section 14.
[587]*Ibid*, section 17.
[588] L Soyode and SO kajola, *Taxation Principles and Practice in Nigeria* (Ibadan: Silicon Publishing Company, 2006) p. 421.
[589] Section 12(1) of ID(ITR) Act, *op cit.*
[590]*Ibid*, section 18(a).
[591]*Ibid*, section 18(b).

entitled to any relief under Section 28 of CITA.[592] The relief under section 28 of CITA[593] relates to waivers or refund of liability of expense.

There is also, tax holiday of three years for a new company going into the mining of solid mineral.[594] Similarly; a company engaged in gas utilization (downstream operations) enjoy a tax holiday for three years and an additional two years, subject to satisfactory performance of the business.[595] Also, under the Nigeria LNG (Fiscal Incentives, Guarantees and Assurances) Act,[596]the Nigeria LNG Limited was declared a pioneer company by the provisions of Industrial Development (Income Tax Relief) Act.[597] However, the tax holiday was to last for ten years or five years when the cumulative average sales price of liquefied natural gas reaches $3(Three Dollars)/mmbtu.[598] Thus, the relief is no longer applicable, as the 10 years moratorium on fiscal incentives and guarantees to the NLNG ended on October 9, 2009.[599]

4.5.4 Allowable Deductions

An allowable deduction arises where the law permits the deduction of certain expenses from the profit and loss account before the computation of tax. It is targeted at encouraging companies to support charitable projects. It is also geared towards stimulating companies to invest in certain capital projects that will sustain the growth of the company.

Section 24 of the Companies Income Tax Act[600] provides to the effect that: except where the provisions of subsection (2) or (3) of Section 14 or 16 of the Act apply, for the purpose of ascertaining the profits or loss of any company from any source chargeable with tax under this

[592]*Op cit.*
[593]*Op cit.*
[594]Section 36 of CITA, *op cit.*
[595]*Ibid*, Section 39.
[596] Cap N87, LFN, 2004.
[597]Section 1 of the NLNG (FIG and A) Act, *op cit*.
[598]*Ibid*, section 2.
[599]*Ibid*.
[600]*Op cit.*

Act, there shall be deducted all expenses for that period by that company wholly, exclusively, necessarily and reasonable incurred in the production of those profits including, loans employed as capital in acquiring the profits,rent, premiums. Any outlay or expenses incurred during the year in respect of:Salary, wages or other remuneration paid to the senior staff and executive.Cost to the company of any benefit or allowance provided for the senior staff and executives.Also, expenses incurred for repair of premises, plants, machinery or fixtures employed in acquiring the profits, or for the renewals, repair or alteration of any implement, utensil or articles so employed.

Furthermore, any contribution to a pension, provident, or other retirement benefits fund, society or scheme approved by the Joint Tax Board under the powers conferred upon it by paragraph (g) of Section 85 of PITA,[601] subject to the provisions of the Fourth Schedule to the Act and to any conditions imposed by that Board; and any contribution other than a penalty made under the provisions of any enactment establishing a national provident fund or other retirement benefits scheme for employees throughout Nigeria are allowable deductions.

In the case of profits from a trade or business, any expenses or part thereof:

i. The liability for which was incurred during that period wholly, exclusively, necessarily and reasonably for the purposes of such trade or business and which is not specifically referable to any other period or periods; or
ii. The liability for which was incurred during any previous period wholly, exclusively, necessarily and reasonably for the purpose of such trade or business and which is specifically referable to the profits are being ascertained and;
iii. The expenses proved to the satisfaction of the board to have been incurred by the company on research and development for the period including the amount of levy paid

[601] *Op cit.*

by it to the National Science and Technology fund which is not deductible under any other provision of this Section.

And such other deduction as may be prescribed by the Minister in any rule or regulation from time to time.

A company is allowed to deduct donations made for the period of assessment to any public fund, statutory bodies and institutions, ecclesiastical, charitable, benevolent, educational and scientific institutions established in Nigeria, which are specified in the Fifth Schedule to CITA.[602] The allowable deductions for donations to any funds, body or institutions in Nigeria shall not exceed ten percent of the total profits of that company for that assessable year, except the President by order otherwise directs. Any outgoings and expenses, which are allowable as deductions under Section 24, shall be excluded from the allowable deduction under this section.[603]

There is also, a specific provision for donations to a university and other tertiary institutions for research or any developmental purpose, or as an endowment out of the profits of the company for that period.Any deduction under this section shall not exceed 15 percent of the total profits or 25 percent of the tax payable in the year of the donation whichever is higher.[604]

There shall also, be deducted the amount of reserve made out of the profits of that period by that company for research and development, such deduction shall not exceed ten percent of the profits of that company for that year. Furthermore, companies and organizations involved in research and development activities for commercialization shall be allowed 20% investment tax credit on their qualifying expenditure for that purpose.[605] The above deductions are meant to

[602]*Op cit.*
[603]*Ibid*, section 25.
[604]*Ibid*, section 25.
[605]*Ibid*, section 26.

promote research and development and also to support charitable organizations. Notwithstanding any other provisions of the Act, no deduction shall be allowed for the purpose of ascertaining the profits of any company in respect of the matters listed in section 27 of CITA.[606]

There are similar provisions on allowable deductions under the Petroleum Profit Tax Act,[607] (hereinafter referred to as PPTA). There are also, incentives for gas utilization undersection 11 and 12 of the PPTA.[608] The incentives are meant to encourage investment in the extraction of gas from crude into usable products, and to discourage gas flaring.However, there are deductions that are not allowed under the provisions of the PPTA.[609]

In the ascertainment of allowable deductions, the import of the words 'wholly, exclusively and necessary incurred' used in Section 24 of CITA[610] and Section 10(1) of PPTA[611] has generated a lot of controversy. For any expense to be deductible from Companies Income Tax or Petroleum Profit Tax, the expense must have been wholly, exclusively and necessarily[612]incurred in the production of those profits or in the case of petroleum profit, tax incurred for petroleum operations and for activities incidental thereto.

In *Shell Petroleum Development Company Limited v Federal Board of Inland Revenue*[613]the appellant submitted its petroleum profit tax returns for the period January 1st 1973 to December 31st 1973 to the respondent. The respondent refusedto allow deductions for exchange losses, central bank commission and scholarship expenses on the grounds that such expenses were not deductible as expenses incurred for the purpose of petroleum operations. The appellant objected to the exclusion of the above items, and appealed to the Federal Body of

[606]*Op cit.*
[607]*Op cit.* Section 10.
[608]*Op cit.*
[609]*Op cit.*
[610]*Op cit.*
[611]*Op cit.*
[612] Section 24 of CITA, *op cit*, includes the word 'reasonably.'

Appeal Commissioners. The Federal Body of Appeal Commissioners dismissed the appellants appeal and confirmed the respondent's revised assessment. The appellant appealed to the Federal High Court. The Federal High Court allowed the appeal in respect of exchange losses and central bank charges, but dismissed the appeal against scholarship expenses. Both parties appealed to the Court of Appeal. The Court of Appeal allowed the respondents appeal in respect of the exchange losses and Central Bank commission and dismissed appellants appeal in respect of the scholarship expenses. Thus, restoring the judgment of the Body of Appeal Commissioners and setting aside the judgment of the Federal High Court.

On further appeal to the Supreme Court, the court unanimously allowed the appeal. In reaching its conclusion the Supreme Court defined the words 'wholly' and 'exclusively.' Thus, according to ordinary dictionary meaning the words 'wholly' and 'exclusively' have virtually the same meaning. They can be said to mean 'solely' or 'entirely.' The dictionary meaning of the word 'necessarily' is the same as that of the words 'inevitably' and 'unquestionably.'[614]

The Supreme Court considered the provisions of sections 2, 8, 9(1), 10(1) and 11 of PPTA[615] in the determination of the appeal, and held among other things:that the payment of tax by a petroleum mining company is incidental to petroleum operations. That the definition of the phrase 'all operations incidental to' in section 2 of the Petroleum Profits Tax Act[616] cannot be circumscribed to the drilling mining, extracting or other like operations. To do so would be to do violence to the true meaning of the definition of 'petroleum operations' and push the *ejusdem generis* rule of construction too far.

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[613](1996) 8 NWLR (Pt 466) 257, (2009) 1 TLRN, 224.
[614]Particular at 230.
[615]*Op cit.*
[616]*Op cit.*

On whether exchange losses occasioned by agreement with the federal Government are allowable deduction under the Petroleum Profits Tax Act,[617]the court held that: it must be made clear here that the *lisin* this case is not the tax assessed but the loss incurred in sourcing the pounds sterling for the payment of the tax. In my opinion such expenditure is necessary for the purpose of the appellant undertaking its operations. It is pertinent to point out that the appellant is not exempted from suffering the exchange losses but that it should not pay petroleum tax on the exchange losses, because the obligation imposed by the agreements in question are incidental to petroleum operation as defined by section 2 of the PPTA.[618]

The payment ofbank charges to the central bank of Nigeria which had not rendered any service to the appellant but simply because the Federal Government had so directed was inevitable and was, therefore incurred in the course of the appellants business which was petroleum operations. Thus, in their respectful opinion, the bank charges qualify for deduction under the general provisions of section 10(1) of PPTA.[619]

On whether expenses incurred in awarding scholarship are allowable deductions. The Court held that the concurrent findings by the lower courts that the expenditures incurred on awards of scholarship was a statutory duty on the appellant to incur the expenditures and that is what the expenditure in question is about. It cannot therefore, be held that the expenditures were not solely and inevitably incurred. Consequently, the courtheld that the concurrent findings on the point made by the lower courts are perverse. Therefore the appeal against the refusal by the respondent to allow deduction in respect of expenses to the tune of ₦257, 550, 00 incurred in connection with the awards of scholarship by the appellant succeeds.

[617]*Op cit.*
[618]*Op cit.*
[619]*Op cit.*

Similarly, in *Gulf Oil Company (Nig.) Limited v FBIR*[620]the respondent refused to allow the deduction ofcommissions paid to the central bank in connection with the payment of petroleum profit tax.The appellant's contention was that the charges/commission imposed by the Central Bank are deductible. The commission was as a result of the Federal Government directive and subsequent agreement with the oil companies that, petroleum profit tax be paid abroad in foreign currency to the credit of the Central Bank. In compliance to this directive and agreement the appellant incurred expenses which are Central Bank charges/Commission.The appellant appealed to the Federal Body of Appeal Commissioners, who dismissed the appeal.The Court of Appeal, relying on the Shell's case[621] held that:

> A close examination of the definition of the words 'petroleum operations' in section 2 would show that the specific words therein are not limited to 'drilling, mining, extracting or like operations' but include in addition the phrase 'or process, not including refining at a refinery, in the course of a business carried on by the company engaged in such operations.[622]

The Court further held that:

> In paying the bank charges the appellant merely carried out the directive of the federal Government. The issue here is not whether the federal Government had the power to give the directive.It is enough that the appellant was asked to pay the charges to the Central Bank of Nigeria. The appellant had no choice than to comply and this it did. There can be no gain saying that the

[620](2012) 7 TLRN, 163.
[621]*Supra*.

> payment of tax by the appellant to the federal Government is certainly incidental to the business of the appellant, which is petroleum operation.[623]

Some scholars have disagreed with the conclusion of the Supreme Court in the *Shell's case.*[624]The question is whether a directive or agreements can vary the express provisions of a statute? In this directionUmenwekehas observed that:

> …there appears to be no legal basis why the Supreme Court upheld the provisions of the agreement against an existing provision of the law. If the government really wants the Petroleum profit Tax paid in foreign currency, it could have taken steps to legislate it by statute.[625]

In the same vein Lerkwagh had argued that:

> By section 8 of PPTA,[626] a company engaged in petroleum operations is under liability to pay tax in Lagos in naira currency. However, this liability was discharged through contract agreements with the appellant and substituted with a new liability to make payment in London in pounds Sterling. Consequently the Supreme Court held that since the agreements were not illegal but retains the spirit of the law. Effect must be given to them accordingly. This line of reasoning of the learned justices can, with due respect be faulted on several fronts.Firstly, taxing statutes are special specie of statutes, which must be given strict interpretation. Secondly, the Petroleum Profits Tax Act's provisions in

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[622]Particular at 166.
[623]*Ibid*.
[624]*Supra.*
[625] MN Umenweke, *opcit*, p.415.

> respect of the currency for payment of tax by companies engaged in petroleum operations are very clear and unambiguous. Consequently, the issue of resorting to the spirit of the law did not arise. The parties had no option than to adhere to the strict provisions of the law.[627]

The researcher agrees with the view that the decision of the Supreme Court in the *Shell's case*[628] does not seem to reflect a strict interpretation of the provisions of the PPTA:[629] especially as it amounts to allowing an agreement vary the provisions of a statute. However,the Supreme Court may have been swayed by the need to protect public policy and encourage foreign investment in Nigeria. It is to that extent that the judgment could be said to meet the justice of the case, even though it may not be a strict reflection of the provisions of the Law. Thus, the Supreme Court may have adopted the principle of 'Utmost Public Good' in arriving at their decision in the Shell's case[630]by balancing the obligation to interpret tax laws strictly with the need to protect the economic objectives of Nigeria as a country.

Also, the Supreme Court agreed with the submission of the counsel to the appellant that, Shell was obliged to incur the disputed losses/expenses in the course of satisfying its obligation under the agreement with the Federal Government. Thus, the Supreme Court adopted the contractual 'doctrine of accord and satisfaction' in reaching their decision. According to the Supreme Court, the term accord and satisfaction has been judicially defined as follows:

> Accord and satisfaction is the purchase of a release from an obligation. Whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the

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[626]*Op cit.*
[627] K Lerkwagh, *op cit*, pp.138-139.
[628]*Supra.*
[629]*Op cit.*

> obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration, which makes the agreement operative.[631]

The adoption of the contractual doctrine of accord and satisfaction may not entirely be trouble free. It is doubtful if the principle of accord and satisfaction is applicable to tax laws.Generally, an agreement between parties cannot varyexpress provisions of a statutethus; the directive of the Federal Government toShell ordinarily should have been void. However, the wisdomof theSupreme Court may be based on the fact that it will be unfair for an agent of the Federal Governmentwhich, is the Federal Board of Inland Revenue, to benefit from the consequence of the directive of its principal. It is the researcher's view that the doctrine of accord and satisfaction applied by Supreme Court in the *Shell's case*[632]is in line with commercial practice and will encourage investors.

Furthermore, the researcher is of the view that courts at all levels in Nigeria, should take a cue from the Supreme Court, in the *Shell's case*.[633]Consequently, in adjudicating over revenue matters, the courts should take into consideration the overall objective of promoting trade and investment in Nigeria, especially at this critical stage of our national development. This provision finds support in *Elf Oil (Nig) Ltd v Oyo State Board of Inland Revenue*.[634]Where it was held that 'courts are to interpret Acts and Statutes of Internal Revenue for the Federal Government and State Government narrowly and strictly against the authorities, but liberally in favour of the people.'

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[630]*Supra.*
[631]*British Russian Gazette and Trade Outlook Ltd v Associated Newspapers ltd*. (1933) 2 KB 616, pp at 643-644**.**
[632]*Supra.*
[633]*Supra.*
[634](2003) F WLR (Pt 138) 1352 at 1371.

Allowable deductions, are meant to encourage companies in their cooperate social responsibilities.

4.5.5Double Taxation Reliefs for Foreign Companies and Expatriates.

Generally, every company doing business in Nigeria is liable to pay tax in Nigeria,[635]thus, a foreign company in appropriate circumstances is chargeable to tax in Nigeria.[636]Similarly, the income of an expatriate resident in Nigeria is subject to tax in Nigeria irrespective of where it is paid.[637]

Any country desirous of economic growth and development, must as of necessity engage other countries in mutually beneficial economic ties.[638]To this end, Nigeria has entered into several investment promotion and protection Agreements. Notable among these agreements are Double Taxation Agreements, which are either bilateral or multilateral.[639]

A tax treaty or agreement is a reciprocal arrangement between two or more tax systems. In such agreements the parties involve, undertake to exempt from tax the income of individuals or companies brought into or received into their territory; if the individuals or companies have paid tax on such income in their country of origin.[640] These agreements are known as Double Taxation Agreements; the primary purpose of these agreements is to promote international trade and commerce, by reducing the costof doing business internationally and it also, helps to attract foreign direct investment.Nigeria has signed comprehensive Double Taxation Agreements with the following countries[641]United Kingdom,[642]Pakistan,[643]

[635]Section 9 of CITA, *op cit.*
[636]*Hallburton Energy Services Ltd v Federal Inland Revenue Service* (2011) 8 TLRN 15.
[637]Section 3(1) of PITA, *op cit.*
[638] IO Okauru (ed) *Federal Inland Revenue Service and Taxation Reforms in Democratic Nigeria*. (Abuja:FIRS, 2012) p.325.
[639]*Ibid.*
[640]*Ibid.*
[641]*Ibid*, at 328-329.
[642]Signed on the 9th of June, 1987.

Belgium,[644]France,[645]theNetherlands,[646] Romania,[647] Canada,[648]South Africa,[649] and China.[650]Nigeria has also signed a double taxation agreement on air and shipping, with the Italian government[651]

Nigeria is also, a party to the following multilateral treaties; 1975 ECOWAS Treaty, 1931 League of Nations Motor Vehicle Convention and Final Protocol, 1961 Vienna Convention on Diplomatic Relations, 1969 Vienna Convention on the Law of Treaties, 1997 Draft Protocol on the ECOWAS Value Added Tax and 1997 Draft protocol on the ECOWAS Community Levy.[652]

The reliefs under these treaties are by way of tax credit. The mechanism of tax credit according to the Nigerian Investment Promotion Commission is such that the tax payable in Nigeria on profits of a Nigerian company being remitted into the country is reduced by the amount of foreign tax paid abroad. The converse is equally true where an overseas company receives profits from abroad.[653] There are various double taxable reliefs for companies and individuals under our tax laws.

There are double taxation reliefs for foreign companies or none resident companies in Nigeria. Generally,anon-resident company is liable to pay tax on income derived from Nigeria except there is a specific provision in any law which exempts it from tax.[654]Thus, a foreign company or

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[643]Signed on the 10th of October, 1991.
[644]Signed on the 20th of November, 1989.
[645]Signed on the 20th of November, 1989.
[646]Signed on the 11th of December, 1992.
[647]Signed on the 21st of July, 1992.
[648]Signed on the 4th of August, 1992.
[649]Signed on the 29th of April, 2000.
[650]Signed on the 15th of April, 2009.
[651]*Ibid*.
[652]Nigerian Tax Card 2012/2013, PWC, www.pwc.com/ng/ accessed on the 11th of May, 2014.
[653]Investment Incentives, www.nipc.gov.ng/investment.html.accessed on 16th May, 2014.
[654]*Offshore International SA v FBIR*, cited in S Salau and B Atilola 'Taxation of Expatriates and Foreign Companies in Nigeria' *NTN*Vol 15 No. 5, 2010, p. 6.

none resident is liable to tax in Nigeria, once it has an established place of business in Nigeria[655] and derives income in Nigeria.[656]However, where there are agreements between Nigeria and the country of origin of the company, the company is entitled to reliefs based on the terms of the said agreement.[657]

Furthermore, Nigeria is a member of the Commonwealth. There is the Commonwealth tax relief.[658]A Nigerian company under the Commonwealth tax relief is granted 50% of the Commonwealth tax rate,[659]fornoneresident companies or foreign companies, the tax relief is 50% of the Commonwealth tax rate provided it is not more than 50% of the Nigerian tax rate, otherwise the relief is the rate by which the Nigerian tax rate exceeds 50% of the Commonwealth tax rate.[660]

Any claim for relief for tax for any year of assessment shall be made not later than six years from the end of the assessment year.[661] Also, where a Commonwealth country has entered into any double taxation agreement with Nigeria, the provisions of Section 44 of CITA[662] will cease to apply. The provisions of the agreement will be the basis of assessment except the agreement otherwise provide.[663]

There are double taxation reliefs for foreign companies engaged in Aviation and Shipping business. These businesses are peculiar, in the sense that, they involve operations in more than one country. Therefore they must have a special tax regime. Section 44(1) of CITA[664] provides to the effect that: where a company other than a Nigerian company carries on the business of

[655]*Addax Petroleum Services Ltd v FIRS* (2013) 9 TLRN 126.
[656]*Shell Petroleum International Mattscgappij B. V. v Federal Board of Inland Revenue* (2011) 4 TLRN 97.
[657]Section 45(1) of CITA, *op cit.*
[658]*Ibid,* section 44.
[659]*Ibid* section 44(1).
[660]*Ibid,* section 44(2).
[661]*Ibid,* section 44(3).
[662]*Op cit.*
[663]*Ibid,* section 45

transport by sea or air, and any ship or aircraft owned or chartered by it call at any seaport or airport in Nigeria, the profits or loss to be deemed to be derived from Nigeria, shall be the full profits or loss arising from the carriage of passengers, mails, livestock or goods shipped or loaded into an aircraft, in Nigeria, However, section 44(1) of CITA[665] does not apply to passengers, mails, livestock or goods which are brought to Nigeria solely for transshipment or for transfer from one aircraft to another or in either direction between an aircraft and a ship.

Irrespective of this provision, where there is a subsisting double taxation agreement between Nigeria and the country of domicile of the Air or Shipping Company, the provisions of that Agreement shall apply.[666] Nigeria has entered into Double Taxation Treaty with several countries. Under these agreements, the Shipping and Aviation Companies from those countries are taxed differently. For instance, under Article 8 of the Double Taxation Treaty between Nigeria and the United Kingdom and the Republic of Ireland 'A resident of a contracting State shall be exempt from the tax in the other contracting State in respect of profits or gains derived from the operations of ships or aircraft in international traffic.'[667] The implication of this provision is that any shipping or aviation company from United Kingdom or Ireland plying the Nigerian route is not liable to tax on the income derived from such operations. Also, any Nigerian company involved in Air and Shipping business plying the United Kingdom or Republic of Ireland route is also exempted from tax on the basis of reciprocity.[668]

It is doubtful whether these provisions will encourage trade and investment in Nigeria. The treaty is to the advantage of United Kingdom and Republic of Ireland, as they are bigger

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[664]*Op cit.*
[665]*Op cit.*
[666] S Salau and B Atilola, *art cit,*11.
[667]*Ibid.*
[668]*Ibid.*

players in the airline business than Nigeria. However, it may encourage some indigenous airlines to ply those routes.

Article 8 of the Double Taxation Treaty agreement between Nigeria, France, Belgium, and Pakistan have similar provision, but with the following qualification 'if such operations in international traffic are carried on by an enterprise of only one of the contracting State, the tax charged shall not exceed one percent of the earnings of the enterprise derived from the other contracting State.'[669] This is a better treaty than the treaty with United Kingdom and Ireland.

Similarly, the double taxation agreement between Nigeria and Canada contains a different qualification. It provides that where no enterprise of a contracting State has in a year, derived earnings in the other contracting State from the operation of aircraft in international traffic, earnings derived in that year in the first mentioned State by a resident of the other State from operation of aircraft in international traffic shall be taxed in the first mentioned State, but the tax so charged shall not exceed one percent of such earnings, and the lowest amount of Nigerian tax that would have been imposed on such earnings, if they had been derived by a resident of any third party State in which no enterprise of the first mentioned State had derived earnings from the operation of aircraft in international traffic in that year.[670]

While Article 8 of the Double Taxation Treaty agreement between Nigeria and Romania is to the effect that profits of an enterprise of a contracting State from shipping operations in international traffic shall be taxable only in that State. Also, the income of an enterprise of a contracting State shall be exempted from tax on the other contracting State on the basis of reciprocity.[671]

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[669] *Ibid.*
[670] *Ibid* at 12.
[671] *Ibid.*

The Agreement between Nigeria and Netherlands is on the basis of reciprocity. Except Netherlands exempt Nigerian Ships or airlines from tax, any Netherlands Ship or airline, will be liable to pay the 2% tax as provided in section 14 CITA.[672]Reciprocity is the basis of most international agreements. This is because countries enter into bilateral or multilateralagreements that are mutually beneficial to the parties. However, Netherlands stands to benefit more than Nigeria in this agreement. This is because Nigeria is basically an import dependent country and have very few indigenously owned ships and aircrafts compared to Netherlands.

Generally, an individual is expected to pay tax on his income either because he is resident in Nigeria or because he derives his income in Nigeria.[673]Thus,a non-resident employee[674] is liable to pay tax only on the income deemed to be derived from Nigeria. Similarly, a Nigerian who derives income from another country is liable to be taxed in that country. The problem arises where anon-resident employee repatriates his income; it will amount to double taxation if their countries of origin tax themagain.

However, there are provisions aimed at providing double taxation reliefs to individuals. Thus, where there is a double taxation agreement between Nigeria and the country of residence of the non-resident or expatriate employee, the amount of relief shall be computed in accordance with the provisions of section 38 and 39 of PITA.[675]

For the purpose of double taxation relief in Nigeria; The arrangements specified in the Seventh Schedule to PITA[676]and the Schedule to CITA,[677] shall be deemed to have been made

[672]*Ibid.*
[673]*Ibid* at 2.
[674] That is a person who is not domiciled in Nigeria but stays up to 183 days in a year and derives income from Nigeria. Section 10(1) a, ii of PITA, *op cit.*
[675]*Op cit.*
[676]*Op cit.*
[677]*Op cit.*

under the provisions of section 38 of PITA,[678] and to apply throughout Nigeria with effect from the year of assessment on the first day of January 1989, and in the case of any other country on such date as is specified in the agreement with that country.[679]The amount of the tax chargeable in respect of the income, which is liable to both tax and foreign tax, shall be reduced by the amount of the credit admissible under the terms of the arrangement.[680]The total credit to be allowed for any year of assessment shall not exceed the total tax payable by him for that year of assessment.[681]

In conclusion,Nigeria seems to have very attractive tax incentivesunfortunately; in spite of these incentives investors still don't find Nigeria attractive for investment. Tax incentives although relevant as a tool to stimulate investment in an economy, cannot on its own attract investment. It must be complemented with good infrastructures like good roads, seaports, airports, etc; also, there must be consistency in the formulation of economic policies, coupled with political stability. For instance, the gains from tax incentive are not commensurate with the extra cost of fueling generating plants. Investors will prefer to have electricity than tax incentives.

If Nigeria can improve on these areas, investors will be more inclined to take advantage of her tax incentive to invest in her economy. For instance, in Dubai, UAE, to ensure that their tax free zone succeeds, the Government had to go to the extent of constructing the world's largest artificial sea port. Nigeria although with very attractive tax incentives, is unable to attract the expected foreign investors.

4.6Legal Framework for the Administration of Free Trade Zones in Nigeria.

[678]*Op cit.*
[679] Section 38(5) PITA, *op cit.*
[680]*Ibid*, section 39(2) PITA, *op cit.*
[681]*Ibid*, section 39(4) PITA, *op cit.*

The concept of free trade zones has proven to be a veritable tool for socio economic development. Thus, several countries have established free trade zones. There are different names for free trade zone depending on the nomenclature a country decides to adopt. For instance, in china, it is called 'Special Economic Zone,' in the United States of America it is known as 'Foreign Trade Zone,' while in many other countries, it is called 'Free Trade Zone, Export processing Zones, Free zone, Economic free zones. In Nigeria, different names have been adopted for it. Some are designated as Economic Processing Zones, Free Trade Zones,and Export Processing Zone etc. Free zones irrespective of the nomenclature adopted by the promoters have basically the same features.

The Nigeria Export Processing Zone Act (NEPZAct)[682] and the Oil and Gas Export Free Zones Act (OGEFZAct)[683] are the major legislationson Free tradezones in Nigeria. Both legislations are similar in content except that the OGEFZAct is specifically for the regulation of Oil and Gas Exports. It is the researcher's view that it is unnecessary for the OGEFZAct[684] to have been enacted, the NEPZAct[685] should have been amended to provide for the regulation of oil and gas export free zone. The import of enacting the OGEFZAct[686] could also have been addressed by the provisions of item 8 to the Third Schedule of NEPZAct.[687] It provides as follows; 'other activities deemed appropriate by the Nigeria Export Processing Zones Authority.' Under these provisions the Nigerian Export Processing Zones Authority has discretionary powers, which could be exercised in favor of Oil and Gas activities. Also, the President would have needed to

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[682]*Op cit.*
[683]*Op cit.*
[684]*Op cit.*
[685]*Op cit.*
[686]*Op cit.*
[687]*Op cit.*

do was to exercise his powers under section 1 of NEPZAct[688] to designate Onne/Ikpokiri areas of Rivers State as an Oil and Gas Export Free Zone. Under section 1 of NEPZ Act[689]the President of the Federal Republic of Nigeria is vested with the powers to designate an area, as an export-processing zone, upon the recommendation of the Nigerian Export Processing Zones Authority.[690]The NEPZ Act[691] and OGEFZ Act[692] did not define afree trade zone. However, from the characteristics of free trade zones, free trade zones can be defined as an area designated for the production of approved goods and services, that enjoys special legal status and is provided with several incentives, particularly exemption from taxes. They are established for the purpose of attracting investment, and stimulating economic growth in a country.

Over the years, there has been a proliferation of Free Trade Zones all over the world.Within the last three decades, export-processing zones have become major instruments of trade policy.Omoportrays the level of growth of Economic Free Zones over the years as follows:

> In 1970 only a handful of countries permitted such zones, by 1996 the zones had increased to over 500 in 73 countries. In 1997, 93 countries had set up export processing zones employing 22.5 million people and five years later, in 2003, export processing zones in 116 countries employed 43 million people.The World Atlas of Free Zones published in September 2011, identified 1735 free zones in 133 countries. China alone has 213 free zones under nine different regimes, and in 2009, they accounted for around 47% of the country's total exports.[693]

[688]*Op cit.*
[689]*Op cit.*
[690]Section 1(1) of NEPZ Act.*op cit*.
[691]*Op cit.*
[692]*Op cit.*
[693]*Ibid* at p. 53-54.

Similarly, the International LabourOrganisation observed that '… the number of EPZs has expanded significantly from about 79 located in 25 countries in 1975 to 5,174 hosted in more than 110 countries in 2003.'[694] In Africa, several countries apart from Nigeria have embraced the concept of free trade zone. For instance,in Mauritius the whole country is designated a free trade zone.[695]

In Nigeria, the idea of setting up free trade zones dates back to the early seventies. The Federal Government then stimulated by the establishment of the scheme in the Far East and Caribbean, commissioned the United Nations Industrial Development Organizations (UNIDO) to evaluate the viability ofestablishing an Export Processing Zone in Calabar.[696] However, the first effective attempt to set up an export processing zone was in 1991, with the promulgation of the Nigerian Export Processing Zones Decree No 34 of 1991.[697]

In 1996, the Federal Military Governmentpromulgated the Oil and Gas Export Free Zone decree No 8 of 1996.[698] The aim of this law was to designate OnneIkpokiri Area of Rivers State as an export free zone to drive development in the oil and gas sector.[699]Also, in 1996, the Companies Income Tax Act[700] was amended by decree no 31, to include the provision of 100% capital allowances for expenditure incurred by a company in its qualifying building and plant equipment on an approved manufacturing activity in an export processing zone.[701]

Under the NEPZA Act,[702] the President is empowered to designate an area, as an Export Free Zone.[703]After the establishment of Calabar free trade zone, which was completed in 1999

[694] U Ngwaba 'Legislative Framework of Export processing Zone' in E Azinge and S Omo, *op cit*, p. 199.
[695]*Ibid* at p. 55-56.
[696]*Ibid* at p. 60.
[697] U Ngwaba, *op cit*p. 200.
[698]*Op cit*.
[699]Section 1 of the OGEFZ Act, *op cit*.
[700]*Op cit*.
[701]Section 35 of CITA, Section 35 of CITA.
[702]Section 35 of CITA.

and commissioned in 2001, several otherfreetradezones schemes have been developed in Nigeria.[704] The private sector, recognizing the advantages of free zones as a vehicle for industrial and commercial development of the country have also, joined in the establishment free trade zones.[705] In Nigeria, there are more than twenty free trade zones that are either fully operational or being developed.[706]

Section 1(1) of the OGEFZAct[707] on the other hand, specifically designates Onne/ Ikpokiri areas of Rivers State as an export free zone. The drafters of the OGEFZAct[708] did not seem to envisage the establishment of other oil and gas export free zones. This is because there is no provision in the Act, authorizing the President to designate any other area as oil and gas export free zone. This may be deliberate, considering that oil and gas is the mainstay of Nigeria's economy. The Nigerian Export Processing Zones Authority ((hereinafter referred to as NEPZA)is established by NEPZ Act[709] to oversee the administration of the export processing zones.[710] Similarly, the Oil and Gas Export Free Zone Authority (hereinafter referred to as OGEFZA)is established to operate and manage the oil and gas export free zones.[711]

In addition to the forgoing, NEPZA is also charged with the responsibility of recommending to the President, areas to be designated as an Export Processing Zones.[712]The authority may also, from time to time,prescribe activities which may be carried on in a zone, and may by order amend Schedule 2 to the Act.[713] The authority can also increase the number of

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[703]Section 1 of the NEPZA Act, *op cit.*
[704] PO Idornigie,*op cit.*
[705]*Ibid*.
[706]List of Free Trade Zones in Niger. http://www.nigeriatradeub.gov.ng. Accessed on the 5th of June, 2014.
[707]*Op cit.*
[708]*Op cit.*
[709]*Op cit.*
[710]Section 2 of NEPZ Act, *op cit*.
[711]Section 1(2) and 2 of the OGEPZ Act, *op cit.*
[712]Section 1(1) of NEPZ Act, *op cit*.
[713]*Ibid*, item 8 of Schedule 3, Section 5(3) OGEPZ Act, *op cit*.

approved activities in the zones.[714] Similarly, it can also amend or vary the listed duty free articles in Schedule 4 of the Act.[715] NEPZA may with the approval of the minister, make regulations for the proper implementation of the Act.[716] This provision gives NEPZA wide powers to control and manage the export processing zones.

Under the NEPZ Act,[717] an export processing zone may be operated and managed by a public, private or by public private partnership under the supervision of and with the approval of NEPZA[718] thus, privately owned free trade zones can be established in Nigeria. The NEPZ Act[719] did not stipulate how an Export Processing Zone can be established, especially the procedure to establish private free zones. However, NEPZA has set out a detailed procedure on how to participate or develop a free zone in Nigeria:[720]

The World Bank had noted that in the last ten to fifteen years, the number of privately owned and managed zones have grown substantially globally, because they are believed to achieve superior results.[721]Although, there are several private free trade zones in Nigeria, it is doubtful if they have produced superior results. The first privately owned free zone in Nigeria is the Snake Island Integrated Free Zone, in Lagos State.[722] There are other privately owned free trade zones in Nigeria.[723]

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[714]*Ibid*, Section 27, Section 25 of OGEPZ Act, *op cit.*
[715]*Ibid*, Section 12(3).
[716]*Ibid*, Section 27, Section 25 of OGEPZ Act, *op cit.*
[717]*Op cit.*
[718]*Ibid*, Section 1(2).
[719]*Op cit.*
[720]Procedure for obtaining Free Zone Developer/Promoter Licence, http.www.nepza.gov.ng. Accessed on the 31st of May, 2014.
[721] OO Eruaga, 'Free Zone Legislation in Nigeria: An Appraisal,' in E AZinge and S Omo, *op cit,* p. 76.
[722]*Ibid* at p. 75.
[723] For instance, Ladol Free zones, Lagos, Airline Services Export Processing Zone, Lagos, ALSCON Export Processing Zone, AkwaIbom, OILSS Logistics Free Zone, Lagos, Lagos Free Zone, Lagos, Sebore Farms Export Processing Zone, Adamawa State. see PO Idornigie, *op cit* pp. 159-160.

The NEPZ Act[724] also allows for public private partnership in the establishment of free trade zones. The Africa Free Zones Association has advocated that: '…the public private partnership approach to attract investment and accelerate funding and development of the various trade zones across Africa, as well as to increase funds for the free trade zones in Africa should be adopted.'[725]Nigeria has some public and private partnership established economic processing zones. For instance, Tinapa Free Zone and Tourism Resort Calabar, Cross Rivers State and theLekki Free Zone, Lagos State.

The Minister[726] may, by order published in the federal gazette, modify the application of any enactment which is made applicable in a zone by subsection (1) of this section, where the enactment concerned restricts or interferes with the smooth running or operation of licenses therein. This power vested in the Minister is a legislative power. It means the Minister can amend or modify any law that affects the smooth running of the zone. This power appears to be too wide, as it could be abused by the Minister.The NEPZ Act[727] for the purpose of administering the export processing zones vests the administration of the zones on NEPZA subject to the powers of the president and the Minister where applicable.

The NEPZ Act[728] and the OGEPZ Act[729]provided for a wide range of incentives for approved activities and approved articles. Under the NEPZ Act,[730] the approved activities are as specified in Schedule 3 to the NEPZ Act.[731]Any enterprise, which proposes to undertake an approved activity within a zone shall apply to NEPZA in writing for permission to do so and

[724]*Op cit.*
[725] EH Odum 'Funding of Free Trade Zones' in E Azinge and S Omo, *op cit*, p. 303.
[726] Section 28 of NEPZ Act *op cit*, defines minister to mean Minister charged with responsibility for matters relating to trade.
[727]*Op cit*.
[728]*Op cit*.
[729]*Op cit*.
[730]*Op cit*.
[731] Section 6(1) and 9(3) of NEPZ Act, *op cit*.

shall submit such documents and information in support of its application,[732] in line with the procedure for obtaining free zone enterprise licence out lined by NEPZA[733]

4.6.1 Incentives for Free Trade Zones

Free Trade Zones are established to attract foreign investment and boost the economy. They are special vehicles to drive the Government's fiscal policy thus; companies operating in the zone enjoy tax exemptions and special incentives.The NEPZ Act[734] provides for a long list of incentives for companies operating within an Export processing Zone which include:

(1) Exemption from all Federal, State and Local Government taxes, levies and rates.[735]

(2) Exemption from payment of customs duty, on any capital goods, raw materials, components or articles intended to be used for the purpose of and in connection with an approved activity, including any article for the construction, alteration, reconstruction, extension or repair of premises in a zone, or for equipping such premises.[736]

(3) 100% Capital allowance for expenditure incurred in a company's qualifying building and plant equipment, on an approved manufacturing activity in an export processing zone.[737]

(4) Enterprise operating in the zone can be owned 100% by foreign investors.[738]

(5) No restriction on repatriation of foreign capital investment in the zone at any time, with capital appreciation of investment.[739]

(6) Unrestricted repatriation of profit and dividends by foreign investors.[740]

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[732]Section 9 of NEPZ Act.
[733]Section 10 of NEPZ Act.Procedure for obtaining Free Zone Enterprise licence, http://www.nepza.gov.ng. Accessed on the 31st of May, 2014.
[734]*Op cit.*
[735] Section 8 and 18(1)a of NEPZ Act, *op cit;* Section 8 and 18(1)a of OGEPZ Act, *op cit.*
[736]Section 12(1) of NEPZ Act, *op cit;* Section 12 of OGEPZ Act, *op cit.*
[737] Section 35(1) CITA, *op cit.* This provision may be of little or no effect, since, Section 8 and 18(1)a of both the NEPZ Act, *op cit* and the OGEPZ Act, *op cit* granted complete tax holiday, from any tax imposed under any legislation in Nigeria.
[738] Section 18(1)a of NEPZ Act, *op cit;* section 18(1)a of OGEPZ Act, *op cit.*
[739]*Ibid*, section 18(1) b.

(7) Exemption from company incorporation requirements. The issue of licence to operate in the zone serves as registration.[741]

(8) Waiver of import and export licences.[742]

(9) Waiver of expatriate quotas.[743]

(10) Rent free land at construction stage. However, rent shall be paid subsequently at a rate to be determined by the authority.[744]

These are the main incentives for any enterprise operating in an Export Processing Zone in Nigeria. The main tax incentive is the provision of complete tax holiday for any company operating in the zone. Interestingly these tax holidays include both State and Local Government taxes and levies.This provision on the face of it appears to be unconstitutional, considering that the National Assembly lacks the constitutional power to deprive States and Local Government the powers to collect taxes and levies; they are entitled to under the constitution.[745]However, the 1999 Constitution vest the powers to control and manage Exclusive Economic Zones on the Federal Government.[746]

The major tax incentives for an export free zone are that; import of raw materials and components for goods meant for re-export are duty free. Also, capital goods, machinery, equipment and any facility necessary for the proper administration of the premises are duty free.[747]

Nigeria seems to have one of the most attractiveincentives for free trade zone when compared to some other countries. For instance, in India,the main tax incentives for export

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[740]*Ibid*, section 18(1) c.
[741]*Ibid*, section 10(2).
[742]*Ibid*, section 18(1) d.
[743]*Ibid*, section 18(1) h.
[744]*Ibid*, section 18(1) f.
[745]Section 4 of the 1999 Constitution, *op cit*.
[746]Section 44(3) of the 1999 Constitution, o*p cit.*

processing are:100% exemption from income tax for the first five years, and 50% for the next two years and no excise duties on the procurement of raw materials, consumable spares and capital goods from the local market.[748] Similarly, in Dubai, UAE, the Jebel Ali Free Zone one of the world's most dynamic and successful export processing zones has the following tax incentives:[749]Exemption from corporate tax for 50 years, a concession that is renewable, exemption from import or re-export duties, exemption from Personal Income Tax, 100% foreign ownership of companies, free capital repatriation, and exemption from expatriate quota.

One striking feature of the incentives for free zones in Dubai is the exemption from Personal income Tax. This will make the zones attractive to expatriate workers thus, the needed manpower will always be available. Nigeria should take a cue from Dubai and extend tax incentives to personal income tax.

Mauritius, which is arguably one of the most competitive and successful economies in Africa, established its free zone in 1992. The aim of the government was to establish a customs free zone for goods destined for export. The objective was to promote the country as a regional warehousing, distribution, marketing, and logistics center for Eastern and Southern Africa.[750]The major incentives for the Mauritius free trade zone are: exemption from customs and excise duties on imports of equipment and raw materials, exemption from tax dividends and capital gains, free repatriation of profits, dividend and capital.[751]Similarly, in Namibia, companies in free trade zone are exempted from corporate income tax, duties and VAT on machinery, equipment and raw materials imported into Namibia for manufacturing purposes.[752]

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[747] Section 12 of NEPZ Act, *op cit*; section 12 of OGEPZ Act *op cit*.
[748] EPZ and Tax Incentives in India, http://www.business.mapofindia.com/epz/tazincentives, accessed on the 1st of June, 2014.
[749] Jebel Ali Free Zone, http://www.jafza.ae, accessed on the 1st of June, 2014.
[750] Investing in Mauritius, Frontier Finance,http://www.frontierfin.com. Accessed on 31st May 2014.
[751]*Ibid*.
[752]*Ibid* at p. 233.

In the United States, foreign trade zones, the incentives are reduced payment of duty rates on foreign goods that enter the US market. Also, there is exemption from duties for imported goods that are later re-exported.[753] In Malaysia, companies operating in the export processing zone are exempted from custom and excise duties, sales tax and service tax.[754]In Singapore, the whole country is considered a free trade zone like Mauritius. The tax incentives are exemption from income tax rate, for the first two years and 7.5% for the next three years. After five years, companies pay the normal foreign investment enterprise tax rate of 15%.[755] In China, manufacturing industries in free trade zones enjoy 2 years exemption and 3 years half reduction of taxes from their first profit-making year. While non-manufacturing enterprises enjoy one year exemption, two years reduction and 10% levy from their first operational year.[756]

Nigeria's permanent tax holiday forfree trade zones appears to be too generous. Other countries reviewed have a period of between 10 to 50 years tax holidays. It is therefore suggested that relevant laws should be amended to reduce the tax holidays forfree trade zones to 20 years. A tax incentive that is in perpetuity will not motivate investors and may serve as a disincentive, as companies may become docile, uncreative and unproductive.Also, there is need to restrict the scope of tax free zones to specific sectors of the economy that are critical to the development of the economy of Nigeria and it should not be restricted to only goods for export.

4.6.2A Review of the Impact of Free Trade Zones on Trade and Investment in Nigeria.

The goal of the Nigerian trade policy is to encourage the development of a private sector economy. Free trade is part of the concept of trade liberalization. Trade liberalization is an

[753] US Foreign Trade Zone (FTZ) Programme, http://www.selectusa.commerce.gov. accessed on 31st May, 2014.
[754] YT Chai and OC in 'The Development of Free Industrial Zones – The Malaysian Experience' cited in AO Adediran, *op cit*, p. 234.
[755]N Quintine – Amiator, *op cit*, p. 134.
[756] Shanghai Free Trade Zone Incentives: Tax cuts and exemptions. http://www.ftz- shanghai.com/freetradezones, accessed on the 10th of September, 2014.

economic strategy that seeks to enhance trade and investment, by removing trade barriersand allowing the free flow of goods and services across borders and minimizing the cost of doing business in a country.[757]The establishment of Free Trade Zones is a deliberate policy of the government to embrace the concept of trade liberalization. Free trade zones are intended to create employment, attract foreign direct investment, diversify the economy, increase the production of exportable goods and encourage the transfer of technology etc.

Nigeria has one of the best tax incentives for free trade zones. While some countries provide for reduced tax rates for some years,[758] Nigeria has complete tax exemption for companies operating within the free trade zones; there is no restriction as to the number of years such exemption can be enjoyed.[759] The rationale for these incentives in free trade zones is to attract foreign investment and enhance the growth and development of a particular sector of the economy.[760]

It is not in doubt that free trade zones can be an effective tool to boost the economy and attract investment however; the extent to which this is achieved is dependent on the trade policy and political will of a nation.[761]Unfortunately, a recent World Bank statistics revealed that more than 50% of the free zones in the world have failed, especially in the developing countries.[762]

The establishment of free trade zones does not guarantee success in itself. For a free trade zone to succeed, several factors must be taken into consideration, according to the United Nations Economic and Social Commission for Asia and the Pacific:

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[757]*Ibid* at p. 216.
[758] For instance, in Singapore, the tax incentive is 0% for the first two years, 7.5% next 3 years, after which normal tax rate of 15% applied.
[759] Section 8 of NEPZ Act, *op cit*; section 8 of OGEPZ Act, *op cit*.
[760]N Quintine – Amiator, *op cit*, p. 132.
[761] O Osanakpo, *op cit*, p. 227.
[762] EU Moneke, 'Nigerian Export Processing Zone Authority: A Critique' in E Azinge and S Omo, *op cit*, p. 110.

> International experiences suggest that there are certain factors that greatly increase the likelihood of success with FTZs. Successful FTZs are usually characterized by quality infrastructure, a supportive government, lighter regulation, a strong export focus, tax and customs exemptions and large storage and logistic capacities.[763]

Several countries have successful free trade zones. For instance, China Special Economic Zone played a significant role in opening the Chinese economy to foreign investment. Today, China is one of the preferred destinations for Foreign Direct Investment.[764] The establishment of thespecial economic zone was not the only factor responsible for the Chinese free trade success. China had to change her trade policy and liberalize several aspect of her economic policy, including changing from a closed economy to an openeconomy. Other attractions to China were political stability, sound economic policies and massive infrastructural development.[765]

Singapore is another success story. Singapore although not blessed with natural resources, through the mechanism of trade liberalization developed into a modern city State. In addition to making the whole Singapore a free trade zone, the government of Singapore introduced other economic development strategies. Apart from the provision of incentives, there was huge investment in infrastructural development to the extent that Singapore is regarded as one of the most infrastructural developed countries of the world today.[766]

The Jebel Ali Free Zone in Dubai, UAE is another success story. It was the bedrock of the economic transformation of the economy of Dubai. The success of the free zone was based

[763] United Nations Economic and Social Commission for Asia; and the Pacific 'Free Trade Zone and Port Hinter Land' UN Publication, 2005. Cited in N Quintine- Amiator, *op cit,* p.124.
[764] U Ngwaba, *op cit,* p.190.
[765] *Ibid*.

on the political will of the government of Dubai. To ensure that the free zone succeeds, the government carried out massive infrastructural development. She constructed the world's largest artificial seaport, where goods can be transported or received from any other seaport in the world.[767]Also,the Al Maktoun Airport was constructed, and it is the 8th largest cargo airport in the world. This is coupled with good road network and a metro rail line.[768] Thus, the success of the Jebel Ali Free Zone is not unconnected with the provision of the needed infrastructure by the government.

Mauritius arguably is the most successful free trade zone in Africa. Mauritius was a mono economy that relied heavily on the export of sugar and its bye products.[769]The country was characterized by high rate of unemployment and was economically backward before 1970. The whole ofMauritius is designated anexport processing zone. Before Mauritius established her export processing zone, a proper study of successful export processing zones in countries like Singapore, Taiwan and Philippines, was undertaken.[770]To ensure the success of the export processing zone scheme, Mauritius embarked on several economic reforms, with emphasis on the production of goods for export. The success of Mauritius was based on sound economic policies and the provision of the needed infrastructure.[771]

Some countries, free trade zone did not achieve the intended purpose of establishing the zones; and could be termedas failed free trade zones. For instance, in Senegal, the Dakar Free Trade Zone was unsuccessful.[772]Some of the factors that led to its failure include the

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[766]*Ibid* at 222-223.
[767] Jebel Ali Free Zone, *loc cit*.
[768]*Ibid*.
[769] L Kinuda – Rutashobya, 'Exploring the Potentialities of Export Processing Zones (EPZs) for Economic Development of Africa: Lessons from Mauritius' (2003) Management Decision Vol 41 No 3 pp. 226-232. Cited in U Ngwaba, *op cit*, p. 189.
[770]*Ibid*.
[771]*Ibid*.
[772] O Osanakpo, *op cit*, p.223.

administrative bottlenecks in processing of application by investors, and the inability of the government to provide the needed infrastructure. For instance, the operators were expected to build their own factory building and warehouses.[773]

In Nigeria, it is conceded that some of the free trade zone schemes have made some remarkable impact. For instance, the Calabarfree trade zone, attracted several financial institutions, and was able to generate considerable employment.[774]Thus, General Electric investment of over One Billion Dollars in Calabar free trade zonegenerated over 300 Jobs and is expected to generate about 2,250 Jobs when completed.[775]Also, the Lekki Free Trade Zone was able to attract over 75 investors, 57 of which were foreign investors, and was able to create over 5560 jobs.[776] The Lekki Free Zone on the other hand helped to attract the development of Lekki area of Lagos State, with the building of a lot of commercial and residential properties.[777]

However, considering the impact of free trade zones on the economies of Singapore, china, Korea, Dubai, Mauritius etc.;Nigeria cannot be said to have achieved the objective of establishing free trade zones. This is because apart from Calabar and Lekki the attractiveness of foreign investors to the Nigeria free trade zones is relatively still very low. The unattractiveness of foreign investors to the Nigeria free trade zones is traceable to a number of factors, among which are poor infrastructures.For instance, the epileptic power supply situation in Nigeria increases the cost of doing business in Nigeria. Also, Nigerian roads are in a deplorable state.Furthermore, there is high rate of corruption among policy makers.Consequently, free trade zones in Nigeria are unable to neither generateconsiderable employment, boost the Nigeria

[773]*Ibid*.
[774] Free Zone Review 2001-2011, March 2012 Report, NEPZA cited in EU Moneke, *op cit*, p. 108-109.
[775]*Ibid.*
[776] P Atuanya, 'GE Calabar Facility to Provide 2,250 Jobs' *Business Day*, September 14th, 2015, www.businessdayonline.com accessed on the 20th of April, 2016.
[777] EU Moneke, *op cit*, p.109.

economy nor achieve the kind of success recorded bysimilar zones in places like Dubai, Singapore, Mauritius, etc. In this directionMonekeobserved that:

> For countries that have recorded failure, the low degree of government investment in infrastructural development has been a major factor. Other reasons include poor site location, week administrative bodies, uncompetitive incentives and poor zone management. Inept application of the project, inadequate government support, political and economic instability…[778]

Similarly,Ngwaba stated that:

> …major constraints have been identified to include insufficient incentives and promotion, poor location, inadequate trade policy reforms in the host country, inefficient bureaucracy, inadequate infrastructure, namely roads, ports, airports, telecommunication, electricity and water.[779]

It is obvious that the free trade zone scheme has not yielded the needed result in Nigeria and most African countries; However, with the greatest respect it is difficult to agree with the position of Moneke[780] and Ngwaba[781] that uncompetitive and insufficient incentives are part of the factors that may have led to failures of some free trade zones in Nigeria. This is because Nigeria gives permanent tax holidays to operators in the zones. As earlier stated this appears too generous considering that countries like India give only five years tax holiday in the first instance, Kenya is 10 years, while China gives full tax exemption for two years and tax reduction

[778] EU Moneke, *op cit*, p.110.
[779] U Ngwaba, *op cit*, p.192.
[780] *Op cit.*
[781] *Op cit.*

for the next three years while the United States provides for only reduced tax rates in their zones. The reasons for the failure of free trade zones in Nigeria are obvious;for free trade zones to be successful there must be the provision of needed infrastructural development. In Nigeria today, there are, no good road network, and most of the existing ones are in a deplorable state. The airports are not enough to service the free trade zones; this is further compounded by the inability of the Government to address the issue of power supply. Furthermore, Security challenges in some parts of the country's, especially the Niger Delta has led to an over dependence on the Lagos seaport for export and import. These factors increase the cost of doing business in Nigeria and discourage foreign investors from coming to Nigeria.

Nigeria ought to be a very successful free trade zone center. This is because there are other attractions to invest in Nigeria in addition to the favourable tax incentives. She is Africa's largest market, and blessed with abundant natural resources. It is the researcher's view, that for Nigeria to achieve its objectives of establishing free trade zones, to wit, the attraction of foreign investment, urgent measures should be taken to improve on the state of her infrastructure. This can be achieved through public private partnership or concessioning of critical infrastructure to private organizations that have the capacity to fund such projects. Also, the security situation in the country should be addressed by evolving a community based policing and intelligence strategy.

In conclusion, Nigeria seems to have very attractive provisions on tax incentive, unfortunately, the Nigerian tax system has not been able to make considerable impact on trade and investment in Nigeria. The tax incentive provisions have not been able to stimulate the economy, drive trade and investment nor attract significant foreign direct investment in Nigeria. For tax incentives to become more meaningful to investors there is an urgent need to reduce corporate tax rates and

reduce the number of tax payments. Furthermore, all forms of double taxation and multiplicity of taxes should be eliminated. Investors look at the tax system entirely, and will not be moved by attractive tax incentives, if there are other discouraging factors in the tax system. Tax incentives alone cannot turn around the economic fortunes of a nation. For tax incentives to have positive effect in Nigeria there is need for some economic reforms, in this direction the Government's fiscal policy on taxation shouldemphasize the introduction of more of indirect taxes like value added tax, than direct taxeslike companies income tax. The Government must invest on critical infrastructure like power, roads, airports and seaports. Also, Nigeria should adopt a targeted tax incentive strategy. In this case Nigeria should select areas she intends to attract investors, ban the importation of such goods into Nigeria and provide tax holidays for investors in those sectors. For instance, although Nigeria accounts for about 10.8% of Africa's tomato production, ironically Nigeria is the 8thlargest importer of tomatopaste in the world.[782] Thus, the Government should ban the importation of tomatoes paste, and encourage investors to establish tomatoes factories by providing special incentives for them.

[782]Agusto& Co '2015 Tomato Processing Industry Report'www.agustoresearch.com/2015-tomato-processing-industry-report/ accessed on the 20th of May, 2016.

CHAPTER FIVE

STATE TAX LAWS AND IT'S EFFECT ON TRADE ANDINVESTMENT IN NIGERIA.

5.1State Taxing Powers.

Nigeria is a Federation, thus, taxing powers are shared between the Federal and State Governments. The State Houses of Assembly, despite the overconcentration of taxing powers on the National Assembly, can legislate on taxation, subject to the provisions of the Constitution.The State Houses of Assembly have powers to make laws for the peace, order and good government of the State or any part thereof with respect to the following:Any matter not included in the Exclusive Legislative List of the constitution, any matter included in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to this constitution to the extent prescribed in the Second Column opposite thereto and any other matter with respect to which it is empowered to make laws in accordance with the provisions of this constitution.[1]

From the foregoing, the State Houses of Assembly has powers to make laws on any matter not included in the Exclusive Legislative List,[2] any matter in the Concurrent Legislative List to the extent prescribed in the second column opposite thereto[3] and any matter it is specifically empowered to make laws on in accordance with the provisions of the Constitution.[4] It is instructive to note that the National Assembly has all the powers of a State house of Assembly, for the purpose of legislating for the Federal Capital Territory.[5]

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[1] Section 4(7) of the Constitution of the Federal Republic of Nigeria 1999, (as amended) (hereinafter referred to as the Constitution.)
[2] *Ibid*, Section 4(7) (a).
[3] *Ibid*, section 4(7) (b).
[4] *Ibid*, section 4(7) (c).
[5] *Ibid*, section 299.

The State Houses of Assembly, apart from its powers to legislate for the taxation of Local Government Councils[6] which will be discussed later in this chapter, also, has powers to legislate on residual matters,that isany matter not included in the Exclusive or Concurrent Legislative List[7]. Consequently, the National Assembly cannot legislate on residual matters. The courts have long settled this issue. In *AG Ogun State v Aberuagba*.[8] The Supreme Court stated per Bello Jsc. as follows:

> A careful perusal and proper construction of section 4 would reveal that the residual legislative power of government was vested in States. By Residual legislative powers within the context of section 4, is meant what was left after the items in the exclusive and concurrent legislative list and those matter which the constitution expressly empowered the federation and States to legislative upon, had been subtracted from the totality of the inherent and unlimited powers of a sovereign legislature. The federation had no power to make laws on residual matters.[9]

In furtherance of the powers of the State Houses of Assembly to make laws for the imposition and collection of taxes, the various State Houses of Assembly have enacted several tax laws. State tax laws have largely contributed to the multiplicity of taxes in Nigeria and in most cases amount to double taxation. Thus, State and Local Government taxes have been described as nuisance taxes,[10] and the manner of administering these taxes, are perceived in several quarters

[6] *Ibid*, section 7.
[7] *Ibid*, section 4(7) (a).
[8] (2009) 1 TLRN, 82.
[9] Particular at 97.
[10] E Aiyedun 'Effectiveness of Tax incentives as Catalyst for Economic Development in Nigeria (1999) 4 *MILBQ* No. 2, 122.

to be arbitrary.[11] In the course of this work, I shall look at the impact of these taxes on trade and investment in Nigeria. However, it is important to look at fiscal federalism under the constitution and the taxing powers of state governments. This is becausethe fiscal federalism structure as provided in the Constitution[12] is to a great extent responsible for the abuse of taxing powers by States.

5.2 Fiscal Federalism and Taxing Powers of State Governments.

The taxing powers of State governments, is to a large extent limited by the fiscal federalism provisions of the constitution. To this end it is important to discuss the concept of fiscal federalism in relation to taxation under the Nigerian constitution.[13]

Nigeria is a federation, consisting of 36 States and a Federal Capital Territory.[14] The powers of the Government are distributed between the States and the Federal Government. The provisions of the constitutionespecially with regards to fiscal matters, leaves a lot of doubt, as to whether Nigeria is really a Federation. Federalism according to Sagay:

> … is an arrangement whereby powers within a multinational country are shared between a federal or central authority, and a number of regionallised governments in such a way that each unit including the central authority exist as a government separatelyand independently from the others, operating directly on persons and property within its territorial area, with a will of its own and its own apparatus for the conduct of affairs and with an authority in some matters exclusive of all others. In a federation, each government enjoys autonomy, a separate

[11]MA Popoola 'Taxation as an Incentive for the Inflow of Foreign Investment to Nigeria'MILBQ,112.
[12]*Op cit.*
[13]*Op cit.*
[14] Section 2(1)(2)(3) of the constitution, *op cit*.

> existence and independence of the control of any other government. Each government exists, not as an appendage of another government (e.g. the federal or central government) but as an autonomous entity in the sense of being able to exercise its own will, on the conduct of its affairs free from direction by any government. Thus the central government on the one hand and the State governments on the other hand, are autonomous in their respective spheres.[15]

Similarly,Nwabueze defined federalism as:

> … an arrangement whereby powers of government within a country are shared between a national, country-wide government and a number of regionalized (i.e. territorially localized) government in such a way that each exist as a government separately and independently from the others operating directly on persons and property within its territorial area, with a will of its own and its apparatus for the conduct of its affairs, and with an authority in some matters exclusive of all the others. Federalism is thus, essentially an arrangement between governments, a constitutional device by which powers within a country are shared between two tiers of government, rather than among geographical entities comprising different people.[16]

From the above definitions, the main features of federalism are the existence of two independent tiers of government, and the distribution of powers between them. Thus, federalism

[15] Culled from E Ihedioha 'Legislative Issues in Fiscal Federalism in Nigeria' a Paper delivered at the Second Anniversary Lecture of the Fifth Assembly of the Delta State House of Assembly, Asaba on 14th June, 2013, p. 3.

[16] BO Nwabueze, '*Federalism in Nigeria under the Presidential Constitution* (Lagos: Lagos State Ministry of Justice, 2003) p. 1.

can be defined as an arrangement in a country where governmental powers are shared between two independent tiers of government. Local Governments are not a tier of government; they are a system under the control of state Governments. In Nigeria Local Governments don't have legislative powers under the Constitution; the powers of the Federation are shared between the Federal Government and State Governments,[17] while Local Government administration was structured as an appendage of the State Governments under the Constitution.[18] However, it is recognized as a level of government for the purpose of resource allocation. There is need to strengthen Local Governments by giving them some Legislative Powers, one quick way to do this is to amend the Constitution to give Local Governments the powers to legislate on all the items under the fourth schedule to the Constitution.

Fiscal federalism on the other hand has been defined as follows:

> Fiscal federalism means the application of the federal principle in resource mobilization and allocation within and among the constituent units in a federation. In other words fiscal federalism is the division of powers, functions, duties, and financial resources among different levels or tiers of government.[19]

The principles of fiscal federalism are concerned with how taxing, revenue generation, spending and regulatory functions are distributed among the federating units and how intergovernmental transfers are structured among the units.[20] The researcher therefore defines fiscal federalismas the distribution of the powers to regulate the finance and revenue of a country among the tiers of government.

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[17]Section 4-6 of the Constitution (as amended), *op cit.*
[18]*Ibid*, section 7.
[19]E Ihedioha, *op cit*, p. 4.
[20] IO Okauro (ed) *A Comprehensive Tax History of Nigeria* (Abuja: FIRS, 2012) p. 1.

The National Tax Policy document encourages States to direct their tax policy towards ensuring that the tax system reflects the principle of fiscal federalism.[21] In this regard, it is intended that the Nigerian Tax Policy would therefore uphold the application of fiscal federalism in the generation and expenditure of revenue by Government at all level in accordance with the tenets of the Nigerian Constitution.[22] The expectation of the National Tax Policy is that there should be a workable and acceptable platform which should be adopted by all tiers of Government for the proper application of the doctrine of fiscal federalism in relation to taxation.[23] In this regard, the role of fiscal federalism is capturedin the National Tax Policy document as follows:

> It is expected that the tax policy and other tax legislation, would resolve the issue of who collects what, how it is collected, who controls what is collected, how what is collected is shared, who is responsible for spending what is collected and who is ultimately responsible and accountable to the tax payers for the revenue collected and its expenditure.…it is believed that adherence to these principles would bring an end to disputes on the limits and powers of the tiers of Government in our federation on fiscal matters. It will also bring clarity and certainty to tax administration in the entire Nigerian tax system.[24]

[21]Appendix 3 of the National Tax Policy.
[22] Role of Fiscal Federalism, paragraph 1.6 National Tax Policy.
[23]*Ibid.*
[24]*Ibid.*

This position is quite laudable, but unattainable in view of the constitutional provisions on fiscal federalism in Nigeria. It is only the Constitution[25] that can properly resolve the issue of who collects what, how it is collected, who controls what is collected, how what is collected is shared; a policy document cannot do that. As earlier established, the Constitution[26]gives overriding powers to the Federal Government on taxation matters. The drafters of the constitution did not seem to appreciate the import of federalism. Hence, in making provisions for fiscal matters, the principles of fiscal federalism were ignored to a great extent. An examination of the legislative powers of the National Assembly will clearly reveal that there is no fiscal federalism in Nigeria especially in relation to issues of taxation.

The National Assembly has powers to legislate on any matter in the Exclusive Legislative List.[27] The under listed items in the exclusive list relates to fiscal matters.

Item 6. Banks, banking, Bills of Exchange and promissory note.

Item 5 Bankrupcy and Insolvency.

Item 7 Borrowing of Moneys within or outside Nigeria for the purposes of the federation or of any State.

Item 15 Currency, Coinage and Legal Tender.

Item 16 Custom and Excise duties

Item 24 Exchange Control

Item 39 Mines and Minerals, including oil fields, oil mining, geological surveys and natural gas.

Item 50 Public debt of the federation

Item 58 Stamp duties

[25] *op cit.*
[26] *op cit.*
[27] Part I of the Second Schedule to the Constitution, *op cit*, by virtue of section 4(2) of the constitution.

Item 59 Taxation of income, profits and capital gains, except as otherwise prescribed by this constitution.

Item 62 Trade and commerce.

Item 68 any matter incidental or supplementary to any matter mentioned elsewhere in this list.

Also, the National Assembly has powers to legislate on any matter, it is specifically empowered to legislate upon under the provisions of the Constitution,[28]and any item in the Concurrent Legislative List[29] to the extent prescribed in the Second Column opposite thereto.[30]In addition to the foregoingsection 44(3) of the Constitution provides as follows:

> Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the exclusive economic zone of Nigeria, shall vest in the government of the federation and shall be managed in such manner as may be prescribed by the National Assembly.[31]

The State Houses of Assembly are only competent to legislate on residual matters,[32] items in the Concurrent Legislative List to the extent prescribed in the Second Column opposite thereto,[33] subject to the doctrine of covering the field[34] and the enactment of laws for Local Government administration.[35]

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[28]*op cit.,* section 4(4) (b).
[29]*Ibid,* Part II of the Second Schedule to the Constitution, *op cit.*
[30]*Ibid,* section 4(4) (a).
[31]*op cit.*
[32]*Ibid,* section 4(7) (a).
[33]*Ibid,* section 4(7) (b).
[34]*Ibid,* section 4(5).
[35]*Ibid,* section 7 and the Fourth Schedule .

Against the backdrop of the *distribution* of powers under the 1999 constitution,[36] one can safely come to the irresistible conclusion that the constitution is not a federal constitution. Nwabueze has identified some fundamental characteristics of a federal system of government they are:

(1) The power arrangement should not place such a preponderance of power in the hands of either the national or regional government to make it so powerful that it is able to bend the will of the others to its own.Federalism presupposes that the national and regional government should stand toeach other in a relation of meaningful independence resting upon a balanceddivision of powers and resources. Each must have powers and resources sufficient to support the structure of a functioning government able to stand on its own against the other.

(2) From the separate and autonomous existence of each government and the plenary character of its powers within the sphere assigned to it, by the constitution, flows the doctrine that the exercise of these powers is not to be impeded, obstructed or otherwise interfered with by the other government, acting within its own powers.[37]

The provisions of the 1999 Constitution,[38] which is substantially the same with the 1979 Constitution of the Federal Republic of Nigeria, on fiscal matters is far from these characteristics, making it is like a unitary constitution. There is over concentration of fiscal powers on the federal government. In a bid to introduce a semblance of federalism; the constitution has introduced what has been described as feeding bottle federalism,[39] where federating units go to Abuja at the end of the month to share money.

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[36] *Op cit*
[37] BO Nwabueze, *op cit*, pp. 20-21.
[38] *Op cit*
[39] I Ekweremadu, 'Keynote Address at the Second Anniversary Lecture of the Fifth Assembly of the Delta State

The provisions of section 162, 163, 164 of the Constitution[40] provides to the effect that any amount standing to the credit of the federation account or the net proceeds from tax and duties, shall be distributed among the States on the basis of derivation. According to Ekweremadu:

> Those early days of real fiscal federalism built on the philosophy of 'no food for lazy man region' witnessed massive development across the regions. Each constituent part worked hard to harness and wisely spends its resources to meet its needs and goals. The regions sort to outdo one another in human capital, infrastructural and industrial development, serviced, not with oil money, but by proceeds from palm produce in the East, Cocoa and Rubber in the West and groundnut in the North.[41]

This was the position before the oil boom. Under the 1963 Republican constitution, all minerals, both solid and oil found in the continental shelf of a region belonged exclusively to that region. The Federal Government was mandated to pay 50% of the royalties received by the federation in respect of the minerals extracted in that region to the regions.[42] With the discovery of crude oil, events took a new turn. During the oil boom of the late sixties and seventies, the right of the regions over their resources was abrogated by Offshore Revenue Decree No. 9 of 1971. This was reflected in all subsequent constitutions. In the 1979 constitution, it was section 40(3) while in the 1999 Constitution[43] it is section 44(3).

Over the years, there has been an entrenchment of this kind of federalism, where power is over concentrated at the federal level. Ekweremadu decrying this ugly trend stated as follows:

House of Assembly, Asaba on June 14, 2013, p. 2.

[40]*Op cit.*

[41]*Ibid.*

[42]Section 140 of the 1963 Constitution of the Federal Republic of Nigeria.

> A federating arrangement where the federating units converge at the federal capital every month like spoilt adults to be bottle fed with free money without thinking of how to make their own money is what I have described as feeding bottle federalism. And typical of free money, this culture has had a lottery effect on the nation. It is like a poor man who wakes up on top of billions of lottery cash. His sense of productivity, priorities, and frugality disappears…This culture of free money has also affected our national attitudes to taxation as a catalyst for socio-economic development.[44]

Nigeria is a mono product, oil dependent economy. However, with the volatility in the oil market, State governments have seen the need to diversify their economy.[45] Thus, the need to increase internally generated revenue is more urgent than ever before. Taxation has been recognized as a veritable tool by State Governments to boost internally generated revenue. However, the provisions of the Constitution on fiscal matters, as earlier discussed, limits thepowers of the State Government's to impose and collect taxes.

Unfortunately, the Federal Government in reaction to the observation that taxing powers are over concentrated at the federal level amended the Taxes and Levies (Approved List for Collection) Act,[783] in 2015 by an order of the Minister of Finance[784] to include most of the arbitrary taxes by State Governments. Part 11 of the Act which is on taxes collectable by State Governments was amended to include the following taxes: Business Premises Registration Fees

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[43] *Op cit.*
[44] I Ekweremadu, *loc cit.*
[45] KA Muhammed 'Delta 'State Beyond Oil; Taxation As a Catalyst for Socio-Economic Development' A paper presented at the Second Anniversary Lecture of the Fifth Assembly of the Delta State House of Assembly, on June 14th, 2013, pp. 4-6.
[783] Cap T2 LFN, 2004.
[784] Taxes and Levies (Approved List for Collection) (Act Amendment) Order, 2015.

of Urban and Rural areas of each State renewable annually, Land Use Charge, Hotel, Restaurant or Event Centre Consumption tax, Entertainment tax, Environmental Tax, Mining, Milling and Quarrying Fee, Animal trade Tax, Produce Sales Tax, Slaughter or Abattoir Fees, Infrastructural Maintenance Charge or Levy, Fire Service Charge, Property Tax, Economic Development Levy, Social Services Contribution Levy, where applicable and Signage and Mobile Advertisement jointly collected by State and Local Governments. Also, Part 111, which is on taxes collected by Local Governments, was amended to include Wharf Landing Charge.[785]

This Act seeks to expand the no of taxes the States can collect,although, it is arguable that an Act of the National Assembly cannot determine the taxing powers of States and Local Governments. Clearly this amendment seeks to institutionalise double and multiple taxation in Nigeria, a development that is not good for the development of trade and investment in Nigeria. Thus, at this point in Nigeria it is obvious that the Taxes and Levies (Approved List for Collection) Act,[786]seems to be compounding the challenges of taxation and ought to be repealed.

The multiple taxes imposed by State Governments raise little revenue, cause huge inconveniences and pose serious obstacles to private sector investment.[46]Popoola decried this detestable trend in the following way:

> Judging from the experience in the recent past on tax administration in Nigeria, especially as it relates to the State tax authorities, there had been regimes of arbitrary and unilateral imposition of excessive and duplicated taxes on both corporate and individual taxpayers and naturally, taxpayers are confused and frustrated. Equally, there is arbitrariness and multiplicity of assessment in the imposition of

[785]*Ibid* Section 3 and 4.
[786] Cap T2 LFN, 2004.

taxes, rates and levies by both the State and Local government authorities.[47]

The imposition of multiple and arbitrary taxes by State governments, in most cases increases the cost of doing business and discourages trade and investment in Nigeria. For the State tax laws to stimulate trade and investment there is need to amend the constitution to entrench fiscal federalism, and expand the taxing powers of the States. This will discourage the detestable trend of trying to tax everything possible by State Governments, without considering the overall impact on the economy.

There is an urgent need to address the issue of non-fiscal federalism in Nigeria, to attract foreign investors. To achieve this, the Constitution needs to be amended to increase the taxing powers of State Government's. Thus, Items 58,59, and 62 of the Exclusive Legislative List of the Constitution should be moved to the Concurrent Legislative List of the Constitution.

5.3 Imposition and Collection of Levies, Rates, charges, Fees etc by State Governments.

The State Houses of Assembly, as earlier established has powers to legislate on the imposition and collection of taxes. In the exercise of these powers, the State Houses of Assembly have with the greatest respect have been reckless; oftentimes these powers have been exercised arbitrarily without considering the impact on trade and investment. Investors who are trying to take advantage of the tax incentives provided by Federal tax laws are oftentimes embarrassed by State taxes like environmental tax and agricultural tax, which are sometimes outside the legislative competence of the State Houses of Assembly to legislate upon. Over the years, Nigeria has been over dependent on oil revenue, and with the fluctuations in the oil market, and the attendant

[46]E Aiyedun, *loc cit.*
[47] MA Popoola, *loc cit*.

effect of dwindling revenue from oil, States are forced to generate revenue by any means. However, as earlier established, there seems to be an over concentration of taxing powers on the Federal Government by the Constitution.[48] Thus, the fiscal federalism structure of the 1999 Constitution[49] has to a large extent limited the ability of States to generate revenue. Irrespective of this fact, the States are constrained to depend on taxation as the most reliable alternative means of generating revenue.

The States oftentimes, have emphasized the potentials of taxation as a means of generating revenue to the detriment of other functions of taxation. Hence, the States have not been able to fully appreciate that taxation is an effective tool for socio economic development. Thus, in the process of trying to generate revenue through taxation, the development of trade and investment is adversely affected. Consequently, investors do not see the states as conducive enough to do business; this is because the cost of doing business will be higher with the presence of these multiple state taxes in addition to federal taxes. In most cases, States impose double taxes on the same issue, by simply giving them different names. To further worsen the situation, investors are left with no choice other than to pay these state taxes after they have paid the federal taxes. This is because they operate their business in states except the ones that are solely based in the Federal Capital Territory. This practice is unfair to investors, because States share from the proceeds of the Federal *Corporate* tax.[50]States, recognizing that they lack powers to impose Company Income Tax, have devised a means of taxing companies by imposing all manner of taxes. Some of these taxes are examined below.

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[48]*Op cit.*
[49]*Op cit.*
[50]Pursuant to section 162,163 and 164 of the Constitution, *op cit.*

5.3.1 Environmental Tax.

Environmental taxes are among the taxes imposed by State governments that could be described as nuisance taxes. In most cases, they are either unnecessary or outside the legislative competence of the State Houses of Assembly on taxation. The most fundamental issue in this discussion is to ascertain whether the State Houses of Assembly has powers to legislate on environmental matters.

The Merriam Webster Dictionary defines environment as 'the conditions that surround someone or something, the conditions and influences that affect the growth, health, progress, etc.of someone or something' or 'the complex of physical, chemical and biotic factors (as climate, soil, and living things) that act upon an organism or an ecological community and ultimately determine its form and survival.'[51]In other words environment implies the interaction of the natural world, air, land, sea, etc. with the living things in it.'

The Constitution[52] clearly sets out the environmental objectives of every tier of government; consequently, section 20 of the 1999 Constitution[53] provides as follows: 'The State shall protect and improve the environment and safeguard the water, air, land, forest and wildlife of Nigeria.' This is the only direct provision on environmental matters in the constitution.However, this provision is non-justiciable as it is part of Chapter Two of the Constitution.[54]

Generally, the Constitution[55] does not clearly State, which tier of government has the powers to control environmental matters. The Concurrent Legislative List does not have copious

[51]www.merriamwebster.com/dictionary/environment, accessed on 10th June 2014.
[52]*op cit.*
[53]*op cit.*
[54]Pursuant to Section 6(6) c of the 1999 Constitution, *op cit*.
[55]*Op cit.*

provisions on environment matters. However, there are a few items that have environmental implications in the Concurrent LegislativeList. For instance:

Items 3, 4 and 5 on Antiques, monuments and archives

Items 13 and 14 on Electric power.

Items 17 and 18 on Industries, commercial and agricultural development and

Items 21 and 22 on Scientific and technological Research.

It is instructive to note that the powers of the State to legislate on any item under the Concurrent LegislativeList are circumscribed by the doctrine of covering the field. The State Assemblies can also legislate on waste management issues and environmental sanitation issues for Local Government.[56] Thus, the powers of the State to legislate on environmental matters are mainly on Local Government environmental sanitation matters. Further discussion on this issue will be done while considering the taxing powers of Local Government in subsequent part of this chapter.

The National Assembly seems to have more powers to legislate on matters that affect the environment. In the Exclusive Legislative List[57]the following items are connected with the environment.

Item 3 Aviation, including airports, safety of aircraft and carriage of passenger and

Goods by air

Item 21 Drugs and poisons

Item 2 Fishing and fisheries other than fishing and fisheries in rivers, lakes,

waterways, ponds and other inland waters within Nigeria.

Item 36 Maritime shipping and navigation on tidal waters, River Niger and its effluents on

[56] Items 1 (c), (e), (f), (h), and 2 (b) and c of the Fourth Schedule to the 1999, Constitution, *op cit.*
[57] Part I of the Second Schedule of the 1999 Constitution, *op cit.*

any such other inland waterways designated by the National Assembly as international waterway or to be an inter State waterway, seaports.

Item 37 Meteorology

Item 39 Mines and minerals, including oil fields, oil mining, geological surveys and Natural gas

Item 40 National parks

Item 41 Nuclear energy

Item 54 Quarantine

Also, by the provisions of item 68 of the Exclusive Legislative List of the Constitution,[58] any matter incidental or supplementary to any matter mentioned elsewhere in the list, is within the legislative competence of the National Assembly. It has been observed that, the above provision '…gives the federal government the pre-eminent position in all matters of environmental management.'[59] It is obvious that the National Assembly can legislate on almost all environmental issues. However, based on section 20 of the Constitution,[60] the States can legislate on any issue that affects the environment, especially when that issue has not been covered by an act of the National Assembly.

State governments to a large extent have abused the powers to enact laws for the protection of the environment. In most cases, the government has revenue generation in mind, rather than the need to address environmental issues. This has led to the proliferation of environmental taxes and tariffs. In trying to use environmental issues to raise revenue, the environmental laws

[58] *Op cit.*
[59] L Atsegbua et al, *Environmental Law in Nigeria, Theory and Practice*, (Lagos: Abuba press, 2003), p.18.
[60] *Op cit.*

of States end up being in conflict with federal laws.[61] To demonstrate the extent environmental taxes have been abused, a study of some environmental laws in Delta State will be apt. By the provisions of Section 16(1) of the Delta State Ecology Law 2006, the Governor is empowered with the advice of the appropriate authority to compile a table to be known as Ecology Tariff, Specifying the fees, rates and charges payable in respect of matters falling under the general scope of the law. Pursuant to this section, the Governor of Delta State on October 3,2006, by an order prescribed the rates, fees and charges of the ecology tariff. An upward review of the Ecology Tariffs was included as an annexure XIX in the Delta State Internal Revenue Consolidation Law, 2009.[62]

A critical look at the ecology tariff clearly reveals that most of the environmental issues sought to be taxed are incidental to oil and gas,[63] mining and minerals,[64] communication,[65] aviation[66] marine[67] which are items under the Exclusive Legislative List[68] and by the provision of item 68 of the Exclusive Legislature List, any matter incidental to or supplemental to any item in the Exclusive Legislative List is within the legislative competence of the National Assembly. Thus, these tariffs are forms of double taxation, as investors are compelled to pay these tariffs after paying companies income tax or petroleum profit tax. It is the researcher's view that these tariffs are unconstitutional and illegal. Unfortunately, companies are being harassed on daily basis by the Delta State Internal Revenue Board to pay these tariffs. Oftentimes they drag them

[61] A Nwokoro, 'Environmental Protection in Nigeria: An Overview of Legislations and Monitoring Authorities,' a paper presented at a retreat for Delta State Legislators, in Lagos on 10th of June, 2013, p. 2.
[62] Cap C99, Laws of Delta State.
[63] see items 1,2,3,8,9,11,32,41,54 etc. of the Ecology Tariffs, annexure XIX Delta State Internal Revenue Consolidation Law, *op cit.*
[64] *Ibid* ,items 5,7,26,31,33.
[65] *Ibid*, items 37, 38.
[66] *Ibid* item 10.
[67] *Ibid* 20,21,44.
[68] See items 3,36,39,46 of the Exclusive Legislative List, and section 44 of the Constitution, *op cit.*

before the state revenue courts, whose responsibility is to enforce the state revenue laws. This practice is a major disincentive to investment and should be stopped.

Similarly, under the Delta State Environmental Protection Agency Law,[69] the Governor is vested with powers to prescribe effluent discharge fees. Pursuant to this law, the Delta State Internal Revenue Consolidation Law contains annexure of the effluent discharge fees.[70]

A critical examination of the items under this effluent discharge fees shows that most of the items has to do with activities in the oil industries and aviation. These issues are clearly outside the legislative competence of the state governments, and to that extent, it is unconstitutional for the State House of Assembly to legislate upon. This practice of trying to use environmental laws to raise revenue instead of protecting the environment should be discouraged. Even when the states have the competence to impose such fees or tariffs, they should decline because it will increase the cost of doing business in the state, and make the state unattractive to investors. Considering the fact these companies are also, liable to pay Company Income Tax, Tertiary Education Trust Fund Tax, Petroleum Profit Tax, and a host of other taxes imposed under various Acts of the National Assembly, which the State governments benefit from. For instance it will amount to double taxation to subject a company that pays petroleum profit tax to pay effluent discharge fees. This is because there is no rationale for introducing such fees other than revenue generation, and as consistently argued revenue generation should not be done at the expense of an investment friendly environment.

5.3.2 Consumption Tax

Consumption tax is a tax imposed on the sale or use of goods and services. It is usually collected by the seller of the goods or provider of the services on behalf of the Government.

[69]Laws of Delta State.
[70]Annexure IV of the Delta State Internal Revenue Consolidation Law, *op cit.*

Consumption tax has generated a lot of controversy between the States and the Federal Government. The issues have centered on the power to impose and collect consumption tax in Nigeria, and the major question has been whether states can validly legislate on consumption tax. The Federal Government and the State Governments have at various times legislated on various forms of consumption tax, like Value Added Tax (hereinafter referred to as VAT) and sales tax. Although, VAT, sales tax or consumption tax was not expressly mentioned in the Constitution,[71]there is a constitutional basis for the imposition of consumption tax in Nigeria. The combined effect of section 4 (1-4) and items 62(a) and 68 of the Exclusively Legislative List of the Constitution[72] gives the National Assembly powers to legislate on trade and commerce between Nigeria and other countries, including import of commodities and export of commodities from Nigeria,and trade and commerce between States[73] and any matter incidental or supplemental to item 62(a) of the Exclusive Legislative List to the Constitution.[74] The National Assembly can clearly legislate on consumption tax, based on the above Constitutional provisions[75] because consumption tax is imposed on goods and services which are clearly incidental and supplementary to trade and commerce. It is instructive to note that it is only international and inter State trade and commerce that is within the competence of the National Assembly. Salau and Atilola have suggested that:

> The constitution vests the National Assembly of the Federation, the power to legislate among other taxes on taxation of incomes. Since a consumption tax is an indirect taxation of the income of the taxpayer, it

[71]*Op cit.*
[72]*Op cit.*
[73]*AG Ogun State v Aberuagba* [1985] 1NWLR[Pt.73] 395, [2009] I TLRN, 82.
[74]*Op cit.*
[75] MN Umenweke 'Attorney General of Lagos State Eko Hotel Ltd and anor [2008] 235, Revisited' 2012 *TLJN,* 123.

> is only the national assembly that is empowered under the constitution to legislate on such specie of taxation in Nigeria.[76]

The above suggestion with the greatest respect will be overstretching the scope of income tax, and will imply that consumption taxes is a form of double taxation, considering that there is personal income tax and company income tax. The controversial issue has been whether a State can validly enact any other form of consumption tax after the enactment of ValueAdded Tax Act[77] (hereinafter referred to as VAT Act) by the Federal Government. Several States in a bid to generate revenue have tried to introduce one form of consumption tax or the other. This has in most cases increased the tax burden in most of these states; taxpayers on the other hand have often resisted this trend by challenging the constitutionality of such taxes. Thus, in *Attorney General of Ogun State v Aberuagba*,[78] the Supreme Court was called upon to decide on the constitutionality of Ogun State Sales Tax law. Section 3(1) of the law provides as follows:

> A tax to be known as sales tax, shall be charged in accordance with the provisions of this law on all taxable products brought into the State and on the supply of goods and services in any inn not exempted from the requirement of registration under this law at the rate specified opposite each class of goods or service in the First Schedule to this law.

While invalidating this provision, the Supreme Court held that:

> A State cannot make sales tax laws affecting any of the matters in the exclusive legislative list, or a sales tax on any item in the concurrent

[76] S Salau and B Atilola, 'Reflections on the Constitutionality of the Hotel Occupancy and Restaurant Consumption Law of Lagos State 2009' [2010] 1 *NJBCL* NO 2.7.
[77] Cap VI LFN, 2004.
[78](2009) 1 TLRN 82.

> legislative list, which is inconsistent with any law validly made by the federation, based on the doctrine of covering the field. It also held that the States can legislate on sales tax, within the State, that is intra State but cannot legislate on sales tax inter State.[79]

Thus, the Sales Tax Law of Ogun State was declared unconstitutional because section 3(1) of the law imposes sales tax on goods brought into Ogun State, which is clearly an issue within the legislative competence of the National Assembly based on item 61(a) of the Exclusive Legislative List of the 1979 Constitution.[80] The position of the Court in this case was based on the fact that the law seeks to impose inter State sales tax, which is not within the legislative competence of a State House of Assembly.

In *Nigeria Soft Drinks Company v Attorney General of Lagos State*.[81] The constitutionality of the Sales Tax Law of Lagos State was in question. The Court of Appeal upheld the Sales Tax Law of Lagos State because it only sought to impose sales tax within Lagos State unlike the Ogun State Sales Tax Law that sought to impose taxes on goods coming into Ogun State from other States. However, in *Mama Cass Restaurant Ltd &ors v Federal Board of Inland Revenue & Anor,*[82] the Federal High Court sitting in Lagos refused to follow the *Nigerian Soft Drinks case*,[83] but relied on the *Aberuagba's case.*[84] The court held that the Sales Tax Law of Lagos was unconstitutional. That the Value Added Tax Act had already covered the field, the Sales TaxLaw of Lagos State is seeking to provide for. It noted that the revenue generated under the Value Added Tax Act[85] is for the benefit of the Federal, States, Federal Capital Territory and

[79] Particular at
[80] Now item 62(a) of the Exclusive Legislative list under the 1999 Constitution, *op cit.*
[81](1987) 2 NWLR (Pt 57) 444.
[82](2010) 2 TLRN, 98.
[83]*Supra*.
[84]*Supra*.
[85]*Op cit.*

Local Government Councils. In *AG Lagos State v Eko Hotels*,[86] the constitutionality of the Sales Tax Law of Lagos State was in issue again. The Court of Appeal relying on the *Aberuagba's case*[87] held per Dongbana- Mensem JCA as follows:

> Even though the Supreme Court in the case of *Attorney General of Ogun State v Aberuagba* … held that a State House of Assembly has power to make sales tax law, it emphasized the point that such State should not make any sales tax where any law validly made by the federation has covered the field…. The rates and the goods upon which the Sales Tax Law and VAT are charged are the same. The laws are however two different sources and in the circumstance, the one law, that is the VAT Act, of the Federal Government, has by the operation of statute, been given priority of place per the provisions of section 4(3) and (5) of the 1999 constitution. VAT and sales taxare the same. VAT as earlier noted, is ordinary termed National tax on sales of goods and services. The actual beast of burden of the VAT/Sales Tax is the consumer and the tax is charged on consumable items. The imposition of both VAT and Sales Tax will therefore create double taxation.[88]

Lagos State in her determination to impose consumption taxes enacted the Lagos State Hotel Occupancy and Restaurant Consumption Law, 2009. The constitutionality of this law has generated so much controversy. The Federal High Court in *Mas Everest Hotels v AG Lagos*[89]held that it is constitutional. However, in *Princes Court Limited v AG Lagos & ors*,[90] the

[86](2008) A FWLR (Pt 338) 235, (2009) 1 TLRN, 224.
[87]*Op cit.*
[88]Particular at 238.
[89](2010) 2 TLRN, 1.

Federal High Court relying on *AG Ogun State v Aberuagba*[91] and*AG Lagos State v Eko Hotels Ltd*[92] held that the previsions of the Lagos State Hotel Occupancy and Restaurant Consumption Law seeks to impose the same tax as the one imposed by the Value Added Tax Act[93] and that its provisions are inconsistent with the provisions of the Value Added Tax Act,[94] the Taxes and Levies (Approved list for collection) Act[95] and declared the law null and void. With the greatest respect, this decision does not seem to reflect the correct position of the law on this issue. Authorities on this point,[96] clearly recognizes the powers of the State Houses of Assembly to legislate on consumption tax within the State. The Supreme Court in the *Aberuagba's case*[97]stated clearly that it is not only the Federal Government that has power's to legislate on trade and commerce. The court went further to state that, while the Federal Government has exclusive powers to legislate on international trade and commerce and inter state trade and commerce, intra state trade and commerce is within the residuary powers of the states. Thus, the Ogun State Sales Tax Law was invalidated because the state lacks powers to legislate on consumption tax, but rather because the state went beyond her powers to legislate on inter state consumption Tax. However, the court advised against the imposition of consumption tax by states since they benefit from proceeds from VAT and it will amount to double taxation. The imposition of consumption tax by State governments has been a source of serious concern to investors. This is because it exposes consumers to double taxation, and invariably increases the cost of goods and services. The attendant effect is low patronage. It is suggested that since the

[90](2010) 3 TLRN, 30.
[91]*Supra*.
[92]*Supra*.
[93]*Op cit*.
[94]*Op cit*.
[95] Cap T2, LFN, 2004.
[96]*AG Ogun State v Aberuagba&ors* (supra); *Nigerian Soft Drinks Ltd. v A G Lagos State* (supra).
[97]*Supra* at 89.

States benefit from the revenues generated from VAT which is a Federal Government imposed consumption tax, they should refrain from the imposition of any other form of consumption tax. It is therefore suggested that the constitution should be amended to vest States with the powers to impose and collect consumption tax to the exclusion of the Federal Government.

5.3.3 Agricultural Taxes.

The States in the exercise of its powers to regulate agricultural activities also, uses this as a revenue generation tool. In Delta state for instance, movement of livestock attracts different rates.[98] Even the transportation of snail and day old chicks attracts some fees.[99] This issue of agricultural taxes was a source of concern to the Joint Tax Board. The Board noted that levies are imposed on cattle, yams, cereals, tomatoes, onions, goats, sheep, fruits, etc. It further noted that cattle dealers and food stuff traders are charged between ₦18,000.00 (Eighteen Thousand Naira) and ₦30,000.00(Thirty Thousand Naira) per truck at each state check point.[100] The implication of this trend was underscored in the report of the Joint Tax Board to the National Economic Council from its findings of a nationwide survey on the illegal collection of taxes and levies on the highways across the country. The board stated as follows in its report:

> Food items and other related items end up being triple or quadruple the cost at the time it reaches its final destination, making goods uncompetitive in the market place. For example, the cost of a Cow is ₦ 50, 000.00 at its take off point and ₦ 150, 000.00 in Onitsha / Port Harcourt and ₦ 180, 000.00 in Lagos being points of delivery. This results in an implied tax of 200% to 260%.[101]

[98] See Annexure XVI of the Delta State Internal Revenue Consolidation Law, 2009, *op cit*.
[99] *Ibid.*
[100] 10 Okauru, 'Faces of Multiples Taxation in Nigeria' *JTN News*. Vol 2 No. 2, January 2011. 11.
[101] *Ibid*

A consequence of this current situation and coupled with the effect of multiple taxation, is that tax on goods is in multiples of the cost of the goods itself, resulting in a clearly uncompetitive situation and an unnecessary higher cost of doing business.

This attitude of State Governments in the imposition of unnecessary taxes and levies should be discouraged. These could be one of the reasons the agricultural sector is largely subsistent. States have not been able to attract huge investment in the agricultural sector because of this trend of imposing unnecessary taxes on agricultural products. More worrisome is the barbaric method of collecting agricultural taxes by blocking roads. State Governments should adopt strategies that will attract investors in the agricultural sector. One strategy will certainly be the removal of some unnecessary taxes on agricultural products for instance, in Delta State, there is a fee for the inspection of Animals.[102]Ordinarily, the purpose of the inspection of animals is to ensure the people of Delta eat healthy meat. Unfortunately, what is done in practice is that revenue officers block the road to collect these fees without inspecting the animals. A thriving agricultural sector will create employment, and generate revenue for the state through Personal Income Tax. A look at the table for agricultural taxes in Delta State, will lead to the irresistible conclusion, that they generate very little revenue but cause a lot of embarrassment to investors in the sector. This practice should be stopped especially with the renewed interest to develop the Agricultural sector.

5.3.4 Economic Development Tax.

This is another unnecessary tax. It is unnecessary because, it discourages economic development in itself. The tax increases the cost of doing business and puts the State in the category of an investment hostile State. This tax is emphasized inAkwaIbom State where the AkwaIbom State

Internal Revenue Service is advocating for an upward review of this tax to generate more revenue for the State[103]

In some States, instead of introducing policies and incentives that will attract investors, taxes areimposed for nonexistent investors. For instance, apart from the numerous taxes existing in most States, which are enough to discourage investors, they still have levies like registration of business premises. In Delta State for instance, there is a business premises permit which is renewable annually.[104]

Registration of business premises ordinarily is not a bad idea, but it should not be a tool for revenue generation. Rather, it should be used for the purpose of data collection to enhance planning. It could also be used for the purpose of enforcing the collection of Personal Income Tax from employees, to avoid an unnecessary increase in the cost of doing business in the State.

5.3.5 Communication Tax.

Communication is an item in the Exclusive Legislative List of the Constitution[105] and ordinarily, States should have no business legislating on matters incidental to it. However,States like Lagos State, in the usual habit of testing the waters on tax matters, are trying to use a back door strategy to impose such tax.

In 2006, Lagos State introduced the Lagos State Infrastructure Maintenance and Regulatory Agency Law. On the surface, the law was to protect the environment but it had provisions that sought to regulate the telecommunications industry by imposing telecommunication taxes on the telecommunication industry.[106] This law was challenged by the

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[102] See Annexure XVI of the Delta State Internal Revenue Consolidation Law, 2009, *op cit.*
[103] Annual Report of Internal Revenue ServicesAkwaIbom State, 2010, p.41.
[104]Item 2 of Annexure XVIII of the Delta State Internal Revenue Consolidation Law,2009, *op cit.*
[105]Item 46 of the Exclusive Legislative List,part 1schedule 2, 1999 Constitution, *op cit.*
[106]B Olakeye, 'Telcos, LSG at Loggerheads Over New Telecom Taxes' *Daily Sun*, January 15, 2013, p.49.

Association of Licensed Telecoms Operators of Nigeria (ALTON). In *ALTON v AG Lagos State*[107]the Federal High Court in declaring the law unconstitutional held as follows:

> Though the LASIMRA Law looks innocent on the face of it, its provisions clearly seek to regulate telecoms and usurp the functions of the NCC. It is an attempt by the Lagos State government to regulate telecoms and if allowed, similar legislations would spring up in other States of the Federation.[108]

In spite of this decision, Lagos State, still bent on regulating the telecommunications industry enacted the Physical Planning Law of Lagos State. Under the Physical Planning Law of Lagos State, 2010, telecommunication industries are expected to pay about ₦3, 000,000.00 per base station while banks are also expected to pay for the use of their mast.[109] The General Manager of the urban infrastructure regulatory unit of the Ministry of Physical Planning Lagos State, while reacting to the reluctance of the Telecom Operators to comply with this law, stated as follows:

> Let it be known that telecom operators would be deceiving themselves, if they think the ministry laws can be challenged. Ministry's of Physical Planning is a statutory body of Lagos State, and it has the right to regulate telecommunications installations in the length and breadth of Lagos State.[110]

[107]Unreported Suit no. FHC/L/CS/517/2006 ruling deliveredon the 23rd of February, 2007 at the Federal High Court Lagos.
[108]*Supra.*
[109]B Olakeye,*loc cit*.
[110]*Ibid.*

This statement is a clear demonstration of the lack of appreciation of the constitutional provisions on the regulation of telecommunications. The telecom providers are not ready to comply with this law, thus, there may be another legal battle in court over this law.

The imposition of this law, is undoubtedly an example of double taxation on the telecomm industries because they pay Companies Income Tax, Tertiary Education Trust Fund Tax, etc., the proceeds of which Lagos State benefit from. Lagos State should encourage the telecom industry, by providing incentives for them, considering that they are among the major employers of Labour in the State.

5.3.6 Infrastructural Tax.

This type of tax ordinarily is not bad, as people will be happy to enjoy the use of public infrastructure for a fee. The fee is aimed at generating revenue for the maintenance of infrastructure. This type of tax or toll fees, as popularly called is a major tool to attract investment in the development of public infrastructure. Toll gates where toll fees are paid existed on all major highways in the country before they were disbanded by the Obasanjo Administration.[111]

Over the years, Government at both the Federal and State levels has recognized the need for a public and private sector synergy in the development of public infrastructure. Thus, the National Assembly enacted the Infrastructure Concession Regulatory Commission Act, 2009. Similarly, in several States, public-private partnership laws have been enacted, for instance, The Lagos State Public Private Partnership Law 2011. These laws allow the government to enter into agreements with private companies for the development of infrastructure. Under the agreements, the private companies will fund the construction of the infrastructure, while the Government will allow them to recoup their funds through the collection of tolls for a specified period of time.

This practice is good for a developing country like Nigeria. States can collect loans for infrastructural development, and repay back through the collection of tolls. However, the powers of the State to enter this kind of agreement are not absolute. The subject matter of the infrastructure must be within the competence of a State to legislate upon. States can only impose infrastructural tax on matters within the legislative competence of the State. For instance, in Lagos State, the Lagos State Government built a bridge over the Lekki lagoon and imposed a toll for users of the bridge. This was challenged in *Adegboruwav AG Federation and 3 ors*,[112] the Federal High Court held that the power to control the lagoon upon which the bridge was built and other navigable waters lies with the federal government. Although the Federal Government had given some authority to the State to construct the bridge, there was no law authorizing the collection of tolls on it.[113] This case fully accentuates the need for fiscal federalism in Nigeria.

5.3.7 Tourism Tax.

Tourism is a potential tool for development. State governments have seen the potentials of the tourism sector and are desirous of developing the sector. In doing that, revenue generation has become the uppermost thing in their minds, hence, rather than initiate policies that will attract tourist and get indirect revenue, they seek to get direct revenue from tourism. For instance, section 2(1) of the Cross River State Tourism Development Levy Law, 2007, provides to the effect that any person that utilizes the services of or purchases product from any leisure and tourism enterprises in the State shall pay 5% of the gross value of services rendered or products purchase as levy to the State.The enterprise to which this levy applies shall include the following:

(a) Hotels

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[111]In 2004.
[112]Reported in *The Punch,* March 28, 2014, p. 7.

(b) Guest Houses

(c) Lodges

(d) Resort and Leisure Parks

(e) Tourism Camps

(f) Travel Agents / Tour operators.

This law will obviously conflict with the VAT Act,[114] andamounts to double taxation. Therefore as earlier established the law is unconstitutional as it is a form of consumption tax.[115]

Tourism Tax is a form of consumption tax. Lagos State has made several attempts to introduce consumption taxes, irrespective of the existence of VAT Act.[116] The Lagos State Government introduced the Lagos State Hotel Licensing Law and Hotels Occupancy and Restaurant Consumption Law 2009. The Federal Government challenged the Hotel Licensing Law, but it was upheld by the Supreme Court on grounds that only a State House of Assembly can legislate on such matters.[117]The hotel licensing law is constitutional to the extent that it seeks to licence hotels but if it imposes any levy then it will certainly conflict with VAT Act[118] However, the constitutionality of the Hotel Occupancy and Restaurant Consumption Law, 2009 did not get the same approval. In *Mas Everest Hotels case*,[119] the Federal High Court held that it was constitutional; but in *Princes Court Limited case*,[120] the Federal High Court relying on the Supreme Court decision in *Aberuagba's case*,[121] and *Eko Hotels Limited case*[122] held that the

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[113]AAdesomoju 'Court Stops Toll Collection on IkoyiLekki Bridge' *The Punch*, March 28, 2014, p. 7.
[114]*Op cit.*
[115]*AG Ogun v Aberuagba*,(*Supra).*
[116]*Op cit.*
[117]*AG Federation v AG Lagos State*, *Supra.*
[118]*Op cit.*
[119]*Supra.*
[120]*Supra.*
[121]*Supra.*
[122]*Supra.*

provisions of the law was unconstitutional as it seeks to impose the same tax, imposed by the VAT Act.[123]Abdulrasaq commenting on this law stated as follows:

> However, it must be said that this new tax would simply add to the layer of the complaints about multiplicity of taxes in the state and the aim stated is not convincing enough. What has this tax got to do with the maintenance of infrastructure in the State? Are the uses of these infrastructures peculiar to hotels and restaurants or the tourism industry? Can tourism tax serve as a way of redistributing wealth? Or are Hotels and Restaurants only for the rich, so that the tax paid would help in the redistribution of wealth? Tax laws should be made simple, why complicate it by introducing a new legal structure for hotels and restaurant.[124]

The need to generate revenue must be balanced with the need to attract tourist and investors in the tourism sector, considering its potentials to generate employment and boost the economy. The State must be made internationally competitive for the tourism industry. For instance, it has been observed that hotel rates in Lagos are already too high and unattractive to tourist, when compared to places like Accra.[125]

The State government rather than impose levies on tourist and hotels, which will make the cost of tourism in Nigeria unattractive, should develop tourism infrastructures, and charge access fees; this will make the State a more competitive tourist destination.Abdulrazaq illustrates this position thus:

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[123]*op cit.*
[124]MT Abdulrasaq, 'Tourism Taxation in Lagos State' *Nigerian Tax Notes*, Vol 13, No. 2, 2008, 10.
[125]*Ibid.*

> There are many instances where tourism taxes are desirable but in these circumstances. It is better to tax products that are complimentary to tourism activities, for example access to museums, artisan products, and souvenirs, entertainment and night clubs as well as recreational centers such as the various beaches.[126]

The States in most cases see taxation as a means of revenue generation rather than as a tool for socio economic development. The States seek to give credence to the statement of Chief justice Marshall of the United States Supreme court where he stated that:.. 'thepower to tax is the power to destroy.'[127] He stated in another case that 'it is of the essence of the taxing power that when exercised to the full, it may destroy the interest or the industry taxed.'[128]

It is expected that States will heed this advice and refrain from imposing taxes that discourage investment. In Delta State for instance, the State Internal Revenue Service goes about harassing businesses to pay fees for fire service. The Delta State Internal Revenue Consolidation Law[129] prescribes an annual Fire Service fee for all types of enterprises including provision store, Hair dressing saloons, fashion designers etc.[130] One wonders why there is a fire service fee. It only increases the cost of doing business in the State, and amounts to double taxation. Furthermore, State Governments should impose more of indirect taxes than direct taxes. For instance, instead of imposing levies on hotels, the Government should develop tourism infrastructure and charge access fees.

5.4Tax Regime of Local Government Authorities.

[126]MT Abdulrasaq, 'Tourism Taxation in Lagos State' *op cit*,11
[127]In *Sonzinsky v United States*, 300 US 506, 513 (1937) cited in BO Nwabueze, *op cit*, p. 241.
[128] In *McCuullough v Maryland*, 4 Wheat 316(1819) cited in BO Nwabueze, *op cit*, p. 241.
[129]*Op cit.*

The existence of Local Governments is guaranteed under the constitution.[131] While the State Houses of Assembly has the powers to ensure their existence, under a law, which provides for the establishment, structure, composition, finance, and functions.[132] The Fourth Schedule to the Constitution[133] contains the main functions of Local Governments' councils, and it is the State Houses of Assembly, that has powers to legislate on those issues. The combined effect of section 7(1) and section 7(5) of the Constitution[134] gives the State Houses of Assembly powers to legislate on the imposition and collection of taxes, fees, and rates by Local Government Councils on the following matters:

(a) Collection of rates for radio and television licence.[135]

(b) Licensing of bicycles, trucks, canoes, wheelbarrows and cars.[136]

(c) Collection of rates for use of public facilities like cemeteries,[137] markets, motor parks, slaughter houses, public conveniences.[138]

(d) Tenement rates.[139]

(e) Out door advertising.[140]

(f) Any other matter within the legislative competence of the State House of Assembly.[141]

Furthermore, item 9 of the Concurrent Legislative List[142] gives the House of Assembly powers to make provisions for the collection of any tax fee or rate or for the administration of the law providing for such collection by a local government council, subject to such conditions as it may

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[130] Annexure V
[131] Section 7(1) of the Constitution, *op cit*.
[132] *Ibid*.
[133] *op cit.*
[134] *op cit.*
[135] Item 1(b) of the Fourth Schedule to the Constitution, *op cit.*
[136] *Ibid*, item 1(d).
[137] *Ibid*, item 1(c).
[138] *Ibid*, item 1(e).
[139] *Ibid*, item 1(j).
[140] *Ibid*, item 1(k).

prescribe. However, the provisions of the law shall regulate the liability of persons to the tax, fee or rate in such a manner as to ensure that such tax fee or rate is not levied on the same person in respect of the same liability by more than one Local Government Council.[143]

The powers of the Local Government to collect tax, is one of the most abused tax regime in Nigeria. The States in exercise of their powers to legislate for Local Government oftentimes hijack the powers to collect Local Government tax.[144]In enacting the laws, the State Houses of Assembly induced by the Governors usually insert provisions that allow Local Government Councils to delegate their powers to collect such taxes to the State Government.[145] This attitude of State governments has in most cases left the Local Government Councils with no other option, that to impose arbitrary taxes,illegal fees, levies and rates. Most Local Government taxes are sticker based; they sell all manner of stickers ranging from commercial sticker, bus sticker, lorry sticker, trailer sticker etc. These sticker forms of taxes are usually enforced by thugs who block roads and harass commercial vehicles with all manner of stickers. This ugly trend should be discouraged in its entirety. There is need to do an examination on the powers to collect property taxes. This is one area the State Governments hijack the powers to collect such taxes from Local Governments Councils.

5.4.1 Property Taxes.

In the last few years, there has been an emphasis on imposition of property taxes in Nigeria. Property was defined in the Delta State Internal Revenue Consolidation Law, 2009, as '…any material or physical asset of a person or corporation, and includes commercial building and

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[141]*Ibid*, item 2(d).
[142]Part 2, Second Schedule to the Constitution, *op cit.*
[143]*Ibid*, item 10.
[144] This practice was condemned strongly by the Court of Appeal in *AG Cross &Anor v Mathew Ojua* (2011) 5 TLRN, 1. Where the State sought to hijack the powers of the local government on property tax in the Urban Tax Law of Cross River State.
[145] For instance, Section 1(3) of the Land Use Charge Law of Lagos State. The Lagos State High Court upheld this

business premises.'[146]The definition of property in this law is restrictive. This is deliberate because all forms of taxes are actually taxes on private property,[147]since income is the bases of most tax. Within the context of this discussion, property tax can be defined as the compulsory imposition of levies, rates or a charge on real property, that is, land and building by the law.

The House of Assembly of a State has powers to make laws on tax in respect of any matter not specifically vested on the National Assembly, and on any area the Constitution[148] specifically empowers the State Houses of Assembly to make laws on taxation. The Constitution[149] has specifically given powers to the State Houses of Assembly to impose taxes on property. However, it may make provision for the collection of such taxes by the Local Government. Section 7(5) and item 1(j) of the Fourth Schedule to the Constitution,[150] provides as follows:

> 1. The main functions of the Local Government Council are as follows:
>
> (j) Assessment of privately owned houses or tenements for the purpose of levying such rates as may be prescribed by the House of Assembly of a State.

Thus, by the combined effect of Section 4(7), Item 9 of the Concurrent Legislative List and Item 1(j) of the Fourth Schedule of the Constitution,[151] the State Houses of Assembly are vested with legislative powers to legislate on the administration of property taxes in Nigeria.

There seems to be some confusion in some States on who has the powers to administer property taxes between the State and Local Governments. It seems to be settled that Local Government

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practice in *Ayo Idowu v A G Lagos State* (2001) 5 TLRN 86.
[146]Section 2.
[147]AIpaye, 'Property Taxation in Nigeria' 2011 Vol 16, No. 2, *Nigeria Tax Notes*, 1.
[148]*Op cit.*
[149]*Op cit.*
[150]*Op cit.*
[151]*Op cit.*

Councils are constitutionally the sole authority to collect taxes and levies on all real properties based on the provisions of Item 1(j) of the Fourth Schedule to the 1999 Constitution.[152]Osinbajo reechoed this position as follows:

> The Land Use Charge law, imposes a land based charge which is payable on all real properties in Lagos State, in accordance with the constitutional stipulations as to Local Government Tax Collection Powers, each Local Government Council was designated the sole authority to levy and collect land use charge in its area of jurisdiction. The law however, permits any Local Government Council to delegate to the State, by written agreement only, such assessment and collection powers.[153]

In the same vein, Ipaye observed as follows:

> It is clear from all these provisions that the constitution envisages State laws on property and tenement rating, which will be administered substantially by Local Government Authorities, hence, Nigeria as in most other countries, State legislative authorities determine the design and structure of property taxes, while local authorities take charge of the administration and collection.[154]

This position have judicial support in the case of *Knight Frank &Rutley (Nig.) v A G Kano State*,[155] where the Kano State Government appointed consultants to undertake the

[152]*Op cit*.
[153] Y Osinbajo, 'Poperty Taxation as Catalyst for Development,' Vol. 22, *JPPL*, 4-5.
[154] A Ipaye, *op cit*,8.
[155](1998) 7 NWLR (Pt 554) p.1.

valuation of properties within Kano metropolis, the Court of Appeal held that the powers for assessment of privately owned houses or tenements for purposes of imposing rates is vested on Local Government Authorities. Affirming the decision of the Court of Appeal, the Supreme Court held that State Government does not have concurrent jurisdiction with Local Government, on their constitutional role set out in the Fourth Schedule of the Constitution.[156]

From the analysis above, it is therefore settled that only Local Government Councils can collect property taxes. The State Government can only exercise such powers if there is a written delegation from the Local Government Councils.[157] It is noted that the issue of delegation will obviously be abused by State Government, as State Governments will compel the Local GovernmentCouncils to issue such delegation, even when they are not inclined to. This is because; the 1999 Constitution[787] puts Local Government Councils in a weak position to negotiate with State Governments.

Furthermore, there are different forms of property taxes in force in most states, for instance, tenement rates, ground rent, land development charge etc.This is clearly double taxation, and as stated earlier, multiplicity of taxes is a serious disincentive to trade and investment. Furthermore, State Governments have the constitutional powers to tax only properties that arenot houses, e.g. farms, golf courses gardens, etc. The State Governments can also collect Ground Rents, Premiums, as they do not fall within the definition of privately owned houses or tenement.

Tenement rate are paid by the owner of the house for the use of the house by himself or his tenants, and the rate is charged on each building, that means, in an estate of several buildings, each of the building will be assessed separately. This was the position of the court in the case of

[156]*Op cit*.
[157] See Section 3 of the LUCL, *Ayo Idowu v A G Lagos State* (*supra*).
[787]*Op cit*.

Appraiser v Nigeria Railway Corporation.[160]The rate is usually paid by the owner, but the mandatory demand notice,[161]may be delivered to the occupant or agent, if the owner cannot be reached.[162] Failure to pay rates as when due attracts penalties ranging from 25% if default is up to 75 days, and 100% if default continues for up to 135 days.[163]The Governor is empowered under the law to set up Assessment Appeal Tribunal to hear complaints relating to the imposition and collection of the charges, the tribunal can reverse the decision of the valuation office, while appeals against the decision of the Tribunal goes to the State High Court.[164]

There are exemptions in most of the Property Tax Laws; unfortunately, none of the exceptions is aimed at promoting trade and investment. The following categories of properties are exempted:

(1) Property owned by a religious body and used for public worship and religious education only.[165] As earlier argued this exception needs to be qualified. Most religious organizations are now involved in some form of trade and investment. Thus, there should be a qualification that the tax exception applies only to properties that are used solely for religious purposes.

(2) Cemeteries and burial grounds.[166] With the modern trend of people investingon private and commercially oriented burial grounds, there may be need to reconsider this exemption. For instance, a commercial cemetery like the privately owned andoperated Victoria Court Cemetery in Lagos fall clearly within the description of aproperty usedfor commercial purpose. This is because the cemetery was built as a choice burial ground for the affluent in

[160](1964) 1 All NLR 63.
[161]Section 9, LUCL, *op cit*.
[162] Y Osinbajo, *op cit*.
[163]Section 10, LUCL, *op cit.*
[164]Section 12, LUCL, *op cit.*
[165] See Section 7 LUC Law, Lagos State, Section 13, Tenement Rate Law, Lagos State.
[166] Section 7 LUC, section 13, TRL Lagos, *supra.*

the society, with the intention of makingprofit.[167] Thus, commercial cemeteries should be taxed.

(3) Nonprofit organizations and nonprofit educational institutions.[168] The choice of wordsof the Land Use Charge Law of Lagos is significant, it specifically used the words:'nonprofit educational institutions.' This is necessary because of the increase in the number of commercially driven private schools, the deliberate use of the word'nonprofit' is to create a possibility for such private schools to be charged tenementrates, especially where it is established that they are profit oriented.

(4) Palaces of Traditional Rulers.[169]

(5) Properties used as public libraries by nonprofit organizations.[170]

(6) Properties owned by the Federal, State, Local governments and Diplomatic Missions are also exempted.[171]

Partial reliefs can also be granted temporary structures used for commercial games and leisure by a nonprofit organization.[172] Apart from these exemption, some statutes specifically exempts assets of some organizations, for instance, Section 16(1) of the Nigeria National Petroleum Corporation Act[173] exempts oil pipelines and otherinstallations, including oil rigs, refineries,pumping stations, tank farms, from tenement rates. This position was upheld by the Court of Appeal in the case of *Shell Petroleum Development Corporation v Burutu Local Government Council*.[174]

(8) The Governor can also by notice publish in the official gazette exempt any property,

[167] P Obatemi 'Even the Dead are Clamouring for Change'www.dailymail.ng accessed on the 16th of April, 2016.
[168] Section 7 LUC, Lagos.
[169] *Ibid*, see also, section 7 Property Tax Law of Delta State.
[170] Section 7 LUC, Lagos State, section 13 TRL, Lagos.
[171] *Ibid*.
[172] Section 8 PTL.
[173] CAP N123. LFN 2004
[174] (1998) 9 NWLR (pt. 565) 318.

thus, all owner occupied pensioners properties and family houses have been exempted.[175]

Generally, most of the exemptions are to encourage religious, educational, and charitable organizations. Also, Diplomatic Missions and Public Institutions are generally not liable to taxes. However, under the Land Use Charge Law of Lagos State[176] a person, who due to special hardship could not pay the property tax, can apply to the Governor for exemption.[177]

Several developed economies, have depended largely on revenue generated from property tax, to drive their development plan. For instance, Singapore had to impose up to 60% estate duty which was later reduced to between 5% and 10%. She depended largely on these taxes in her transformation agenda, which has made her one of the most infrastructural advanced countries in the world today.[178]In the United States of America, the State usually authorizes the Local Councils to collect property tax.[179] In the State of Texas, several local authorities collect and spend property taxes. Texas Counties and Local School Districts tax all non exempt property within their jurisdiction.[180] The Governing Body of each Local Government determines the amount of property taxes and sets its own rate.[181] The revenue generated from this taxes are used to fund community services, like running of public school, maintaining city streets, county roads, police departments, fire protection, etc.[182] The Texas Constitution gives basic guidelines for the assessment of property taxes. It stipulates that such tax must be equal and uniform and that all property is taxable except it is exempted by a federal or State Law.[183]

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[175] Y Osinbajo, *op cit*, 6.
[176] 2001.
[177] See Section 7(1)e of the Law of the LUC Law of Lagos State.
[178] Y Osinbajo, *op cit*, 21.
[179] http://www.windows.state.xx.us/taxinfo/proptax5.html, accessed on the 28th January 2013.
[180]*Ibid*.
[181]*Ibid*.
[182]*Ibid*.
[183]*Ibid*.

In South Africa, reforms for Local Councils started in 1998, and culminated in the Property Rates Bill of 2000. Section 229 of the South Africa Constitution recognizes the powers of the Municipal Councils to impose rates on properties.[184]In Malaysia, property or assessment tax is imposed on all property holdings, including shops, factories, and residential and agricultural properties situated within the jurisdiction of the local authorities.[185] Nigeria has a lot to learn from the experience of Singapore, South Africa, the United States of America and Malaysia. Property tax is basically a local tax in most countries and like in Nigeria; it is usually administered by the local authorities. However, in most of these countries unlike Nigeria, property tax is effective because it is tied to services rendered by the local council authorities to the people. Thus, the people are motivated to pay because of the value added services they get in return.

Property tax is a veritable source of steady revenue for local governments if effectively administered. In several other jurisdictions, it has recorded a very positive and astounding success; Ipaye[186] compared the success in some countries to Lagos. According to him, while property tax account for only 7.6% of revenue generated in Lagos, in the United States of America, property taxes account for as much as 75% of its internally generated revenue. In Brazil it constitutes 29% of their revenue, also in South Africa, property tax accounts for about 20% of its revenue. To reap the benefits of property tax in Nigeria, there is the need to change her property policy. At the moment, there is no basis for comparing Nigeria with any developed country because in developed countries, the tax is based on the value added services the payer is getting from the Government, but in Nigeria, the payer is expected to pay for no value. Imagine

[184] R Franzsen, 'Local Government and Property Tax Reform in South Africa.' http://www.incolninstedu/pubs/299 accessed on 28th January, 2013.
[185] http://www.malasia.gov.my.en/relevant%20topics/money/taxinvestment/citizen/taxation.
[186]AIpaye, *op cit*, 144.

a typical Nigeria house owner being asked to pay property tax, in a place that does not have access to good roads, electricity, and water; where everybody digs their borehole, generate their electricity through generators, construct their sewage, the response will obviously be in the negative.

The reluctance to pay property tax in Nigeria is largely attributable to the negligence of the Government in the discharge of their responsibilities to the people. The leadership of Nigeria has been characterized by corruption and has demonstrated ineptitude in the management of the nation's resources. Thus, they lack the moral standing to impose more taxes, when they have not been able to deploy the available resources, towards an improved standard of living for the people.

In developed countries, the Local Councils provide pipe-born water to every house, the sewage is centrally done, and managed effectively by the Local Councils, emergency services are available for every resident, electricity and good roads are no longer issues they bother about. South Africa even charges direct user charges on property owner and occupiers.[187] Thus, if the level of infrastructure improves in Nigeria, the attitude of tax payers towards property tax will naturally improve.

In conclusion, state taxes are a major challenge in the economic development of Nigeria as a country. The power to impose taxes has been abused by state Governments, to the extent that they fail to recognize the role that taxation could play in the development of trade and investment in Nigeria. Often time's taxes are imposed on matters the state Government lacks the powers to impose taxes on, by hiding under some provisions of the constitution, for instance, environmental taxes. This has led to the existence of two laws on the same matter, that is a federal law and a state law. In most cases State tax laws are illegal, arbitrary and amounts to

double taxation. The proliferation of state taxes under the guise of revenue generation needs to be discouraged. Multiple taxation is a serious disincentive to trade and investment in Nigeria and it is one of the reasons the generous tax incentives under the various tax laws are unable to have positive effect on the development of trade and investment in Nigeria. To address this trend there is need to review the fiscal federalism structure under the 1999 constitution[188] to increase the taxing powersof states.

[187]*Ibid*, 23.
[188]*Op cit.*

CHAPTER SEVEN

TAX DISPUTE RESOLUTION MECHANISM AND ITS IMPACT ON TRADE AND INVESTMENT

Dispute is a natural phenomenon and an inevitable consequence of human interaction. In every tax system, dispute is inevitable between the tax payer and the tax authorities. The conflict could be as a result of the assessment of tax or the complete refusal of a tax payer to pay tax. Sometimes, the dispute is between the Federal and State Governments, usually on the issue of who has powers to impose or collect certain taxes.

One of the factors investors consider before investing in any society is the mechanism for resolution of dispute. Investors expect tax authorities to enforce tax laws within the ambit of the law and in a civilized manner. However, there may be occasions where the tax authorities may carry out their activities in a manner that appears unfair to the tax payer, for instance, serving the tax payer a wrong assessment. In such situations, dispute may be inevitable, thus, investors will prefer a system that can effectively resolve the dispute within a reasonable time.

The Constitution of Nigeria and the various tax laws clearly provides for tax appeal processes to resolve any dispute arising from tax administration. In furtherance of this, the National Tax Policy clearly states that:

> It is expected that there would be disputes between tax payers and organs of government. This is normal in any society and our laws therefore provide detailed processes for resolving such disputes. In this regard, the Nigerian Constitution recognizes the right of every Nigerian to submit disputes to the courts for adjudication. …in this regard, the Tax Appeal Processes, which is an integral and important

> Part of the administration process, is provided for under relevant tax legislation. The appeal process is available to every taxpayer, who is aggrieved or dissatisfied with a decision or ruling made by the tax authority.[788]

The judicial powers of the federation are vested in courts established for the federation.[789] The judicial powers extends to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.[790]

The constitution specifically established the Supreme Court, Court of Appeal, Federal High court, High Court of the Federal Capital Territory, State High court, Sharia Court of Appeal of the Federal Capital Territory, Sharia Court of appeal of States, Customary Court of Appeal of the Federal Capital Territory, Customary court of Appeal of States.[791] However, this does not preclude the National Assembly or a State House of Assembly from establishing courts other than those listed above, provided that they shall have subordinate jurisdiction to a high court.[792]

In this Chapter, I shall look at the various mechanism provided by law, for the resolution of tax related disputes.

7.1 Tax Appeal Tribunals.

The National Assembly is vested with powers to make laws; for the peace, order and good government of the federation.[793] It is also vested with the powers to establish courts with inferior

[788] Paragraph 5.6 of the National Tax Policy.
[789] Section 6(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) (hereinafter referred to as the Constitution).
[790] *Ibid*, section 6(6) b.
[791] *Ibid*, section 6(5).
[792] *Ibid*, section 6(4) a.
[793] *Ibid*, section 4(2).

jurisdiction to the high courts.[794]Consequently, the National Assembly enacted the Federal Inland Revenue Service Establishment Act,[795]and therein established the Tax Appeal Tribunal (herein after referred to as TAT).[796]

Prior to the establishment of the Tax Appeal Tribunal, resolution of disputes between the Federal Inland Revenue Service and taxpayers was through an appeal to the Body of appeal Commissioners for matters relating to Income Tax,[797] or the Value Added Tax Tribunal for matters relating to the administration of Value Added Tax.[798] With the establishment of the Tax Appeal Tribunal, the Body of Appeal Commissioners and the Value Added Tax Tribunal have been scrapped. [799]

The Tax Appeal Tribunal is vested with the power to settle disputes arising from the operations of this Act and under the First Schedule.[800]The jurisdiction of the Tax Appeal Tribunal is clearly stated in section 11 of the Firth Schedule as follows: The tribunal shall have power to adjudicate on disputes, and controversies arising from the following tax laws: Companies Income Tax Act, Personal Income Tax Act, Petroleum Profits Tax Act, Value Added Tax Act, Capital Gains Act and any other law contained in or specified in the First Schedule to this Act or other laws made or to be made from time to time by the National Assembly.

Also, the tribunal has jurisdiction over the following Acts and matters: Stamp Duties Acts, Taxes and Levies (Approved List for Collection) Act, all regulations, proclamations, Government notices or rules issued in terms of these legislation and any other law, for the assessment, collection and accounting of revenue accruable to the government of the federation,

[794]*Ibid*, section 6(4)a
[795] Cap F36, LFN 2004.
[796]*Ibid*, section 59.
[797] Established under Section 71 of Company Income Tax Act, Cap P8, LFN 2004, but now expunged by the 2007 Amendment to CITA.
[798] Established by section 20 of the VAT Act, *op cit.*
[799] See Section 59 FIRS(E) Act, *op cit.*

as may be made by the National Assembly from time to time or regulation incidental to those laws, conferring any power, duty and obligation on the Service. In addition to the foregoing, enactment or laws imposing collection of taxes, fees, and levies within the Federal Capital Territory. Enactment or laws imposing collection of taxes, fees and levies collected by other government agencies and companies including signature bonus, pipeline fees, penalty for gas flared, depot levies and licenses, collection of fees for oil exploration licence, oil mining licence, oil production licence, royalties, rents (productive and non productive, fees for licences to operate drilling rigs, fees for oil pipeline licences, haulage fees and all such fees prevalent in the oil industry but not limited to the above listed.

By the provisions of the FIRS (E) Act,[801] the Tax Appeal Tribunal is expected to be the court of first instance in the resolution of all tax related disputes. The TAT has jurisdiction to determine its jurisdiction over any tax matter. This was the position of the Tax Appeal Tribunal (Lagos Zone) in *Federal Inland Revenue Service v General Telecom Plc*,[802]where the tribunal rejected the appellant contention that the tribunal lacks jurisdiction to determine its jurisdiction. The tribunal stated as follows.

> We do have jurisdiction to determine our jurisdiction, taking our cue of course from the relevant constitutive instruments. The doctrine of *Kompeten Kompetenz*[803] from arbitration law is a handy retort to the appellants' submission that we have no jurisdiction to address some of the questions raised in the

[800] Section 59(2) of the FIRS (E) Act.
[801] *Op cit*
[802] (2012) 7 TLRN, 108 PP at 133.
[803] The doctrine states that a court or tribunal is competent to determine its competence to adjudicate over a matter.

> preliminary objection. The doctrine says that a tribunal is competent to determine whether it is competent.[804]

It is important to state that, the TAT does not have criminal jurisdiction. The FIRS (E) Act[14c] provides that:

> Where in the course of its adjudication, the Tribunal discovers evidence of possible criminality; the Tribunal shall be obliged to pass such information to the appropriate criminal prosecution authorities, such as the offices of the Attorney General of the Federation or Attorney General of any State of the Federation or any relevant law enforcement agency.[805]

The implication of the above provision is that offenders cannot be prosecuted for tax offences at the TAT.

The Tribunal shall consist of five members to be appointed by the Minister of Finance.[806] There shall be a Chairman for each zone, who shall be a legal practitioner of not less than 15 years cognate experience in tax legislation and tax matters.[807] The Minister shall also appoint a Secretary for each place or zone where the tribunal is to exercise jurisdiction.[808]

The Tribunal which is vested with the powers to adjudicate over disputes arising from all federal tax laws was inaugurated on the 5th of February 2010, with forty members.[809] The Minister

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[804] *Federal Inland Revenue Service v General Telecom Plc*, *supra,* particular at 133.
[14c] *Op cit.*
[805] *Ibid*, paragraph 12 of the FIRS (E) Act.
[806] *Ibid*, paragraph 2(1).
[807] *Ibid*, paragraph 2(2).
[808] *Ibid*, paragraph 9.
[809] I0 Okauru, (ed.) *Federal Inland Revenue Service and Taxation Reforms in Democratic Nigeria*. (Abuja: FIRS, 2012) p.139.

specified eight locations for the tribunal, one in each geo political zone, and one in Abuja and Lagos.[810]

The procedure for the tribunal is guided by the Tax Appeal Tribunal (Procedure) Rules, 2010[811] made by the Minister, pursuant to his powers to make rules for the Tribunal.[812] Any person dissatisfied with the decision of the tribunal may appeal to the Federal High court on point of law within 30 days[813] and further appeals lie to the Court of Appeal and the Supreme Court.

7.1.1 The Constitutionality of the Tax Appeal Tribunal.

The debate on whether the Tax Appeal Tribunal is constitutional has attracted the attention of lawyers, jurists and text writers. The argument has revolved around the following issues:

i. Does the creation of the Tax Appeal Tribunal conflict with the exclusive jurisdiction of the Federal High Court on Revenue Matters of the federation.

ii. The constitutionality of the TAT to handle matters on the Taxes and Levies (Approved List for Collection) Act.

iii. Does the power of the Minister to constitute TAT amount to a breach of fair hearing provisions under the 1999 Constitution?

The argument is further complicated by the conflicting decisions of the Courts on these issues. It is necessary at this stage to examine these issues.

The first issue which bothers on whether the jurisdiction vested on the Federal High Court on revenue and taxation matters precludes the Tax Appeal Tribunal from hearing any matter on taxation has been the subject of several court decisions. The issue is whether the jurisdiction

[810] *Ibid.*
[811] *Ibid.*
[812] Paragraph 21, of the Fifth Schedule to the FIRS (E) Act.
[813] *Ibid*, paragraph 17.

conferred on the TAT by Section 59 and paragraph II of the Fifth Schedule to the FIRS(E) Act conflicts with the jurisdiction of the Federal High Court as provided in Section 251 of the 1999 Constitution. Relevant sections of section 251(1) are reproduced hereunder:

> 251(1) notwithstanding anything to the contrary contained in this constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court, shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters-
>
> (a) Relating to the revenue of the Government of the Federation in which the said Government or any organ thereof or a person suing or being sued on behalf of the Government is a party.
>
> (b) Connected with or pertaining to the taxation of companies and other bodies established or carrying on business in Nigeria and all other persons subject to federal taxation.
>
> (c) Connected with or pertaining to customs and excise duties and export duties, including any claim by or against the Nigerian Customs Service or any member or officer thereof, arising from the performance of any duty imposed under any regulation relating to customs and excise duties and export duties.

The implication of these provisions is that the Federal High Court has exclusive jurisdiction on any matter relating to the revenue of the federation, company taxation, and custom and excise duties.

Atilola has contended that the powers and functions of TAT are unconstitutional, and thus, null and void.[814] He stated further that:

> Section 59 of the FIRS Act is inconsistent with the provisions of section 251(1) and therefore *ultra vires* in that it attempts to share or curtail the constitutionally entrenched exclusive jurisdiction of the Federal High Court in respect of civil causes and matters relating to the revenue of the federation. It is elementary jurisprudence that the constitution is the ground norm or the organic law of the country from which every other law derives its validity… where any other law is inconsistent with the provisions of the Constitution, the constitution shall prevail, and that other law shall to the extent of its inconsistency be void. No law in Nigeria, including the FIRS (E) Act, can validly curtail, restrict or limit the exclusive jurisdiction conferred on the Federal High court by the Constitution.[815]

The courts have not in any way helped to resolve this issue, they have rather complicated it. This argument is a continuation of the argument on the constitutionality of the scrapped Value Added Tax Tribunal and the Body of Appeal Commissioners. In *Stabilini Visinoni v Federal Board of Inland Revenue*,[816] the constitutionality of the VAT Tribunal was challenged. The court of Appeal held that the establishment of the VAT Tribunal was null and void for contravening section 251 of the 1999 Constitution of Nigeria. Section 251(1) vests the

[814] B Atilola 'Reflections on the Constitutionality of the Newly Constituted Tax Appeal Tribunal' *NJBCL* Vol 1, No. 1. (2010) p. 10.
[815] *Ibid* at p. 14.
[816] (2009) 1 TLRN, 1.

jurisdiction of matters relating to the revenue of the Government of the Federation including taxation on the Federal High Court to the exclusion of any other court. Section 20(2) of the VAT Act vested the VAT Tribunal with coordinate jurisdiction with the Federal High Court, and appeal lies straight to the Court of Appeal. The court of Appeal held that this provision is in conflict with section 251 of the Constitution.

Based on the *Stabilini's* case, there has been consistent argument, that by necessary implication, the TAT is unconstitutional. Atilola has submitted that on the authority of the *Stabilini's* case, the Tax Appeal Tribunal being the successor of the Value Added Tax Tribunal with similar powers and jurisdiction must by reasonable extension, suffer the same fate.[817] However, the Federal Inland Revenue Service does not share this view. The FIRS is of the view that:

> To the extent that the TAT is a successor to the VATT, some tax payers have challenged the jurisdiction of the TAT on the basis of *Stabilini Visinoni v Federal Board of Inland Revenue (supra).* The Federal Inland Revenue Service (Establishment) Act which establishes the TAT seeks to cure the defect in the establishment of the VATT that gave rise to the court of Appeal decision in *Stabilini's* case. Appeals from TAT now go to the Federal High Court, subjecting the proceedings of the Tribunal, as it were, to the judicial review of the Federal High Court.[818]

Thus, the position of the FIRS is that since TAT is an inferior body to the Federal High Court, its jurisdiction does not conflict with that of the Federal High Court.

[817] B Atilola *op cit*, 15.
[818] IO Okauru (ed), *op cit*, p 147.

Two recent conflicting decisions of the Federal High Court on this issue have further compounded the controversy. On the 30th of October, 2013. The Federal High Court sitting in Abuja in *TSKJ II Construces Internacional Sociadade LDA v Federal Inland Revenue Service*,[819] relying on the Court of Appeal decision in the *Stabilini's case*[820] held as follows.

> From the appellant's claims and reliefs it is beyond argument, issues of taxation i.e. tax liabilities of the appellant companies as well as the revenue of the government of the federation, fall within the exclusive jurisdiction of the Federal High Court of Nigeria stated in section 251(1)(a)&(b) of the constitution and other laws of the National Assembly…Accordingly section 59(1) &(2) of the FIRS(E) Act are therefore invalid in view of its inconsistency with section 251(1)(a) & (b) of the 1999 Constitution by virtue of section 1 subsection 3 of the 1999 Constitution. The cause of appellants action falls clearly within the scope of section 251(1) (a) & (b) of Constitution of the Federal Republic of Nigeria 1999.[821]

Consequently, the Federal High Court set aside the decision of the TAT against TSKJ II the Appellant, and made consequential orders, restraining the TAT from adjudicating on corporate taxation and federal revenue. The court further declared that TAT is unconstitutional and ordered the Minister of Finance to disband the eight recently reconstituted Tax Appeal Tribunals.

[819] (2014) 13 TLRN, 1.
[820] *Supra*.
[821] TSKJ II case *supra* at 18-20.

The facts of the case are that, a non resident secured a contract for the construction of a gas plant in Nigeria and used TSKJ Nigeria to provide support service in the course of executing the contract. In filling its return on deemed profits base, TSKJ II deducted the charges paid as cost to its subsidiary. The FIRS disallowed the deductible costs under the deemed profit basis of assessment. The FIRS issued additional assessments of about US $12 million on the company. TSKJ II appealed to the TAT sitting in Abuja but the TAT decided in favour of the FIRS. The appellant further appealed to the Federal High Court.

Surprisingly, less than two months after the judgment was delivered in the TSKJ II case, precisely on the 3rd of December, 2013, the Federal High Court sitting in Lagos in *Nigerian National Petroleum Corporation v Tax Appeal Tribunal & Ors*[822] held per Buba J that:

> Even if the Tax Appeal Tribunal is manned by legal minds, it does not enjoy the Status of a Court. It is like a retired Justice of Supreme Court heading arbitration. It does not elevate him to any status more than an arbitral tribunal. Therefore this court is unable to agree with the Applicant that the 1st Respondent is acting in excess of jurisdiction and that only the Federal High Court has exclusive jurisdiction. Apart from the fact that Tax Appeal Tribunal is not a court, it is subject to appeal to the Federal High Court and is indeed supervised by the Federal High Court through Judicial Review as in the instant case. It is not like the Value Added Tax Tribunal that had tripled jumped its decision to the Court of Appeal.[823]

[822] (2014) 13 TLRN, 39.
[823] Particularly at 93-94.

In this case the Federal High Court declined to follow the decision in the Stabilini's case, but agreed with respondents that the case is distinguishable from this present case.

Similarly, the Tax Appeal Tribunal sitting in Lagos, in *Federal Inland Revenue Service v General Telecoms Plc* [824] held that the *Stabilini's* case was decided on the premise that no other court other than the Federal High Court can adjudicate on tax disputes, but went ahead to conclude that the Tax Appeal Tribunal is not a court, and as such it is not affected by the exclusive jurisdiction of the Federal High Court on federal revenue and taxation.[825]Umenweke and Ezeibe while Commenting on the decision in *Nigerian National Petroleum Corporation v Tax Appeal Tribunal & Ors*[826] stated that:

> …tribunals are not courts and cannot come under the purview of courts in Section 251 (1) of the Constitution of the Federal Republic of Nigeria. The closest they can come to courts is to be referred or regarded to as specialized courts or courts in general terms or usage and not courts simpliciter. Apart from the fact that tribunals generally and TAT as in this case are not courts but administrative and statutory tribunals established to resolve taxation disputes between taxpayers and FIRS, their decision are subject to appeal to the Federal High Court.[827]

This is another line of argument to save the TAT. Those who argue that TAT is constitutional have maintained that, TAT is not a court but a mere administrative or fact finding body, whose decisions are subject to review by the Federal High Court. Thus, its power does not conflict with

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[824] (2012) 7 TLRN, 108, particular at 114.
[825] Particular at 118.
[826]*Supra.*
[827] MN Umenweke & KK Ezeibe 'Nigerian National Petroleum Corporation (NNPC) v Tax Appeal Tribunal & 3 Others: The Constitutionality of the Jurisdiction of the Tax Appeal Tribunal Revisited' *International Journal of Business & Law Research* 3(2) April –June 2015, p. 76.

that of the Federal High court. Proponents of this view such as Okauro,[828] insist that tax disputes should necessarily start from TAT. This position is based on the principle of law, that where there is a local remedy or an administrative procedure for the resolution of a dispute, such avenues must be exhausted before recourse can be made to a regular court. This argument finds support in the Federal High Court decision in *Ocean & Oil Ltd v Federal Board of Inland Revenue*.[829] Where the Court dismissed a suit, for failure of the plaintiff to exhaust the procedure at the defunct Body of Appeal Commissioners before resorting to the court. The court relied on the Supreme Court decision in *Eguamwense v Amaghizeuwen*[830] where it was held that where a statute prescribes a legal line of action for determining issues, be it administrative or matters of taxation, the aggrieved party must exhaust all the remedies in law before going to court.

With the greatest respect it is difficult to agree with the view that TAT is not a court but an administrative tribunal. From the wordings of the FIRS(E) Act it is clear that TAT was intended to carry out some judicial functions. For instance, FIRS(E) Act provides that 'The tribunal shall have power to adjudicate on disputes, and controversies arising from the following tax laws…'[831] thus, the tribunal has the powers to adjudicate, this is clearly not an administrative power. Furthermore, the FIRS(E) Act provides that 'Any proceeding before the tribunal shall be deemed to be a judicial proceeding and the tribunal shall be deemed to be a civil court for all purposes.'[832] It is obvious that anybody that has powers to determine the civil rights and

[828] *Op cit*
[829] (2011) 4 TLRN, 135; similar position was also reached by TAT Lagos Zone, in *Shell Nigeria Exploration & Production Co Ltd & others v Federal Inland Revenue Service & Anor*, (2013) 11 TLRN, 9 pp at 18.
[830] (1993) 9 NWLR (pt 315) 1.
[831] Section 11(1) of the Fifth Schedule to the FIRS(E) Act,*op cit.*
[832] Section 20(3) of the Fifth Schedule to the FIRS(E) Act,.*op cit.*

obligation of any person will clearly fall under the definition of a court. This is more so as the FIRS(E) Act has clearly admitted that TAT is deemed to be a civil court for all purposes.[833]

The uncertainties created by the arguments on the constitutionality of TAT, is a disincentive to investors. No investor will like to invest in an environment without a predictable and consistent legal regime. With the greatest respect the Federal High Court rather than resolving the controversy, compounded it by delivering conflicting judgments. However, it is hoped that at the earliest opportunity the Supreme Court will have the opportunity to resolve these issues. It is the researchers considered position that the constitution clearly intended the Federal High Court to have exclusive jurisdiction over the revenue of the Federal Government and Company taxation. Thus, the solution will lie in the amendment of section 251 (1) to recognize TAT as the court of first instance in tax matters while the Federal High Court will exercise appellate jurisdiction over it.

The second issue has to do with the constitutionality of including the Taxes and Taxes (Approved List for Collection) Act among the laws subject to the jurisdiction of TAT.[834] The inclusion of the Taxes and Levies (Approved List for Collection) Act[835] among the laws subject to the jurisdiction of the TAT, raises some constitutional issues. This is because the FIRS do not have the powers to administer all the taxes under the Taxes and Levies Act. Part II of the Schedule to the Act is on State Taxes, while Part III is on Local Government Taxes. TAT does not have jurisdiction over State and Local Government Taxes. The National Assembly does not have the Constitutional Competence to legislate on the administration of State and Local Government taxes base on section 4 of the Constitution. Thus, it is clear that the provision

[833]*Ibid*.
[834]By a community reading of section 59(2), section 7 of the First Schedule and section 11(1) of the Fifth Schedule to the FIRS(E) Act, *op cit*.
[835]*Op cit.*

giving TAT powers to administer the Taxes and Levies Act is unconstitutional to the extent that the Taxes and Levies Act includes State and Local Government Taxes among the taxes that are subject to the jurisdiction of TAT. Therefore Part 11 and 111 of the Taxes and Levies Act should be excluded from the jurisdiction of TAT.

Another issue that may generate controversy is the inclusion of the Personal Income Tax Act,[836] as part of the taxes TAT can adjudicate upon.[837] The Personal Income Tax is a tax that is administered by States; thus, it is the State High Court that has jurisdiction to adjudicate on matters arising from the administration of Personal Income Tax. The Court of Appeal has affirmed the jurisdiction of State High Courts over Personal Income Tax matters in *Lagos State Internal Revenue Board v Motorolla Nigeria Limited & Anor*.[838] Thus, the inclusion of Personal Income Tax Act, among taxes, TAT can adjudicate upon may lead to another row of controversy between the State High Courts and TAT, like the one between TAT and Federal High Court. It is therefore suggested that the Personal Income Tax Act should be expunged from the Acts subject to the jurisdiction of TAT under the FIRS (E) Act, at the earliest opportunity.

The third issue is on whether the powers of the Minister to constitute the TAT, does not amount to a breach of the Constitutional provision on fair hearing particularly *Nemo Judex in Causa Sua* (one cannot be a judge in one's cause). Paragraph 2(1) of the Fifth Schedule to the FIRS(E) Act gives the Minister the powers to appoint the Chairman and members of the TAT.

It is the researcher's view that the supervisory powers of the Minister of Finance appears to violate the principles for fair hearing under section 36(1) of the Constitution, because the Minister also, has supervisory powers over the Federal Inland Revenue Service, the agency of

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[836] *Op cit.*
[837] Paragraph 11(1) ii of the Fifth Schedule to the FIRS(E) Act.
[838] (2013) 12 TLRN, 181, Particular at 187.

Government responsible for the collection of taxes, and he is represented on the board of the Federal Inland Revenue Service. This argument was canvassed by the defendant in the case of *Federal Inland Revenue Service v General Telecoms Plc*[839] but was rejected by the TAT Lagos Zone. The Tribunal held as follows:

> Section 36(1) of the Constitution is not concerned with who appoints, but on who is appointed and how. It requires all empanelling authorities to exercise their appointing functions in a manner calculated to secure independence and impartiality of the body being set up.[840]

It is the researcher's view with the greatest respect that the issue of bias could be inferred from the composition of the tribunal, as justice should not only be done but should be seen to have been done. It is therefore suggested that, while the position of the TAT may have some merits, it will serve the purpose of justice to transfer the administration of TAT to the National Judicial Council. This is because TAT at the moment is more or less a parastatal under the Ministry of Finance like the FIRS. TAT and FIRS are like children of the same mother who is the Minister of Finance. Thus TAT may not be seen as impartial in most of the matters, because they involve her sister agency, the FIRS.

It is certain that the confusion and arguments on the constitutionality of the TAT has not been resolved. However, the issues have nothing to do with the desirability of having such a tribunal; thus, the dictum of Ademola J in *TSKJ II Construces Case*[841]in this direction is commendable. He stated as follows:

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[839]*Supra*.
[840] Particular at p. 156.
[841]*Supra*.

> Whilst not denying the desirability and efficacy of Tax Appeal Tribunals (TAT) in Nigeria's Tax Regime, there is need for constitutional provisions to be enacted as in USA, India, Australia, China etc. to give them the legitimacy they lack presently and there's no better time than now when the Nigerian Constitution is being amended or altered. The establishment of the national Industrial Court (NIC) in the Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010 is a good example.[842]

It is therefore suggested by the researcher that to resolve this issue, the Constitution should be amended. Thus, section 251 (1) should be amended to recognize TAT as the court of first instance in tax matters while the Federal High Court will exercise appellate jurisdiction over it. The advantage of this is that it will ensure speedy resolution of tax matters and also, help to decongest the Federal High Court. It will also allow tax matters to be resolved at first instance by a specialized court.

It is in the interest of investors that there is an effective and efficient way to resolve tax dispute. The controversy over the jurisdiction of the TAT and the uncertainties created could be a disincentive to investors who may want to take advantage of the attractive tax incentives in Nigeria. This is because the investors will certainly want to be sure they can enforce their tax rights within a reasonable time and at a reasonable cost.

[842] Particular at 21.

7.2 The Courts.

The judicial powers of the federation are vested in the courts established for the federation.[843] For the purpose of this discussion, the researcher shall look at the Supreme Court, Court of Appeal, Federal High Court and State High Court's jurisdiction on tax matters.

7.2.1 The Federal High Court.

The Federal High Court was originally called the Federal Revenue Court. The history of the Federal High Court dates back to the promulgation of the Federal Revenue Court Decree No. 13 of 1973. In 1979, the Federal High Court was created by Section 238 of the 1979 Constitution and the Federal Revenue Court Decree was renamed Federal High Court Act.[844] Under the 1999 Constitution, the Court is established by section 249.

The jurisdiction of the Federal High Court is contained in Section 251(1) of the Constitution. A cursory look at the jurisdiction of the Federal High Court shows that, it has exclusive civil and criminal jurisdiction in all Federal Tax Matters, including everything that has to do with the revenue of the Federal Government, Company taxation, custom and excise duties, import duties, fees for mining licences, and taxes from petroleum and minerals etc.

The Court of Appeal summarised the exclusive jurisdiction of the Federal High Court on Federal Tax Matters in *Lagos State Internal Revenue Board v Motorolla Limited & Anor*[845] as follows:

> Under section 251(1)(a) of the 1999 Constitution, the Federal High Court exercises jurisdiction to the exclusion of any other court in causes and matters relating to the revenue of the

[843] Section 6(1) of 1999 Constitution, *op cit.*
[844] E Ojukwu and CN Ojukwu, *Introduction to Civil Procedure*, (2nd ed., Abuja: Helen – Roberts Limited, 2005) pp. 31-32.
[845] *Supra* at p.186.

> Government of the Federation in which the said government or any of its agencies is a party.[846]

Similarly, in *TSKJ II Contruces case*[847] the Federal High Court relying on the *Stabilini Visinonis case* held that:

> By the said provisions of Section 251(1)(a) & (b) of the Constitution, the Federal High Court exercises jurisdiction to the exclusion of any other court in Civil Cases and Matters Connected with or pertaining to the taxation of companies and Other Bodies established or carrying on business in Nigeria and all other persons subject to Federal Taxation.[848]

Thus, it is settled that the Federal High Court has jurisdiction over all Federal tax laws. Furthermore, the Federal High Court subject to the arguments on the constitutionality of the Tax Appeal Tribunal has appellate jurisdiction over the Tax Appeal Tribunal.[849]

7.2.2 State High Courts.

The Constitution of the Federal Republic of Nigeria 1999 establishes High Court for each State of the Federation[850] and the Federal Capital Territory.[851]The jurisdiction of a State High Court is provided in section 272(1) of the 1999 Constitution. The provisions of Section 272(1) of the Constitution are replicated in section 257(1) of the Constitution, the import is to vest similar jurisdiction of a State High Court on the High Court of the Federal Capital Territory, in respect of any civil or criminal matter arising within the Federal Capital Territory.

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[846] Particular at p. 198.
[847] *Supra.*
[848] Particular at p. 18.
[849] Paragraph 17 of the Fifth Schedule to the FIRS (E) Act.
[850] Section 270 of the 1999 Constitution, *op cit.*
[851] *Ibid*, section 255.

The jurisdiction of a State High Court and the High Court of the Federal Capital Territory is subject to that of the Federal High Court. Prior to the 1999 Constitution, there was a lot of controversy as to the limit of the jurisdiction of a State High Court, *vis a vis* that of the Federal High Court.[852] This confusion was based on the use of the words 'a State High Court shall have unlimited jurisdiction' in section 236 of the Constitution of the Federal Republic of Nigeria 1979. It took the amendment of Section 230 of the 1979 Constitution by Decree No. 107 of 1993 to restore the exclusive jurisdiction of the Federal High court.

The provisions of the 1999 Constitution seems to have resolved this conflict; the jurisdiction of the State High Court and the High Court of the Federal Capital Territory is limited by the jurisdiction of the Federal High Court. Thus, any matter specified under section 251 of the Constitution is expressly excluded from the jurisdiction of the State High Court and the High Court of the Federal Capital Territory. Therefore, a State High Court does not have jurisdiction over any matter that has to do with the revenue of the Federal Government or the taxation of companies; these are matters under section 251 of the Constitution.

The State High Courts have powers over all tax matters in respect of which the State Houses of Assembly have powers to legislate on, including the enforcement of State and Local Government tax laws. The Court has both Civil and Criminal jurisdiction over these tax laws. The area that may generate some controversy is the issue of which court has the powers to adjudicate on matters arising from the administration of Personal Income Tax between the Federal High Court and State High Courts.

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[852] For instance, in *Savannah Bank Ltd. v Pan Atlantic Shipping and Transport Agencies* (1987) 1 SCNJ ,87; (1987) 1 SC 198. The Supreme Court declared Section 8 of the Federal High Court Act, which vested exclusive jurisdiction on the Federal High Court on Admiralty Matters void, for being inconsistent with section 236 of the 1979 Constitution which vested unlimited jurisdiction on the State High Court. Thus, it held that both the State High Court and the Federal High Court have concurrent jurisdiction on Admiralty matters.

The taxation of incomes, profits and capital gains is under the Exclusive Legislative List of the 1999 Constitution.[853] Thus, it is the National Assembly that has powers to legislate on any matter under the Exclusive Legislative List and Pursuant to section 4(1) of the Constitution; the National Assembly enacted the Personal Income Tax Act (as amended). However, the Constitution provides that in the exercise of its powers to impose any tax or duty on Capital gains, incomes or profits of persons other than companies, the National Assembly subject to such conditions as it may prescribe, provide that the collection of any such tax or duty or the administration of the law imposing it shall be carried out by the Government of a State or other authority of a State.[854] The implication of this is that, the National Assembly is the competent body to enact laws on Personal Income Tax, but in enacting the law the collection and administration of Personal Income Tax shall be carried out by State Governments. Thus, by the provisions of the Personal Income Tax Act, the State Governments administer personal income tax. Hence, it is the State High Court that has the jurisdiction over Personal Income Tax matters. The Federal High Court does not have jurisdiction over any matter bordering on State tax administration.

The Court of Appeal resolved this issue in *Lagos State Internal Revenue Board v Motorola Nigerian Limited & Anor,*[855] an appeal from a decision of the Federal High Court. The facts are that the 1st respondent who was the plaintiff at the lower court, sought a declaration that the sealing off of his premises by the 1st defendant /appellant was unlawful, an order restraining the 2nd respondent from honouring the cheque issued by the plaintiff/1st respondent to the 1st defendant /appellant and an order of perpetual injunction against the 1st defendant

[853] Item 59 of the Exclusive legislative List, 2nd Schedule to the 1999 Constitution, *op cit.*
[854] *Ibid,* item D7 of the Concurrent List.
[855] S*upra.*

/appellant from further harassing intimidating and disrupting the business of the plaintiff in any way or form.

The issue that arose for determination was whether the Federal High Court can assume jurisdiction over dispute relating to Personal Income Tax. The Federal High Court held that, based on item 59 of the Exclusive Legislative List of the Constitution of the Federal Republic of Nigeria, it has jurisdiction over Personal Income Tax matters.

The Appellant appealed to the Court of Appeal on the jurisdiction of the Federal High Court on Personal Income tax matters. The court of appeal in allowing the appeal held as follows:

> The subject matter of this suit has nothing to do with the operation of 1st Respondent's Company and even if the action is to challenge the lawfulness of the Act of enforcing an alleged tax liability, it is not questioning the power of the National Assembly to make the law and since it is expressly stated that it is the State that can enforce the payment of Personal Income Tax, the challenge should go to the State High Court. The collection of taxes due to Lagos State is definitely not covered by Section 251(1) of the 1999 Constitution. In *Shittu v NACB Ltd. & Ors*.[856] it was held that there is no provision express or implied in the Personal Income Tax decree No. 104 of 1993(Now Act) conferring the jurisdiction on
>
> the Federal High court to hear and determine Civil Causes and Matters Connected with or pertaining to the revenue accruable to

> the government of a State by virtue of the provisions of the decree. The facts in the Shittu Case are similar to those in this appeal and the decision in that case is quite apposite to the resolution of the issue raised in this appeal.[857]

This judgment is unassailable, and reflects the letter and the spirit of the Constitution, on the principles of federalism. The Federal High Court has no business with the enforcement of State revenue generation matters. It is for this same reason, that it is difficult, with the greatest respect to agree with the dissenting judgment of Saulawa JCA in *Lagos State Internal Revenue Board v Motorola's*[858] he stated as follows:

> My understanding of the provisions of section 251(1)(e) of the 1999 Constitution (supra) and Section 7(1)(U)(i) of the Federal High Court Act(supra) is that the Federal High Court is vested with jurisdictional competence to entertain any matter with regard to which the National Assembly has Exclusive Legislative power to make laws under Second Schedule, Part I of the Exclusive Legislative List of the 1999 Constitution. Thus, since item 59 of the Second Schedule Part I (supra) relates to taxation of income et al, there is no gainsaying the fact, that the Federal High Court is indeed cloaked with jurisdiction to entertain the present case. In my view, the Appellant having opted to sue the 1st respondent for nonpayment of the alleged income tax of the employees thereof, the 1st Respondent is a company incorporated under the Companies

[856] (2001) 10 NWLR (Pt 721) 298.
[857] Particular at 198.

> and Allied Matters Act (supra), the Federal High Court has jurisdictional competence to entertain the action.[859]A State High Court's jurisdiction is restricted to the State, where it is located. Unlike the Federal High Court, a State High Court cannot exercise jurisdictional power over a subject matter outside the territory of that State of the Federation.[860]

7.2.3 The Court of Appeal.

The Court of Appeal is established by section 237 of the Constitution of the Federal Republic of Nigeria. The Court of Appeal is next to the Apex Court in Nigeria. It is basically an appellate court. However, it has original jurisdiction to hear and determine any question as to whether:

(a) any persons has been validly elected to the office of President or Vice President or

(b) whether the term of office of the President or Vice President ceased or

(c) whether the office of President or Vice President is vacant.[861]

The Court of Appeal is empowered to the exclusion of all other courts to hear and determine appeals arising from the decisions of the Federal High Court, State High Courts, Customary Courts of Appeal of a State, High Court of the Federal Capital Territory, Customary Court of Appeal of the Federal Capital Territory Sharia Court of Appeals of States, Sharia Court of Appeal of the Federal Capital Territory, Court Martial, or other tribunals as may be prescribed by an Act of the National Assembly.[862] It also, has appellate jurisdiction over the Code of

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[858]*Supra.*
[859] at p. 210.
[860]*Wema Bank Plc v Christolab Med. Ltd.* (2002) 8 NWLR, (Pt 622), 72.
[861] Section 239 of the 1999 Constituion, *op cit.*
[862]*Ibid,* section 240.

Conduct Tribunal, National Assembly Election Tribunal, Governorship and Legislative Houses Election Tribunal.[863]

The Court of Appeal has no original jurisdiction on tax matters; however, the Court has powers to hear appeals on tax matters arising from the decisions of the Federal High courts, State High Courts, and the High Court of the Federal Capital Territory.[864] It is unnecessary for the FIRS (E) Act to state that further appeals goes from the Federal High Court to the Court of Appeal.[865] This has already been taken care of by the Constitution, it will serve no additional purpose to make provisions for it in the FIRS(E) Act, and it is inconsistent with modern drafting techniques.

The researcher is of the view that it is unnecessary for appeals on tax matters to get to the Court of Appeal except the issue bothers on the right to impose and collect taxes or the interpretation of the provisions of the Constitution. The issues can sufficiently be resolved by the Tax Appeal Tribunal and the Federal High Court. It is not in the interest of the state and investors, for tax matters to linger on from one level of adjudication to another. In practice very few tax cases go beyond the high court, it is therefore suggested that the Constitution should be amended to restrict further appeals on tax matters from the Federal High Court to the Court of Appeal to only issues that bothers on the right to impose and collect taxes or the interpretation of the provisions of the Constitution, and such appeals shall be with the leave of the Court of Appeal.

[863] *Ibid*, Section 246(1).
[864] Lagos State Internal Revenue Board v Motorolla Nigeria Ltd & Anor, *supra*.
[865] Paragraph 23 of the Fifth Schedule to the FIRS (E) Act.

7.2.4 The Supreme Court

This is the Apex Court in Nigeria. It is established by section 230(1) of the 1999 Constitution. It has original jurisdiction in any dispute between the Federation and a State or between States if and in so far as that dispute involves any question (whether of law or facts) on which the existence or extent of a legal right depends.[866] In addition to this, the Supreme Court shall have original jurisdiction, if it is conferred on it by act of the National Assembly, provided that no original jurisdiction shall be conferred on it on criminal matters.[867]

Pursuant to Section 232(2) of the Constitution, the National Assembly enacted the Supreme Court (Additional Original jurisdiction) Act,[868] which gave the Supreme Court original jurisdiction over the following matters.

(i) Disputes between the National Assembly and the President

(ii) Disputes between the National Assembly and States

(iii) Disputes between the National Assembly and a State House of Assembly.

The Supreme Court has exclusive appellate jurisdiction to hear and determine appeals from the Court of Appeal.[869] Thus, the Supreme Court is the final arbiter on all tax disputes.

The researcher is of the view that it is unnecessary for appeals on tax matters to get to the Supreme Court except the issue bothers on the right to impose and collect taxes or the interpretation of the provisions of the Constitution. The issues can sufficiently be resolved by the Tax Appeal Tribunal and the Federal High Court. It is therefore, suggested that the Constitution should be amended to restrict further appeals on tax matters from the Court of Appeal to the

[866] Section 232(1) of the 1999 Constitution, *op cit*.
[867] *Ibid*, section 232(2).
[868] Cap S16 LFN, 2004.
[869] Section 233(1) of the 1999 Constitution, *op cit.*

Supreme Court to only issues that bothers on the right to impose and collect taxes or the interpretation of the provisions of the Constitution.

This position is informed by the need to dispose of tax related issues expeditiously, and at reasonable cost. The rigours of having to go through four stratum of adjudication before a final judgment is given will certainly discourage investors. Investors are attracted to countries that have an efficient and effective justice system. This implies that disputes are resolved expeditiously. Considering the popular idiom, 'time is money' most taxpayers hardly want to spend so much time in court on tax matters. It is also, not in the interest of the revenue authorities for tax disputes to take too much time, as it may delay the collection of the expected revenue, which will lead to a depletion of the tax revenue profile. At the moment tax disputes would hardly get to the Supreme Court. This is because, the cost of litigation leads to an increase in the cost of compliance with payments.

7.2.5 State Revenue Courts

The House of Assembly of some States, in exercise of their powers to establish courts, other than those specified in the constitution, with subordinate jurisdiction to that of a High Court,[870]have established Revenue Courts. For instance, in Delta State, the Delta State House of Assembly enacted the Revenue Court Law of Delta State.[871] This law established the Revenue Courts of Delta State[872] which is intended to be a mobile court that can sit anywhere in the State.[873]

The jurisdiction of the court shall only relate to revenue matters arising from state laws. In other words, the court is to enforce State and Local Government tax laws. Section 4 of the

[870]*Ibid,* section 6(4)a.
[871] Cap R7, Laws of Delta State, 2008.
[872] Section 3(1).
[873] Section 3(2).

Revenue Court Law of Delta State provides to the effect that: The Revenue Court shall have and exercise jurisdiction in all matters of Revenue of the State, relating to revenue due or accruing to the State from whatever source, revenue due or accruing to the Local Councils in the State, and any other matter incidental or relating to matters connected therewith. The jurisdiction conferred on the Revenue Court under subsection (1) of this section shall only relate to revenue arising from law having effect in the State.

The Revenue Court is similar to TAT, established at the Federal level. However, the controversy over the constitutionality of the TAT may not arise in the case of State Revenue Courts. This is because while the jurisdiction of the Federal High Court is exclusive under section 251 of the Constitution, that of the State High Court is not exclusive under section 272 of the Constitution. Thus, the State High Court can accommodate the State Revenue Court as a court of subordinate jurisdiction.

The choice of words of the drafters of this law may create some confusion. For instance, section 3(1) of the law provides as follows: (1) 'there is hereby established in Delta State of Nigeria, a Revenue Court which shall be a Court of Record, having unlimited jurisdiction in matters pertaining to the Revenue of the State.' Also, Section 4(1)a of the law, provides that 'The Revenue Court shall have and exercise jurisdiction in all matters of Revenue of the State, relating to Revenue due or accruing to the State from whatever source.' The use of the words 'unlimited jurisdiction, over all revenues due and accruing or due to the State from any source in section 3(1) of the Revenue Court Law will suggest that, the court can adjudicate on revenues like, Federal Allocation, Ecological Fund etc. This will clearly be unconstitutional. However, this issue may have been taking care of by section 4(2) that limits the jurisdiction of the court to

revenue arising from State laws. It is however, suggested that, the legislators should have used the words, revenue generated within the State, rather than revenue from whatever source.

The Revenue Court has criminal jurisdiction over tax offenders,[874] unlike TAT that does not have criminal jurisdiction.[875] Also, unlike TAT, which argues that it is a mere administrative panel or tribunal,[876] the revenue court is clearly a court. Appeals from the Revenue Court lie to the State High Court,[877] and the High Court is expected to dispose of the appeal within 30 days or such other period as the court may deem proper.[878]

The desirability of the Revenue Court is not in doubt. Unfortunately, in practice, the Revenue Court is used as a tool by State Governments to intimidate taxpayers and collect all manner of revenues, even when they are clearly outside the jurisdiction of the court. The court is a court of summary jurisdiction[879]thus, the Revenue Board takes advantage of this to get summary judgment, as a strategy to enforce the several embarrassing and anti investment State tax laws, like Fire Service levy, Environmental fees, etc.

It is important that State governments should recognize that revenue generation is not the only function of taxation. Taxation should also be used as a tool for economic development. The use of Revenue Court as a mechanism to enforce arbitrary State tax laws should be discouraged. This is because investors will be more comfortable, in an environment where the Government respects the rule of law. Also, investors will prefer a system that not only ensures that disputes are resolved within a reasonable time, but also guarantees that justice is done.

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[874] Section 4(3).
[875] Paragraph 12 of the Fifth Schedule to the FIRS(E) Act.
[876] That was the position of TAT, Lagos Zone in *Federal Inland Revenue Service v General Telecom Plc (Supra)* at 144; see also, Federal High Court decision in *NNPC v Tax Appeal Tribunal & Ors(Supra)* at 9.
[877] Section 9(1) of the Delta State Revenue Court Law.
[878] *Ibid*, section 9(2).
[879] *Ibid*, Paragraph 6 of the First Schedule.

7.3 Alternative Dispute Resolution Methods.

Litigation over the years has proven not to be the best and fastest way of resolving disputes. However, it is the constitutionally prescribed mode of dispute resolution. In Nigeria, litigation has been characterized by undue delays and attendant high cost, which has made it unattractive, to the extent that litigants often ask the question, 'why do I want to get into it, when I don't know when I will get out of it?' For instance, in *Alh. Baba Saleh v Alh. Sheitama Monguno,*[880] it took about 24 years for a dispute on mortgages to be resolved from the High Court to the Supreme Court. No investor will be encouraged by this kind of litigation.

Over the years, the use of Alternative Dispute Resolution Mechanisms has become more fashionable. Alternative Dispute Resolution Mechanism gives the parties to a dispute the opportunity to use other means of resolving their dispute other than litigation. Ibe prefers to call it Private Dispute Resolution rather than Alternative Dispute Resolution.[881] According to him:

> Private Dispute Resolution (PDR) is not new and is not unique to any particular State. Before the emergence of modern nation states and indeed before the advent of National Constitution and Courts, this type of dispute resolution existed and was the mode rather than the mean method resorted to by individuals or groups attempting to resolve their differences. PDR takes in its sweep all forms of Alternative Dispute Resolution methods and Arbitration. It is much more than the Traditional Alternative Dispute Resolution commonly

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[880] (2006) 7 SC (pt. 11) 97-99.
[881] CE Ibe, *Insight on the Law of Private Dispute Resolution in Nigeria*, (Enugu: El Demak Publishers, 2008) p. 3.

abbreviated as ADR for it includes arbitration and the use of self-help.[882]

The use of PDR or ADR has proven to be an efficient and effective means of resolving disputes because of its advantages. Some of the advantages in contradistinction to litigation are:

(a) It encourages the use of experts; the parties are allowed to choose a person vast in their area of dispute to help them resolve the dispute e.g. an engineer for construction matters, unlike the court system, where the judge, who is a lawyer, adjudicates on all type of cases.

(b) It allows some flexibility in terms of procedure; parties are allowed to choose venue and even the people to resolve the dispute.

(c) It is faster in most cases.

The National Tax Policy encourages the use ADR in the resolution of tax disputes. It is provided in the National Tax Policy document that:

> …Tax authorities shall carry out enlightenment campaigns on the availability of the appeal process, so that all taxpayers, large or small, corporate entities and individuals are aware that they have a right to submit their disputes for adjudication. Alongside this, however, alternative dispute resolution procedures should also be encouraged between the tax authorities and taxpayers so that only matters, which cannot be resolved, otherwise are submitted for adjudication.[883]

[882] *loc cit.*
[883] Paragraph 5.6.

PDR or ADR methods involve negotiation, mediation, conciliation, arbitration etc. It is not intended to discuss, the forms, technicalities and the use of these methods in detail. The intention here is to examine the possibility of applying these methods in the resolution of tax disputes in Nigeria.

7.3.1 Negotiation.

Negotiation has been defined as a consensual bargaining process in which the parties attempt to reach an agreement on a disputed matter. Negotiation usually involves complete autonomy for the parties involved, without the intervention of third parties.[884] According to Nwosu: 'Negotiation is communication with a view to reaching agreement.'[885] Thus, negotiation is a process, where the parties to a dispute attempt to resolve the disputes themselves without the assistance of a third party. It is a collaborative approach to conflict resolution.[886]

The pertinent question is, can it be an effective tool to resolve tax disputes? The other issue is whether our laws will allow the use of negotiation in resolving tax disputes. It is the researcher's considered view, that our tax laws clearly allow the use of negotiation to resolve tax matters. As a matter of fact, negotiation is the first step in the tax dispute resolution mechanism. For instance, under the provisions of the Company Income Tax Act and Personal Income Tax Act, a person that is disputing an assessment is not expected to rush to TAT or the Courts. He can apply to the relevant tax authority by notice of objection in writing to review and revise the assessment.[887]On receipt of the objection, the tax authority may request for more particulars or books and may invite any person who may be able to give information for

[884] BA Garner (ed in Chief) *Blacks law Dictionary*, (9th edn. Minnesota: West Publishing Co, 2009) P 1136.
[885] KN Nwosu, 'Critical Issues in Negotiation' (2004) *1 NDRJ*, 1.
[886] C Epie 'Alternative Dispute Resolution: Understanding the Problem Solving (win/win) Approach in Negotiations.' (2004) 1 *NDRJ*, 74.
[887] Section 58(1) PITA, section 69(1) CITA.

examination.[88890]Where the tax payer and relevant tax authority agrees as to the correct amount of the tax chargeable, the assessment shall be amended accordingly.[889]

This is clearly a form of negotiation, and the fastest way of resolving disputes relating to tax assessment. It is when they are unable to agree that the tax payer will be left with no other option than to seek other ways to resolve the dispute. Negotiation has been a very useful means of resolving tax disputes, but it has its challenges. It does not have binding force on any of the parties as parties can still ignore the agreement and resort to litigation.

7.3.2 Mediation.

Mediation has been defined as 'a method of nonbinding dispute resolution involving a neutral third Party who tries to help the disputing parties reach a mutually agreeable solution.'[890] Mediation has been described as '…essentially negotiation that includes a Third Party who is knowledgeable in effective negotiation procedures, and can help people in conflict to coordinate their activities and to be more effective in their bargaining'.[891] Thus, mediation involves a third party assisting the parties to resolve the dispute, this will be necessary for instance, where negotiations have reached a deadlock, and it has become obvious that the parties cannot resolve the disputes themselves.

The third party, who is usually referred to as a mediator, does not give a verdict, but assist the parties to reach an agreement. Sebok has aptly described the role of a mediator as follows:

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[888] Section 58(2) PITA, section 69(4) CITA.

[90] Section 58(2) PITA, section 69(4) CITA.
[889] Section 58(3) PITA, section 69(5) CITA.
[890] BA Garner, *op cit,* pp. 1070-1071.
[891] C Moore, How Mediation Works' cited in C Epie, *op cit,* 79.

> Mediators will play a neutral role as they attempt to help you resolve or better manage your dispute. They do not take sides with either party. Their job is to assist you in understanding one another and in reaching agreements. To do this, they establish ground rules and ask questions (usually to one person at a time). They will help you identify the issues and interests in need of resolution. Once issues and interest are identified, they will encourage you to brainstorm solutions. After the mediation, they will write drafts of agreements.[892]

It is difficult to use mediation like negotiation as a means of resolving tax disputes, because it is, an informal way of resolving disputes, and has no statutory backing. The agreements are not enforceable. Thus, parties may not be inclined to subject themselves to a mediation process. Tax authorities, being public agencies will naturally not be inclined to subject themselves to an informal dispute resolution mechanism that the outcome is not binding on the parties.

7.3.3 Conciliation.

Conciliation has been defined as 'a process in which a neutral person meets with the parties to a dispute and explores how the dispute might be resolved, especially a relatively unstructured method of dispute resolution in which a third party facilitates communication between parties in an attempt to help them settle their difference.'[893]

This definition seems to suggest that mediation and conciliation mean the same thing. Both of them involve the process of a third party helping the parties to arrive at an amicable

[892] T Sebok 'Preparing for Your Mediation' (2004) *1 NDRJ*, 30.
[893] BA Garner, (ed), *op cit*, 329.

settlement of the dispute. However there have been arguments as to whether they mean the same thing. Garner illustrates the situation thus:

> The distinction between mediation and conciliation is widely debated among those interested in ADR, Arbitration and International Diplomacy. Some suggest that conciliation is a non binding arbitration, whereas mediation is merely assisted negotiation. Others put it this way; Conciliation involves a third party trying to bring together disputing parties to help them reconcile their differences. Whereas mediation goes further by allowing the third party to suggest terms on which the dispute might be resolved. Still others reject these attempts at differentiation and contend that there is no consensus about what the words mean that they are generally interchangeable. Though a distinction would be convenient, those who argue that usage indicates a broad synonym are most accurate.[894]

It seems that the difference between mediation and conciliation is mere semantics. The difference seem to be that, while there is no legal backing for mediation under our laws, there is legal backing for conciliation. Sections 37-42 and the Third Schedule to the Arbitration and Conciliation Act[895] provides for the use of conciliation in the resolution of disputes.[896]

Although Conciliation is statutory, unfortunately, the rules failed to provide for the mode of impeachment and enforcement of settlement agreement. Ibe observed that:

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[894] *Ibid* at 1071.
[895] Cap A18, LFN, 2004.
[896] For a detailed discussion on Conciliation, see CE Ibe, *op cit*, pp. 63-77.

> Once parties sign a settlement agreement, the dispute is put to an end and parties are bound by the agreement. It is submitted that at law the signed agreement can be pleaded as res judicata or issue estoppel and thus a party cannot resurrect the dispute through litigation or arbitration. The rules, unlike the Arbitration Act and Rules do not provide for impeachment and enforcement of the settlement agreement. There is a lacuna or hiatus in this regard, creating the need to provide for impeachment and enforcement of the signed conciliation agreement. This will make for a speedier disposal of post conciliation matters. Clearly the signed agreement should have the status of an arbitration award, which is at par with a court judgment.[897]

There is hardly any known instance when parties have resorted to conciliation in tax matters. The lacuna on its enforceability is a major reason, and it may not be suitable for the resolution of tax disputes. Taxes arise from commercial activities, no commercial minded person will want to be involved in a dispute resolution method, which may be difficult to enforce.

7.3.4 Arbitration.

Arbitration has been defined as 'a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.'[898] Under the Arbitration and Conciliation Act, Arbitration was defined as a commercial

[897] CE Ibe, *op cit*, p. 75.
[898] BA Garner (ed), *op cit*, p. 119.

arbitration whether or not administered by permanent arbitral institutions.[899] This definition falls short of a proper definition. Arbitration is wider in scope than is being portrayed by this statutory definition.

In Nigeria, Arbitration can be classified into International and Municipal. Municipal Arbitration includes Customary Law Arbitration, Common Law Arbitration and Statutory Arbitration.[900] Statutory Arbitration in Nigeria is regulated by the Arbitration and Conciliation Act. For parties to be subject to arbitration, it must be by written agreement. It is either their contract agreement has an arbitration clause, or they agree to refer their dispute to arbitration. The arbitrators have powers to make binding decisions. Arbitral awards are enforceable in the High Court's as if they are judgments of the Court.[901]

This makes arbitration an effective alternative to litigation. The issue is whether tax matters are arbitrable? This issue was before the Court in *Federal Inland Revenue Service v Nigerian National Petroleum Corporation & 4 ors*.[902] The plaintiff brought an action seeking the determination of whether the Arbitral Tribunal had jurisdiction to determine the subject matter of arbitration which deals with the taxation of the defendants by the plaintiff; a jurisdiction which isordinarily conferred on the Federal High Court by section 251(1) of the Constitution. The facts of the arbitration arose from a dispute between NNPC, first defendant and, Shell Nigerian Exploration and Production Company Limited (2nd defendant), Esso Exploration and Production (Deep Water) Limited (3rd defendants) Nigerian AGIP Exploration Limited, (4th defendant, Total Exploration and Production Nigeria Limited (5th defendant) over production sharing contracts. The 2nd to 5th defendants had dragged the 1st defendant to an

[899] Section 57(1).
[900] CE Ibe, *op cit*, p. 86.
[901] Section 31 of the Arbitration and Conciliation Act, *op cit.*
[902] (2012) 6 TLRN, 1.

arbitration panel pursuant to the production sharing contracts and obtained two separate awards against the 1st defendant worth about 5.25 billion dollars. Before the awards were given, the FIRS had gone to the Federal High Court seeking to stop the arbitral proceedings, because portions of available crude oil sufficient to generate proceeds to cover payment of Petroleum Profits Tax, Education Tax, and Royalty and operating cost were allocated for payment of the said obligation. The FIRS had argued that tax issues were raised in the arbitral proceedings, which are not resolvable by arbitration. The awards were given while the court was still sitting. The Federal High Court voided the awards. The court held that:

> The Constitution of the Federal Republic of Nigeria precludes any other court in Nigeria other than the Federal High Court, not to talk of an Arbitration Tribunal, from exercising jurisdiction over tax matters relating to the Federal Government Revenue. Any determination of issues raised in the claimants claim before the Arbitration Tribunal will impact negatively and will not only infringe on the functions and duties of the Plaintiff but will adversely affect the revenue that would accrue and/or had accrued to the Federal Government of Nigeria.[903]

This case clearly forecloses the use of arbitration for tax matters, until, a superior court holds otherwise. Surprisingly, this matter was initiated by FIRS and celebrated by the FIRS. According to the head of the Legal Department of the FIRS, Mr. Ike Odume:

> FIRS had filled an action to impeach the arbitral proceedings initiated against NNPC by Oil majors in the country and outside

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[903] Particular at 45.

> the country, on the grounds that the tax issues raised in the arbitration proceedings were not resolvable by arbitration.[904]

While it is in the interest of the country that revenue is not lost as a result of an award against the FIRS; the FIRS ought not to have celebrated that it frustrated the possibility of resolving tax disputes through arbitration. This is because the National Tax Policy is a brainchild of the FIRS, and as stated earlier, the policy encourages the use of other means to resolve tax dispute. The FIRS ought to be at the forefront of encouraging the use of alternative dispute resolution mechanism. This is because ADR methods are faster than litigation in most cases. Also ADR processes could end in a win win situation. Thus the FIRS will be able to collect taxes within a reasonable time rather than subject itself to the uncertainties of litigation.

It is the researcher's respectful view that the decision of the court in *FIRS v NNPC*[905] will discourage investment. This is because multinational corporations prefer arbitration to litigation because of the time efficiency in the resolution of disputes. At the moment one of the challenges that foreign investors may not be comfortable with, is the delay in the resolution of disputes. Hence, in most cases when they are entering into contractual agreements in Nigeria, they insist on arbitration clauses. This is because it gives them an opportunity to exploit other means of resolving disputes within or outside Nigeria.

Nigeria is not the only country that is against the arbitrability of tax disputes, for instance, in the Uganda case of *Heritage Oil & Gas Limited v Uganda Revenue Authority*[906] the appellant entered into a production sharing agreement with the Government of the Republic of Uganda. The said agreement contained an arbitration clause to the effect that dispute under the agreement

[904] O Monye, 'FIRS Secures Landmark Judgment Against the Arbitration of Tax Disputes' *Gauge* April – June, 2012, 20.
[905] *Supra.*
[906] (2013) 9 TLRN, 55.

that could not be resolved amicably within 60 days, would be referred to arbitration in accordance with the United Nations Commission for International Trade Law (UNCITRAL) arbitration rules. The appellant disputed an assessment on capital gains tax, and filled two applications before the Uganda Tax Appeal Tribunal. Before the hearing of the applications could be finalized, the appellant brought another application seeking for a stay of proceedings to have the matter transferred to arbitration in line with the arbitration clause in the production sharing agreement. The tribunal dismissed the application. The appellant then appealed to the High Court of Uganda. On the issue of whether tax disputes can be referred to arbitration, The court held per Helen Obura J. that:

> In the instant case, it could not have been the intention of at least Government to agree that tax disputes would be referred to arbitration as any attempt to do so would be contrary to the laws of Uganda. It would also be contrary to Article 14 of the PSA which clearly stated that tax would be paid in accordance with the laws of Uganda in a timely fashion. Allowing the tax dispute to go through the arbitration process in London would definitely not facilitate the timely payment of the taxes as agreed. This means that tax by inference was exempted from the scope of the arbitration agreement and as such it was not one of the contemplated arbitrable disputes under the PSA.[907]

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[907] *Ibid* at 71-72.

The court was of the view that tax matters are statutory and not contractual' thus, cannot be varied by contractual agreements.[908] With the greatest respect, while it is agreed that tax matters are statutory; the tax statutes does not in any way bar revenue authorities from honouring agreements that are necessary for the administration of tax laws. Also, the reasoning of the court that reference to arbitration will delay the payment of tax does not seem to be supported by practical experience. In most cases litigation may take more time than arbitration. Secondly, there is a higher likelihood of a party appealing against a court judgments' than for parties to challenge an arbitral award in tax matters.

Furthermore, a study of several South American countries like Colombia, Ecuador, Argentina, Peru, Bolivia reveals that, their laws does not support the use of Arbitration in the resolution of tax disputes.[909] For instance, in Colombia Article 70 of the Colombian Alternative Dispute Resolution Law 1988 excluded tax disputes from disputethat is resolvable by Alternative Dispute Resolution.[910] Similarly, in Ecuador, the Ecuadorian Arbitration and Mediation Law, 1997, does not allow the arbitration of tax disputes.[911] The rationale seems to be that tax is considered an issue of public order in those States thus; it must be enforced through public recognized channels, that is, the court.[912]

However, in international matters, several countries have embraced the idea of International Tax Arbitration in resolving disputes arising from tax treaties.[913] Cruz commenting on the desirability of international tax arbitration stated as follows:

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[908] *Ibid*.
[909] NQ Cruz, 'International Tax Arbitration and the Sovereignty Objection: The South American Perspective,' (2008) 51, *Tax Notes Int'l* No.6, 534.
[910] *Ibid,* at 535.
[911] *Ibid* at 536.
[912] *Ibid*.
[913] *Ibid* at 533.

> Certainly, for many South American countries (capital importers seeking Foreign Direct Investment), strengthening disputes resolution procedures might be considered an incentive to enter into new tax treaties with capital exporting countries. Indeed, the possibility overcoming the inefficient (and often bureaucratic) domestic judicial system is likely to appeal to foreign investors; the certainty of an efficient mechanism for resolving tax disputes with the host country will counter the instability that investors perceive in South American Tax System. Therefore, mandatory arbitration represents an additional card that South American government can play to attract more investment for development.[914]

The suggestion of Cruz will be helpful to Nigeria and other African countries if adopted. Certainly, an effective and efficient tax dispute resolution mechanism will have tremendous impact on trade and investment. It is therefore suggested by the researcher that the tax dispute resolution mechanism in Nigerian can be strengthened by exploiting the use of Alternative Dispute Resolution Mechanism, especially Arbitration. No doubt Alternative Dispute Resolution Mechanism is a veritable tool to resolve disputes and will certainly be handy in the resolution of tax related disputes. Most disputes arising from taxation are based on assessment and computation of taxable income. Thus, if an expert sits on an ADR panel, he may be able to resolve the dispute on assessment and computation faster than a Judge. It is further suggested that the law and rules regulating the Tax Appeal Tribunal should be amended to allow parties elect to subject their dispute to any of the Alternative Dispute Resolution Mechanisms. In that

[914] *Ibid.*

case the parties shall be bound by the outcome of the Alternative Dispute Resolution process and can only appeal to the Federal High Court. Furthermore the Federal High Court shall be vested with powers to enforce the decisions of the Alternative Dispute Resolution panel.

7.4 Prosecution of Tax Offences.

The various tax laws provide for different offences and penalties. At the moment our tax laws contain about 48 offences and penalties.[915] The aim of providing tax offences in our laws is to discourage tax evasion. For an act or omission to constitute a tax crime, it must be prescribed by a written law. This is in line with the Constitutional provision in Section 36(12) of the 1999 Constitution that provides to the effect, that: 'Subject as otherwise provided by this constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law.'

The researcher does not intend to go into a detailed discussion of tax offences and penalties, which are outside the scope of this work;[916] rather the aim here is to look at the likely effect of our tax criminal regime on trade and investment.

In Nigeria, there is hardly any reported case of a company or a person successfully prosecuted for tax evasion.[917] But in Europe and the United States of Americas, there are several of such cases. For example, the following celebrities have been convicted of tax evasion; Boris Becker, Martha Stewart, Wesley Snipes, Willie Nelson, Nicolas Cage, Marc Anthony, Annie Leibovitz, Darryl Strawberry, Richard Hatch, Heidi Fless.[918]

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[915] I Odume, Tax Offences and Penalties Compendium, (Abuja: FIRS, 2012) 31. This Compendium Contains a detailed list of all the tax offences and penalties under our various tax laws.

[916] For a detailed discussion on Tax Offences, see OT Akinsola 'Tax Crime – Implication and Challenges for Tax Professionals,' *Nigerian Tax Notes*, (2011) Vol 16 No.5; K Lerkwagh, 'An Appraisal of the Regime of Criminal Sanctions in Nigerian Tax Law' (2012) *NIALS Journal of Business Law*.

[917] A Sanni, 'The Power to Prosecute Tax Offences: A Critique of Unipetrol Nigerian Plc v Edo State Board of Internal Revenue' (2011) 11 *NSCR*, 142.

[918] *Ibid*.

In Nigeria, the tax authorities seem not to be too inclined to take criminal actions against tax offenders.[919] This may be due to the following reasons:

(1) The tax authorities are interested in generating revenue thus, they prefer to bring civil action to recover the tax due, rather than pursue criminal causes that will lead to the conviction of tax offenders, and payment of penalties to court. Particularly for companies, criminal prosecution may not achieve the objective of tax authorities, because if convicted, the most they can get is penalties against the company, and in some cases if the *doctrine of lifting the veil* is applied, they could get the directors to pay penalties too.

(2) The other reason is that, even though the tax authorities can prosecute for tax crimes, they need a fiat from the Attorney General. In most cases officers from the office of the Attorney General will directly handle the matter.[920] Also, if it is a federal law like the Personal Income Tax, it seems a fiat of the Attorney General of the Federation is needed before State authorities can prosecute such offences.[921] Thus, the tax authorities need to consult the office of the Attorney General before tax offenders can be prosecuted. This will lead to some bottlenecks; they will rather prefer to institute civil action that is clearly within their competence.

There is a debate among scholars whether or not penal provisions in Tax Acts can serve, any useful purpose. Kanyip has argued that imprisonment of tax offenders does not reflect economic realities, he observed that: '…there exist at present, empirical knowledge on taxation

[919] K Lekwagh, *op cit*. 57.
[920] The Supreme Court laid the issue to rest in Unipetrol Nigerian Plc v Edo State Board of Internal Revenue (2006) 8 NWLR (pt. 983) 624.
[921] On the 14th of March, 2013, the Attorney General of the Federation, granted the Attorney General of Lagos State fiat to prosecute tax offenders in Lagos State under the Personal Income Tax Act. Sequel to a request by the Attorney General of Lagos State. www.nials-nigeria.org accessed on the 21st of July 2014.

as to how, when and whether sanctions work. …imprisonment of a tax payer means the productive capacity to produce for future tax is incarcerated…'[922]

Kanyip suggested further that, instead of imprisoning a convicted taxpayer he should be made to pay an amount five times the tax evaded; as is the practice in United States of America and Switzerland.[923] Lerkwagh does not support the above view, according to him:

> These submissions can be faulted on several fronts. The submission that the imprisonment of a defaulting taxpayer will limit the productive capacity to produce income for future tax is not supported by any empirical evidence and does not agree with simple logic. This is in view of the fact that if a tax payer refuses to pay tax on income already earned, there is no guarantee that he will be willing to pay tax on his future income.[924]

The researcher seems to be more inclined to the position of Kanyip than that of Lerkwagh. This is because it does not seem that criminal sanctions will be an effective tool, to guarantee tax compliance. There is need for tax authorities to evolve strategies to recover tax from tax evaders, without necessarily truncating their ability to earn; considering that the more income earned, the more tax to be collected. Imprisoning a tax payer, means he will not earn for that period he is incarcerated, thus he will not be liable to tax. The best approach seems to be to make tax evaders pay double the tax invaded to serve as deterrent to others. In the case of companies, the management of companies should not be strangulated by imprisonment of its directors due to tax evasion. The negative effect of this is that, the company may not be properly

[922] BB Kanyip cited in K Lerkwagh *op cit*, 52.
[923] *Ibid*.
[924] K Lerkwagh, *op cit*, 52-53.

managed in the absence of the proprietors. Thus, the company may be mismanaged in the absence of the directors; this may lead to loss of income and loss of jobs, with the attendant economic effect of little or no taxable profit. One of the strategies that can increase tax compliance is to make access to some essential services provided by the Government dependent on evidence of payment of tax.

A good example is what happened in the United Kingdom. A coffee company Starburk has been operating in Britain since 1998, but has reported taxable profit once in 15 years since it started operations. It has paid just 8.6 million pounds in 14 years and nothing in the last four years despite sales of over 400 million pounds in 2008. This led to widespread criticism and their customers making a commitment to stop using their products. This eventually led to inquiry by the parliamentary public accounts committee. Bowing to pressures from the public and the parliamentarians Starburk agreed to pay 20 million pounds as corporation tax by 2015, and immediately paid the first five million pounds.[925]

The fast growing concept of tax amnesty seems to be another way out. Investors will be more comfortable with this concept. Amnesty has been defined as 'the act of a sovereign power officially forgiving certain classes of persons, who are subject to trial but have not yet been convicted.'[926] Thus, it implies forgiveness from a wrongful act. Tax amnesty has been defined as 'a waiver or reduction and sometimes removal of penalties in back taxes to encourage defaulting taxpayers to pay what they owe within a specified window.'[927] The objective of tax amnesty is not to completely knock off the penalties for tax infractions, but to forgive or negotiate the tax

[925] M West, Starbucks finally pays £25 million of UK Tax for the first time in five years after six months of outrage despite £253 million profit in just three months' *Daily mai*l, 23 June 2003.www.daily.co.uk. Accessed on the 21st of July, 2014.
[926] *Ibid*.
[927] *Ibid*.

liabilities of individuals and corporate entities in line with laid down statutes.[928]It is an effective tool to expand the tax net and increase revenue. It usually involves some reliefs or relaxation of some penalties to encourage the taxpayer to discuss their tax debt with the tax authority. Usually it is not expected that tax amnesty will be granted to any person more than once.[929]

A tax amnesty scheme must be backed by some sort of legislation to make it effective. Australia, Belgium, Germany, Greece, Italy, Portugal, Russia and South Africa, have successfully implemented tax amnesty programmes.[930] In the United States, an amnesty operated in the State of New York from time to time for minor traffic offences. Offenders who do not pay their tickets but allow them accumulate, were periodically granted amnesty by the traffic courts to come up and clear their arrears.[931] This certainly saves the cost of enforcement and can be extended to tax offences.[932] In the United Kingdom, though the concept of tax amnesty has not been generally applied, it is not completely unknown. In the case of *IRC v National Federation of Self-Employed and Small Business Ltd,*[933] it was applied between the Inland Revenue and Employers of the National Federation. The National Federation challenged the practice in court. The court held that the amnesty was not illegal, that the Inland Revenue did not abuse its powers by entering into special arrangement absolving tax payers from tax.

In Nigeria, there is no legislative frame work for tax amnesty. However, because of its obvious advantages in helping to recover needed funds for development, it should be encouraged. Agbonika has suggested that 'as part of the reform policy in Nigeria, the grant of a

[928]*Ibid.*
[929]*Ibid.*
[930]*Ibid.*
[931] JAA Agbonika, *Problems of Personal Income Tax in Nigeria*, (Ibadan: Abuba Press Ltd, 2012) p. 427.
[932]*Ibid.*
[933] (1981) 2 All E. R. 93.

tax amnesty could ginger tax payers into compliance.'[934]This will certainly help in increasing the level of tax compliance. The researcher is therefore suggesting that relevant tax laws should be amended to incorporate tax amnesty into our laws.

In this chapter, an attempt was made to show the relationship between an effective and efficient tax dispute resolution mechanism and the development of trade and investment. It is suggested that an effective and efficient tax dispute resolution mechanism, is part of the requirement of an investor friendly environment. It appears that tax payers do not have much confidence in our judicial system as most of them hardly go to court. When they go to court, they are not ready to pursue the matter up to Supreme Court. Thus, there is the need to consider the use of Alternative Dispute Resolution Mechanism especially Arbitration in the resolution tax dispute.

[934] JAA Agbonika, *op cit*, p. 429.

CHAPTER EIGHT

CONCLUSION AND RECOMMENDATION

8.1Conclusion.

Taxation apart from being a source of revenue is an effective economic management tool. Thus, it has considerable effect on the development of trade and investment in any economy. In this research, the impact of Nigerian tax laws and the Nigerian tax policy on trade and investment was examined. The Nigerian tax system has not had considerable impact in the development of trade and investment in Nigeria; because it is confronted with a lot of challenges, which include:

(a) Multiplicity of taxes.

(b) High tax rate.

(c) Low level of voluntary compliance

(d) Lack of fiscal federalism.

(e) Double taxation and abuse of taxing powers by State Governments.

There is a relationship between an effective tax system and economic development of a nation. Unfortunately, in Nigeria taxation is perceived as principally a revenue generation tool by policy makers. Thus, the Nigeria tax system is characterized by high corporate tax rates and multiplicity of taxes.

In the course of the research it was discovered that tax rates are relatively high in Nigeria. Nigerian's average tax rate is put at 33.8%,[935]while the companies' income tax rate is 30%.[936]High tax rates impede; the development of small scale businesses and leads to the growth of a large informal sector; a sector that is to a great extent difficult to tax. Studies by the

[935]Paying Taxes 2014: The Global Picture. 'A comparison of Tax System in 189 Economies Worldwide' https://www.pwc.com/tax/paying-taxes/2014. Accessed on 4th April, 2015, p. 174.

Organization for Economic Cooperation and Development (OECD) and the World Bank shows that most investors in the economies surveyed consider tax rates to be among the top constraints to their businesses.[937] Investors expect corporate tax rate to be low, this is because other types of taxes like labour taxes and value added tax, depend on subsisting business to a large extent.

The researcher is therefore suggesting a reduction in companies' income tax from 30% to 20% and an increase in the rate for value added tax for selected goods and services. Nigeria currently has one of the lowest Value Added Taxrate in the world which is 5%.[938] One quick way of doing this is to adopt the practice in Ireland, Italy, Sweden and Luxembourg[939] of imposing different rates for different categories of goods and services. Thus, a higher value added tax rate should be imposed for imported goods and services that local alternatives are available in Nigeria. Also, locally produced goods should be exempted from value added tax for the first five years. This will help to boost the local manufacturing of goods and attract foreign direct investment.This is in line with the global trend of imposing more of indirect taxes.

The Nigerian Tax System is characterized by cases of multiple taxation and double taxation; these are serious disincentives to investors. A recent survey by the World Bank indicates that the average number of tax payments in Nigeria is 47,[940]this is obviously on the high side for a developing country like Nigeria. The National Tax Policy clearly recognizes these challenges and proposes that there should be a reduction in the number of effective taxes.[941] However, the National Tax Policy failed to address the issues that led to multiplicity of taxes,for instance, the lack of fiscal federalism and over concentration of taxing powers at the federal

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[936]Section 40(1) of the Companies Income Tax Act (as amended) Cap C21 LFN, 2004.
[937]*Ibid*, pp.12 and 25.
[938] Section 4 of the Value Added Tax Act, Cap V1 LFN, 2004.
[939]Ohurugu CC 'Value Added Tax and Administration in Nigeria' *MILBQ*,Vol 5, No. 2, 120.
[940]Paying Taxes 2014: *op cit*, p.168.
[941] The National Tax Policy, paragraph 3.4 D(i).

level. The combined effect of Sections 4(1-4), items 16, 25, 39, 58, 59, 62 and 68 of the Exclusive Legislative List to the Constitution,[942] leads to an irresistible conclusion that there is an over concentration of taxing powers on the federal government and this is a contributory factor to the abuse of taxing powers by State Governments.

The abuse of State taxing powers is a factor that leads to the multiplicity of taxes. State Government's in spite of their limited powers to impose taxes, use every possible opportunity to impose taxes. This has led to the proliferation of taxes by State Governments. Most of these States taxes are unconstitutional, arbitrary and in some cases amount to double taxation. For instance, Lagos State sought to impose taxes on the telecommunication industry by introducing the Lagos State Infrastructure Maintenance and Regulatory Agency Law, 2006 this law was declared unconstitutional in *ALTON v AG Lagos State*[943] bythe Federal High Court on the grounds that it seeks to regulate the telecommunication industry.[944]

Another area the States have abused their taxing powers is in the area of tourism. Some states have imposed special rates and levies on hotels[945] in addition to value added tax. Instead of imposing many taxes on hotels and the hospitality sector, the States should develop their tourism infrastructures like museums, recreational parks etc. and charge access fees; this will make the State a more competitive tourist destination. These State taxes often times are duplication of already existing taxes, they raise little revenue, cause huge inconveniences, increase the cost of doing business and pose serious obstacles to the development of trade and investmentin Nigeria. Unfortunately, the amendment to the Taxes and Levies (Approved List for Collection) Act,[946] in

[942]*Op cit.*
[943]Unreported Suit no. FHC/L/CS/517/2006 ruling deliveredon the 23rd of February, 2007 at the Federal High Court Lagos.
[944]*Supra.*
[945]For instance, Lagos State and Cross River State.
[946] Cap T2 LFN, 2004.

2015 by an order of the Minister of Finance[947] seeks to recognize most of these unconstitutional and arbitrary taxes. Clearly this amendment seeks to institutionalise double and multiple taxation in Nigeria, a development that is not good for the development of trade and investment in Nigeria. Thus, it is obvious that the Taxes and Levies (Approved List for Collection) Act,[948]seems to be compounding the challenges of taxation and ought to be repealed.

Multiple taxation is a serious disincentive to trade and investment in Nigeria and it is one of the reasons tax incentives under the various tax laws neither stimulate the economy nor have positive effect on the development of trade and investment in Nigeria. The researcher is therefore suggesting that the Constitution should be amended to address the issue of fiscal federalism by increasing the taxing powers of State Government's.

More worrisome is the Local Government tax structure, it is one of the most abused tax regime in Nigeria. The 1999 Constitution[949]did not give Local Government's Legislative powers, their structure and powers are determined by the State Houses of Assembly.[950]The States in exercise of their powers to legislate for Local Government often hijack the powers to collect Local Government taxes.[951] The researcher is of the view that, the existence of Local Government Councils should be strengthened; by giving them some legislative powers, at least to legislate on the items under the Fourth Schedule to the Constitution.[952]

Also, Nigeria has a relatively high compliance time in the payment of taxes. Studies have shown that it takes an average of 956 hours to pay tax in Nigeria,whereas in United Arab

[947] Taxes and Levies (Approved List for Collection) (Act Amendment) Order, 2015.
[948] Cap T2 LFN, 2004.
[949]*Op cit.*
[950]Section 7 of the 1999 Constitution, *op cit.*
[951] This practice was condemned strongly by the Court of Appeal in *AG Cross &Anor v Mathew Ojua*(2011) 5 TLRN, 1. Where the State sought to hijack the powers of the local government on property tax in the Urban Tax Law of Cross River State.
[952]*Op cit.*

Emirates it takes just 12 hours. [953] The long time it takes in complying with payments of taxes in Nigeria and most African countries is largely due to lack of effective electronic filing system. In the regional analyses for Africa by the Paying Taxes 2014 Survey, it was noted that only 3 out of 53 African countries effectively use electronic filing for all major taxes.[954] In Nigeria, there is the need to fully embrace the electronic tax system although; there are attempts in this direction by the introduction of the Integrated Tax Administrative System (ITAS), an electronic platform for filing returns and assessment.[955]

In the course of this research it was discovered that to address some of these challenges there is need to review some tax laws and the National Tax Policy. For instance, the Stamps Duties Act[956] requires a mortgage deed to be stamped.[957] This requirement for stamping of mortgages does not seem to serve any purpose other than revenue generation. A mortgage is security for a loan transaction, it is not an income or profit; taxation should be from income and profits. Thus, the Stamp Duties Act should be repealed. This is because payment of stamp duties brings an unnecessary delay in the process of concluding business transactions and increases the cost of doing business. Furthermore, it is a form of double taxation by implication, as the investor will still pay his income tax from the proceeds of the investment. Unfortunately, it is not a major source of revenue for the Government.

Also, the Capital Gains Act[958] seeks to impose tax on the gains from the disposal of assets. It is the researcher's view that this law should be repealed; firstly because any income from the proceeds of disposal of assets can be taxed under the provisions of the Personal Income

[953] *Ibid* at pp. 170-172.
[954] *Ibid* at p. 34.
[955] JTB NEWS.
[956] Cap S8 LFN 2004.
[957] Section 80.
[958] Cap C1 LFN, 2004.

Tax Act[959] and the Companies Income Tax Act.[960] This fact was implied in section 12 of the Capital Gains Act.[961] Secondly, this act may impact negatively on long term investors in real property. In most cases the difference in the initial cost of the asset, and the price it is sold, may not be as a result of asset appreciation, but may be based on the impact of inflation.

The researcher also, evaluated the provisions of the National Tax Policy Document. The objective of formulating the National Tax Policy Document was to set broad parameters for taxation and other ancillary matters connected with taxation and make clear statement on the principles governing tax administration and revenue collection in Nigeria.[962] However, it failed to meet these objectives. The National Tax Policy Document failed to address the challenges of taxation in Nigeria, rather the policy merely gave some explanatory notes to justify the present position of our tax system, which gives the federal Government most of the taxing powers.[963]

The status of the National Tax Policy is not quite clear. It is the researcher's view that the National Tax Policy Document does not have the force of law. This position finds support in *UBN Plc v IfeoruwaNig (Ent) Ltd*.,[964] where the Court of Appeal held that a policy document is not a subsidiary legislation. Thus, for the National Tax Policy to have the force of law, it should be enacted as a law, or made pursuant to the provisions of an existing law.

Another issue is the constitutionality of the National Tax Policy. The question is whether the Federal Government has powers to make a policy for all tiers of government. The Federal Government does not have exclusive powers to formulate economic policies (which include taxation). This position was affirmed by the Supreme Court in *AG Ogun State v*

[959]*Op cit.*
[960]*Op cit.*
[961]*Op cit.*
[962]Introductory paragraph of the National Tax Policy Document.
[963]*Ibid*, paragraph 1.6.
[964](2007) 7 NWLR (pt 1032) p. 135.

Aberuagba,[965]where it was held that the control of the economy is not within the exclusive powers of the Federal Government. That, each tier of government has a share in the control of the economy.

From the forgoing, it is clear that the Federal Government lacks the constitutional power to formulate a national tax policy for all the tiers of government. It can only formulate a Federal tax policy thus, for there to be an enforceable National Tax Policy all tiers of Government must be involved in the formulation.

In the course of this research the impact of some tax incentives under our laws were examined. Nigerian tax laws have attractive tax incentive provisions, to the extent that it has been described as too friendly.[966] For instance, there are incentives for investment in natural resources, like the oil and gas sector, contrary to the general believe that it is undesirable to give subsidies for investment in natural resources because the companies have no choice, other than to invest where the resources are found.[967]

Apart from the several incentives under the various tax laws, Nigeria has also, adopted the trade liberalization policy of establishing free trade zones.[968] The features of a Free Trade Zone are tax exemptions and incentives for investors within the zone. Specifically all Federal, State and Local Government taxes, levies and rates are exempted.[969] In addition, capital goods, machinery, equipment and raw materials are duty free and there is unrestricted repatriation of foreign capital investment, profits and dividends.[970]

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[965]*Supra* at 88.

[966] K Lerkwagh, 'Shell Petroleum Development Company of Nigeria Limited v Federal Board of Inland Revenue (1996) 8 NWLR 257 SC: An Overview' (2011) 11 *NSCR*, 140 – 141.

[967]*Ibid.*

[968] By the enactment of the Nigerian Export Processing Zones ACT,Cap N107, LFN, 2004 the Oil and Gas Export Free Zone ACT Cap O5, LFN, 2004.

[969] Section 8, Nigerian Export Processing Zones ACT, *op cit*.

[970] Section 12 & 18(1) b and c of NEPZ Act, *op cit*; section 12 of OGEPZ Act *op cit*.

Nigeria has one of the best tax incentives for free trade zones. While some countries provide for tax exemption or reduced tax rates for some years,[971] Nigeria has complete tax exemption for companies operating within the free trade zones.[972] However, despite the attractive tax incentive for free trade zones, it has not been able to play a significant role in the development of trade and investment in Nigeria.Thus, free trade zones in Nigeria have not been able to generate considerable employment nor achieve the kind of success recorded bysimilar zones in places like Dubai, Singapore, Mauritius, etc.

The unattractiveness of foreign investors to the Nigeria free trade zones is traceable to a number of factors, among which are poor infrastructures. For instance, the epileptic power supply situation in Nigeria increases the cost of doing business in Nigeria. Free trade zones in places like Taiwan, China, Singapore, Korea, Mauritius and Dubai succeeded because the Government provided the needed infrastructure, sound economic policies and a stable investment climate that is attractive to investors.

Although, Tax incentives in Nigeria appears relatively competitive to that of other countries, their effectiveness has however been undermined by arbitrary and costly implementation process. Thus, many businesses operating in Nigeria do not find her tax incentives attractive or effective. Also, most of the tax concession instruments are not effective because the necessary factors like political stability, economic stability and good infrastructure are not on ground. Studies conducted in Singapore and some East Asian countries shows that

[971] For instance, in Singapore, the tax incentive is 0% for the first two years, 7.5% next 3 years, after which normal tax rate of 15% is applicable.
[972] Section 8 of NEPZ Act, *op cit*; section 8 of OGEPZ Act, *op cit*.

investment decisions are influenced by the political and economic stability of the host country rather than on the basis of specific tax incentives alone.[973]

For Nigeria to enjoy the benefits of having a friendly tax incentives regime; the Government must go beyond merely providing tax incentives; it must put in place, sound economic policies, in addition to having political stability. Thus, the Government should direct her tax policy towards the imposing of more indirect taxes than direct taxes. There is also, an urgent need to address the infrastructural deficit in Nigeria. This can be achieved through public private partnership or concessioning of critical infrastructure to private organizations that have the capacity to fund such projects.

Generally, the level of voluntary tax compliance in Nigeria is low, which is to a large extent attributable to the effect of bad leadership over the years. Government at all levels, lack the moral authority to enforce taxes on their citizens and corporate entities. Recent studies show that the ratio of tax revenue to GDP in Nigeria is only 6.1% this is relatively low compared to countries like Denmark with 49%, France 44.6%, United States 26.9%, Botswana 35.2%, South Africa 26.9%, Ghana 20.8%.[974] Similarly, several studies have shown that there is a high correlation between tax compliance and good governance.[975] Nigerians generally are not averse to paying tax; but a situation where everybody provides their water, electricity, security, and all such basic amenities and services that the Government ought to ordinarily provide, will certainly discourage the payment of tax.

Another factor that investors are likely to consider in making investment decisions, apart from tax incentives and a conducive business environment is the tax dispute resolution

[973] E Aiyedun' Effectiveness of Tax Incentives as Catalyst for Economic Development in Nigeria' (1999) 4 *MILBQ*, 119.
[974] T Oyedele, 'Fiscal Fair Play:Why some Animals should not be more Equal than Others' www.pwc.com/ng. accessed on December 10, 2014.

mechanism. The Nigerian Judicial system is slow and cumbersome; often time's cases linger on for years from one court to the other. It is therefore suggested by the researcher that the tax dispute resolution mechanism in Nigeria should be strengthened by exploiting the use of Alternative Dispute Resolution Mechanism especially negotiation and arbitration. At the moment tax matters are not arbitrable in Nigeria.[976] However, there is need to review our tax laws to allow the use of arbitration in the resolution of tax disputes, as is the case in international tax matters.[977]

In this research an attempt was made to demonstrate the relationship between taxation and investment in Nigeria.Taxation has not been able to play a significant role in the development of trade and investment, despite the attractive tax incentives and the fact that Nigeria is Africa's largest market. It was discovered that incentives alone cannot attract investors; it must be complemented by removing things that could serve as disincentives, like high tax rates and multiplicity of taxes. Also, Government must provide the needed infrastructure, like electricity, good roads etc. It is hoped that the recommendations below if adopted will help to improve the Nigerian tax system.

8.2 Recommendations

From this research and findings; in order to make the Nigerian tax system more investor friendly, the following is recommended:

(1) The Constitution of the Federal Republic of Nigeria 1999 (as amended) should be amended to give States and local governments more taxing powers.

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[975] *Ibid*.
[976] *Federal Inland Revenue Service v Nigerian National Petroleum Corporation & 4 ors.*(2012) 6 TLRN, 1.
[977] International Tax matters are arbitrable , see NQ Cruz, 'International Tax Arbitration and the Sovereignty Objection: The South American Perspective,' (2008) 51, *Tax Notes Int'l* No.6, 534.

(a) Item 62(a) of the Exclusive Legislative List to the Constitution should amended by deleting the words 'trade andCommerce between the States.

(b) Section 7 of the Constitution should be amended to vest exclusive Legislative powers over all the items in the fourth schedule to the Constitution on Local Governments.

(2) Corporate Tax rate should be reduced to 20%, and the number of tax payments in Nigeria should be reduced.

(3) The Value Added Tax Act should be amended to provide for different rates for different categories of goods and services. Thus, VAT should be increased for imported goods that local alternatives are available.

(4) Tax holidays for Free Trade Zones, should be reduced to 20 years and renewable for a single term of 10 years.

(5) Electronic tax system should be fully embraced to reduce compliance time.

(6) The National Tax Policy should be reviewed and ratified by States, in line with the principles of federalism.

(7) The Taxes and Levies (Approved List for Collection) Act with its amendments, Stamp Duties Act and the Capital Gains Act should be repealed.

(8) The constitution should be amended to create a Tax Appeal Court with subordinate Jurisdiction to the Federal High Court and with Jurisdiction over all Federal tax matters.

(9) The use of Alternative Dispute Resolution method in the resolution of tax disputes should be encouraged, by amending relevant laws to make tax disputes arbitrable in Nigeria.

(10) Appeals from the decisions of the Federal High Court and State High Courts to the Court of Appeal and from the Court of Appeal to the Supreme Court on tax matters should be

restricted to Constitutional matters and should be with the leave of the Court of Appeal or the Supreme Court.

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