CHAPTER ONE

INTRODUCTION

1.1 Background of Study

The recent global crisis in the world has brought to the fore the need for diversification of the nation's resource base from over-dependence on oil. Taxation has rightly been identified as a major tool in strengthening domestic resource mobilization and a non-exhaustible veritable source of resource and revenue generation to the three tiers of government in Nigeria.

The Nigerian tax system has undergone several reforms geared towards enhancing tax collection and administration with minimal enforcement cost. The recent reforms include the introduction of TIN (Taxpayers' Identification Number) which became effective, automated tax system that facilitates tracking of tax positions and issues by individual taxpayers, e-payment system which enhances smooth payment procedure and reduces the incidence of tax touts and enforcement scheme. The tax authority now has autonomy to assess, collect and record the tax.[1] This enabling environment has led to an improvement in tax administration in the country.

Despite the improvement, there are still a number of contentious issues that require urgent attention and among them is the issue of the appropriate tax authority to administer several taxes. The crisis between Lagos State and Federal Government on the jurisdiction of Value Added Tax in the state is still contentious issue that has been taken to the court.[2]

There is the issue of multiplicity of taxes administered by all the three tiers of government which sometimes imposes welfare cost. The issue of infrastructural development is also a critical issue in Nigeria tax system, the level of infrastructural facilities is in a deplorable state. In Nigeria some of the facilities are often privately sourced, thus a number

[1] Federal Inland Revenue (Establishment) Act, 2007 S. 8(g).

[2] *Eko Hotels Ltd v. Federal Inland Revenue & Anor* (2009) 1 TLRN 176, *Mama Cass & 2 Ors v. Federal Board of Inland Revenue &Anor* (2010) 2 TLRN 99, *Cadbury Nigeria Plc v. Federal Board of Inland Revenue* (2010) 2 TLRN 16.

of people wonder what the taxes collected are used for.[3] The non-provision of social amenities by the government has the tendency to make people evade tax payment.[4] Again, the problem of the tax language that is codified makes it difficult for an average Nigerian to understand.

An efficient and effective tax reforms or administration in the country will go a long way in helping the governments in devising means to tax successfully and ensure increased internally generated revenue. A good policy direction on taxation will clarify taxation powers of each level of government and encroachment on the powers of one level or state by another and laid down procedures for the operation of the various tax authorities.

1.2 Statement of Problem

The long walk to the attainment of effective tax system for the country has been the fulcrum of several fora. The laborious effort has been to identify critical tax administration challenges in Nigeria and measures required to remedy the challenges. Improved tax system will guarantee improved revenue base for the country and will position the country properly to take full advantages offered by taxation. The objective of taxation policies is largely unrealized due to combinations of factors including fiscal federalism issues, complex tax legislation, dispute resolution issues, tracking system of tax administration, corruption and lack of vision of the ruling class and tax authorities. The tax system has increasingly become a nuisance and burden on the citizens in general and taxpayers in particular. This research examined the issues bedevilling tax administration and compliance in Nigeria by analysing the tax gap in the system over the years. The critical appraisal of the provisions of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)on the taxing powers to

[3] R G Asquo, *Tax System in Nigeria Issues and Challenges in Vanguard*, March 24, 2014, www.vanguardng.com/2014/03accessed on 26/9/2016.

[4] *Ibid*

the State and Local Governments, the Federal Capital Territory issues, double taxation, multiple taxation, concentration of taxing powers at the federal level, high direct tax rate and abuse of the powers of imposition and collection of tax in Nigeria.

1.3 Purpose of Study

The purpose of study is to identify the tax administration challenges in Nigeria and pinpointing measures required by tax authorities and practitioners to meet them. In view of this, the research needs to do the following:

1. To determine the extent to which Nigeria federalism affects Nigeria tax system;
2. examine the tax administration and compliance in Nigeria;
3. investigate the impact of tax administration on Nigeria;
4. examine the tax gap in the Nigerian tax system in the light of obsolete laws; and
5. identify the challenges facing tax administration in the country.

1.4 Scope of Study

This study focuses on the problems, prospects of tax reforms and administration in Nigeria using effectiveness and efficiency of the tax laws, policies and tax authorities as case study. The research takes cognizance of the constant failure of attempts to radically improve the system, in the states and local governments' tax authorities juxtaposed with the concentration of powers of imposition and collection on the federal governments and its impact on the economy reviewing its consistency with federalism and other dynamics.

1.5 Significance of Study

The research reveals the inefficiencies in the Nigeria tax system due to obsolete tax regime and insensitiveness of Nigerian leaders to the utilization of tax yield in providing the needed

infrastructure and services for Nigerians. The research revealed the need to review the tax regime in Nigeria. The research also shows that an overhaul of the entire tax system and utilizing the tax yield for the benefit of the taxpayers will help curb tax evasion. This motivation to tax payers will assist Nigeria to experience the prospects in taxation.

1.6 Research Methodology

The methodology adopted in this research is doctrinal method using analytical, expository and comparative techniques of the present tax regime and their loopholes in comparison with the position in other jurisdictions. In examining the tax system, the controversies and issues challenging the tax system are discussed by critically analysing the primary sources; constitution, tax laws, subsidiary legislations like the Federal Inland Revenue (Establishment) Act 2007, case laws and secondary materials like the relevant textbooks, journals, articles and internet sources or materials were consulted.

1.7 Literature Review

The legal text writers and scholars on taxation has devoted time and energy explaining the Nigerian tax systems, its structure, the regime and the problems militating against the efficiency and effectiveness of the administration of tax in Nigeria. Notwithstanding the substantial amount of literature on the challenges of administration of tax in Nigeria, the problems persisted. The persistence and enormity of the challenges bedevilling our tax system is more appreciated considering the introductory statements in the proposed National Tax Policy that reads:

> Fiscal federalism is expected to play a major role in Nigerian tax policy and administration. In this regard, it is intended that the concept of fiscal federalism would be the common thread holding

> the National Tax Policy together. Nigerian tax policy would therefore uphold the application of fiscal federalism in the generation and expenditure of revenue by government at all levels in accordance with the tenets of the Nigerian Constitution.[5]

The above statement of fact contained in the proposed National Tax Policy exposes one of the fundamentals in a federation. It points to the fact that there should be strict adherence to the tenets of federalism which include the basic understanding of which revenue functions and agencies are best decentralized. Commenting on this fiscal federalism as it concerns taxation, Ayua[6] said:

> In a federal country like Nigeria the importance of having a coherent tax system need not be stressed. It is desirable that the taxing powers of the different and independent layers of government should be consistent with each other for if they clash this could be disastrous from the standpoint of their effects on incentives, which, if adverse are bound to cause distortion in the national economy.

This view again restates the essential feature of federalism which is formal distribution or allocation of jurisdictional powers between the Federal and State Governments or component units. It follows therefore that the financial powers of the federation must be distributed between the federal and the state governments under any federal constitution. Hamilton has said[7]that the state governments should be able to command the means of supplying their wants, as that the national government should poses the like faculty in respect of the union.

[5]National Tax Policy (Draft Document) updated as at 7th June 2007. See www.nigeriantaxpolicy.org.
[6]I A Ayua, *Nigerian Tax Law,* (Ibadan, Spectrum's Law Publishing, 1996) p. 9.
[7]Hamilton cited in I A Ayua, *Nigerian Tax Law, ibid*. p. 25.

This analysis assumed that the financial powers of the federation can be so neatly distributed between the federal and state governments and the taxing powers of the respective governments should be independent of each other to raise financial resources necessary to meet the needs of each government. The above discussion by the authors of the gap in the division of the financial powers in Nigeria federalism did not consider the special type of federal state of Nigeria which was provided in the section 2(2) of the Constitution of the Federal Republic of Nigeria (as amended). This research examined the special type of federation of Nigeria taking cognizance of the fact that Nigeria federation involves the states and federal capital territory as component unit. The Nigerian experience as having been exposed by authors, shows that the practice may appear to be simple but division of financial powers of the federation constitutes an intricate and complex problem. Ademolekun[8] has asserted that:

> Finance has emerged as the most critical policy issue in IGR (that is, International Fiscal Relations) in every federal administration system since the Second World War. Almost without exception, the financial resources available to the central government has exceeded considerably those available to the other levels of government.

The view of the author captures the imbalance or the federal dominance of the inter-governmental fiscal relations and where not properly controlled will make the state completely dependent on the federal government financially. It is therefore generally wrong upon the central government to deny the states of their autonomy in matters that directly concern them. It has been further suggested that the development is not a recipe for political unity particularly in a developing heterogeneous society like Nigeria where there is

[8] L Ademolekun, *Public Administration*(Ibadan, Longman Publishing, 1984) p. 93.

differential socio-economic development, with the central government apparently lacking any definitive policy to bring about even development.[9] This particular challenge is presently more acute today considering the experiences in the states and local governments on the services like the sharp rise in the costs of providing education to meet insatiable demand for trained people, paying the salaries of civil servants, providing hospitals and medicare, providing adequate water supply and other valuable services to meet the growth in population and others. This research examined the provisions of sections 2, 5 and 68 of the Federal Inland Revenue Service (Establishment) Act which provides for covering the field in this area of tax administration in Nigeria. This has led to the multiplicity of taxes in Nigeria when revenue to states and local government from Federation Account began to dwindle. On the tax administration, Ayua[10] further said the loss of revenue expected in taxation is due largely to an inefficient and inept tax administration. According to him:

> An inefficient tax administrative machinery may constitute an obstacle to the introduction of desirable substantive reforms in tax system, for example, on the ground that the reforms could not be administered by such an inept tax machinery or that the reforms could throw the whole tax system into jeopardy as the already weakened administrative machinery…

The statement above is suggesting an improvement in the Nigerian tax administration which will enable the tax structure to play its part in the economic development of the country. This will be achieved by eliminating undesirable administrative deficiencies which may frustrate the objectives underlying the regime of taxation.[11]This research examined the inefficiencies in the system taking cognizance of the fact that the world is fast growing into a

[9] I A Ayua, *Nigerian Tax Law, op. cit.* p. 25.
[10] I A Ayua, *ibid*, p. 270.
[11] Nigerian Tax Reform in 2003 and Beyond: main report of the study group on the Nigerian Tax System (2003) p. 318.

global village and Nigeria must follow suit. The research saw the gap on the qualification of the personnel and non-lack of facilities for the retaining of tax administrators. The 2003 Tax Study Group[12] had this to say on the entire tax system in Nigeria:

> The Nigerian tax system is not in good shape by any measure: policy, law, administration, revenue-yield, equity, and impact on the economy, consistency with federalism, dynamism and so on. On the top of all this, the system is unduly loaded with too many taxes most of which are overlapping. Additionally, corruption, arbitrariness, high-handedness, extortion, sabotage, fraud and general lawlessness now heavily characterized tax management particularly at local government and to a lower degree at state and federal levels. Furthermore, the system remains paralyzed by fundamental lack of tax information and data.

The report of the study group capitulated the growing concern about the efficiency or otherwise of the seemingly long list of taxes in Nigeria in terms of revenue yield. It is known that a direct positive relationship between tax revenue and number of taxes, should be impressive, buoyant and robust. Infact, the x-ray of the issues by the study group succinctly made it clear that there is need to radically improve the system, that is, a major rationalisations, instead of peripheral reforms. On his own part, Sanni[13] said that the reality today is that the states and local governments are attempting to take their own shares of the revenues of corporate bodies through the back door in form of illegal taxes and levies. His position is that a lasting and sustainable solution lies in a review of the basis of the division of taxing powers in Nigeria under the constitution. This will guarantee the ability of each level of government to raise its independent revenue to meet its responsibilities. This research

[12] *Ibid*.
[13] A Sanni, *Multiplicity of Taxes as a Bane of Tax Compliance and Yield (2012) Tax Law Journal of Nigeria*. Vol. 1, 81.

critically appraised the status of Taxes and Levies (Approved List for Collection) Act. The appraisal revealed that the Taxes and Levies which contained 55 taxes is not a taxing legislation.

In their contribution, Adam and Ibrahim[14] has this to say:

> The lack of a specific policy direction for tax matters in Nigeria and the absence of laid down procedures for the operation of the various tax authorities is equally a teething problem… This is evident in the various lapses observed in the administration of tax in Nigeria.

The observation above stated that there is an apparent non-review of tax legislation and this has left us with obsolete laws that do not represent Nigeria's current realities and economic policy. The research further considered the current realities which points to the fact that there is no simplification of the tax system to make it codified in simple, non-technical, if possible in the three major languages; Hausa, Ibo and Yoruba and there is multiple taxation by touts that divert government revenue; this is a disincentive to investors. Infact, Iweala said:[15]

> A recent World Bank report shows that for every 100 naira that business have to pay in taxes; they pay about 35 naira in compliance costs. This is a waste of capital that could be reinvested in these businesses to grow them and create more jobs for our economy.

The research revealed that the essence of taxation is to generate fund for provision of infrastructure. In Nigeria there is persistent problem of infrastructure like unstable electricity, good roads, pipe borne water, health and medicare, housing, unemployment and others.

[14]S M Adam and I. Mohammed, *Conceptual Foundation of Environmental Taxation Law and why Nigeria should develop an Environmental Tax Regime* in J A Agbonika (ed) *Topical Issues on Nigerian Tax Laws and Related Areas*(Ibadan: Ababa Press Ltd, 2015) p. 357.

[15]W Odunsi, "Only Boards of Internal Revenue should collect Tax – FG warns States, MDAS". Available at http://businessnews.com.ng/2013/10/22 accessed on 20/12/2016.

Above all, tax rates are increased without corresponding increase in salaries. In the economic policy there is government inability to prioritize taxation in Nigeria. This is a major challenge which discourages a proactive revenue drive, particularly for internally generated revenue. It makes all government tiers heavily reliant on unstable oil revenues. Laws[16] passed allow the government to enter into agreement with private companies for the development of infrastructure.

Also related to this issue of policy is a suggestion made by Aladesawe[17] that in order to eradicate multiple taxation by touts that divert government revenue and service, which is a disincentive of investors and in a bid to increase tax yield. It is mandatory that tax authorities especially at the state level should discontinue with the use of tax consultants for revenue collection. The observation starts with identifying multiplicity of taxes that is in-built in Nigerian tax regime. For instance, in recognition of the fundamentals of federalism, the Taxes and Levies (Approved List for Collection) Act[18] contains as much as 9, 25 and 21 taxes and levies for Federal, States and Local governments respectively. The research pointed out the illegality in the use of consultants by states and local governments in Nigeria contrary to the provisions of the taxes and levies (Approved list for collection) Act. It provides that no other person, other than the appropriate tax authority, shall access or collect on behalf of the government any tax or levy. The Taxes and Levies (Approved List for Collection) Act, itself gives impression of the type of laws and regulations administered by tax authorities in Nigeria. The research made an introspection on whether the current thinking is to ensure that taxes, fees and charges do not exceed those listed in the Act or whether it is meant to streamline the number of taxes into just a few simple broad based taxes with elastic revenue potentials. It is expected, however, that tax authorities are required to provide assistance and

[16] Infrastructure Concession Regulatory Commission Act, 2009; Lagos State Public Private Partnership Law, 2011.

[17] A U Aladesawe: *Diversification of Nigeria's Economy through Tax Revenue in J A Agbonika (ed) Topical Issues on Nigerian Tax Laws and Related Areas, Ibid,* p. 98.

[18] Act No. 21 Cap T2 Laws of Federation of Nigeria, 2004.

necessary insight in respect of this legislation which will assist in the review of this piece of legislation.

In his scholarly contribution on the lingering question of the capacity of the states to legislate on some taxes, Ola[19] in the treatise on the legality or otherwise of states imposing taxes, said the states can impose taxes contrary to the erroneous impression that states under the 1979 Constitution could only collect and administer taxes and not levy same.[20] It is unfortunate that the author based his argument on the provisions of Decree 107 of 1993 which does not currently have the force of law. The issue of which tier of government has the power to levy taxes led to the preponderance of commentaries by scholars and tax Practitioners that the federal government enjoys monopoly of taxing powers, a situation that is at variance with fiscal federalism. Agbonika[21] cited the observation of the study group on the Nigerian tax reform that the cases of Personal Income Tax and Value Added Tax are glaring examples of federal takeover of the powers of the states during the prolonged military government in Nigeria. This research revealed that in line with the practice of true federalism, Personal Income Tax was a regional/state tax until 1975 when the then military government took over power. The military regime passed a federal uniform Personal Income Tax law but allowed the states to collect the tax in their respective territory. The non-demarcation of taxing powers resulting to the concentration of tax revenue on the federal government has got with it a lot of negative implications. One of the issues with the lopsided system in Nigeria is on the jurisdiction of the Federal High Court and the State High Courts.

Again Ola aptly captured this when he said[22] that in cases involving PITD, if the case is commenced in the State High Court, objections are further raised that the issue being a revenue matter should be tried at the Federal High Court. The view of the learned author is

[19]C S Ola, *Income Tax Law and Practice in Nigeria* (Ibadan: Heineman Educational Books, 2001) p. 85 – 87.
[20]*Ibid*.
[21]J A Agbonika, *Problems of Personal Income Tax in Nigeria* (Ibadan: Ababa Press Ltd, 2012) p. 6.
[22]C S Ola, *op. cit* p. 85 – 87.

that the concentration of the taxing powers on the federal government has caused a lot of hardship and even prejudiced cases commenced in either the Federal High Court or State High Court. When a matter of taxation is filed at the Federal High Court, the objection will be that it is not triable as the revenue is not accruable to the federal government and when commenced at the State High Court, the objection will be that the legislation is a federal one. This research shows that the authors failed to consider that Tax Appeal Tribunal does not discriminate the revenue that accrues to the state and the federal government.

The immediate goal of improving the tax administration is a *sine qua non* to maximizing revenue generation for development. Ayua[23] observed that the loss of revenue caused by the widespread tax evasion and avoidance is as a result of lack of statistics and data as well as the manual system of computing assessment and collection of taxes in Nigeria. The opinion of the scholar is that the use of statistics like gross profit percentage of a type of trade or business in the current years as well as for the previous years by the assessing officers to guide them in the examination of accounts cannot be overemphasized. Abdulrazaq[24] in his contribution identified the complexity of tax laws as a factor hampering its growth. He further identified the process of auditing taxable persons which is cardinal to assessment of income tax does not reduce non-compliance. In his view audits are marginally effective in reducing the frequency of reporting errors but not their size. The research shows that persistence of non-compliance despite the application of audits is attributed to the negative effects of the blanket enforcement of complex laws. This include the tendency to treat violators the same whether they acted inadvertently or intentionally and the lack of relative risk to the determined violator who usually get away with paying tax and interest. In her own

[23] I A Ayua, *op. cit.*
[24] M T Abdulrazaq, *Nigerian Revenue Law* (Lagos: Malthouse Press Ltd, 2005) p. 23.

contribution, Okauru,[25] the then Executive Chairman of Federal Inland Revenue Service and Chairman Joint Tax Board, discussing on emerging issues in tax administration said:

> Nigerian tax laws provide various mechanisms for the resolution of tax and other fiscal disputes or disagreements as they arise. However, over the years, we have seen increasing tendency to resort to self-help in the resolution of disputes and disagreements. This has led to prevalence of issues such as multiple taxation, use of unorthodox or illegal methods for the collection of taxes, engagement and use of third parties in core tax administration and the like. There is therefore an urgent need to put in place a system for the speedy and imperial resolution of all tax related disputes arising in the system…

This view revealed one of the core issues challenging tax administration in Nigeria. The resolution of tax disputes is important in tax administration as it will ensure certainty in the administration and improved confidence in the tax system by the stakeholders. Olugbenro[26] contributing on the disputes resolution mechanism said that pending the resolution of the jurisdictional concerns about Tax Appeal Tribunal (TAT).It is imperative for Federal Inland Revenue Service (FIRS) to consider alternative options to resolve these age-long disputes and collect the tax payments due to the federation without much ado or delay. This research shows that attempts by Federal High Court and Court of Appeal to determine the jurisdictional issues produced conflicting decision on the status of Tax Appeal Tribunal. The Court of Appeal in *Cadbury v. FBIR*[27] declared that Tax Appeal is not a court nor a fact

[25] I O Okauru, Emerging Issues in Tax Administration: The Way forward for Nigeria, 4th National Conference of the Department of Finance, University of Lagos (a lead paper) July 2011.https://emergingissuesintaxadministration accessed on 7/10/2016.

[26] Y Olugbenro, Nigeria: 'What is the fate of the Tax Appeal Tribunal'www.mondaq.com/nigeria/x/322466/tax-authorities accessed on 10/10/2016.

[27] *Supra.* p. 34.

finding tribunal. The same court of appeal has in CNOOC Exploration & Production Nig. Ltd & Anor v. NNPC & Anor[28]upheld the jurisdiction of Tax Appeal Tribunal over tax matters. Obayemi[29] contributing agreed that an appellate court has declared that Tax Appeal Tribunal appeal tribunal is not a court or a fact finding tribunal. Contrary to this view, Umenweke disagreed with the proposition that Tax Appeal Tribunal is neither a court nor a fact finding tribunal. In his view he said;

> However, the FIRS (E) Act which established Tax Appeal Tribunal avoided the pitfall of Value Added Tax Decree, infact it cured it by making the Tax Appeal Tribunal inferior to the Federal High Court.[30]

The above view is based on the grounds that the Value Added Tax Decree provides that appeals from TAT go to the Court of Appeal but in FIRS (E) Act appeals from TAT go to the Federal High Court. The jurisdictional issues of Tax Appeal Tribunal had continued to be debated among authors and professionals. This research considers the status of the Tax Appeal Tribunal vis-à-vis the Constitution. Another ranging controversy in Nigerian Tax system is which level can impose Value Added Tax and/or sales tax. Umenweke[31] contributing on this, said that the Sales Tax Law of Lagos died as a result of the judgment in *AG Lagos State v. Eko Hotels Ltd &Anor*.*[32]* The opinion is based on the grounds that by the National Assembly enacting Value Added Tax Act,[33] it has covered the field. After this decision of the Court of Appeal in *AG Lagos State v. Eko Hotels Ltd* case, it is unfortunate

[28] CA/L/1144/2015 & CA/L/1145/2015 unreported.
[29] O K Obayemi, 'Tax Appeal Tribunal's jurisdiction viz-a-viz the Federal High Court'https://www.prosharing.com/new/taxation/taxappealtribunaljurisdictionaccessed 10/10/2016.
[30]M N Umenweke& K K Ezeibe, 'Nigerian National Petroleum Corporation (NNDC) v Tax Appeal Tribunal & 3 Ors – The Constitutionality of the Jurisdiction of the Tax Appeal Tribunal' revisited (April – June 2015) International Journal of Business Law Research 3(2) 73 – 81.
[31]M N Umenweke, 'The Power to impose and collect consumption tax in Nigeria – Attorney-General of Lagos State v Eko Hotels & Anor (2008) ALL FWLR (pt. 398) 235 Revisited '*Tax Law Journal of Nigeria,* vol. 1, April 2012, p. 120.
[32] (2008) ALL FWLR (pt. 398) 235.
[33] Cap VI, Laws of the Federation, 2004.

that the decision rather than calm nerves on the struggle between the States and Federal Government, it has sparked off more litigations and brought unending controversies among tax authorities in Nigeria. 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 and remitted to the federal government. A taxable person shall on supplying taxable goods or services to his accredited distributor, agent, client or consumer, as the case may be, collect the tax on those goods or services at the rate specified.[34] In *Attorney-General of Ogun State v. Aberuagba*,[35] the Supreme Court held that a state cannot make sales tax laws on matters contained in the Exclusive Legislative List and declared the Sales Tax Law of Ogun State unconstitutional as the law imposed tax on goods brought into the state. In *Nigeria Soft Drinks Company v Attorney General of Lagos State*,[36] the Court of Appeal upheld the Sales Tax Law of Lagos State because it only sought to impose sales tax within Lagos State. The Court of Appeal relying on Aberuagba's case in *AG Lagos State v Eko Hotels &Anor*[37] declared the State Sales Law inconsistent with the Constitution. This research is concerned with an only thin issue of whether it is the Federal Government or the State Government that should impose consumption tax within the state. It is the view of the researcher that the Federal Government should impose tax on external and inter-state services only.

The other many issues and challenges bedevilling Nigerian tax system is captured in Sani's[38] definition of multiplicity of taxes in the following words:

> …it refers to the various unlawful compulsory payments being collected by the local and the state governments without appropriate legal backing through intimidation and harassment of the payers. Collection of it is characterised by the use of stickers,

[34] Value Added Tax Act, cap VI LFN 2004.
[35] (1985) 1 NWLR (pt. 3) 395 at 405.
[36] (1987) 2 NWLR (pt. 57) 444.
[37] *Supra.*
[38] A Sani, 'Multiplicity of Taxes as a bane of Tax Compliance and Yield' (2012)*Tax Law Journal of Nigeria, op. cit.*

> mounting of road blocks, use of revenue agents/consultants including motor park touts… where the same level of government imposes two or more taxes on the same tax base.

The challenges identified above is still prevalent on our roads in various States and local governments in Nigeria. The Federal Inland Revenue Service by law is still empowered to collect Companies Income Tax, Education Tax and Technology Levy which shall be paid by the same company. This has led to and encouraged government agencies to "impose taxes" in the form of fees or charges. In *Registered Trustees of Association of the Licensed Telecommunications Operators of Nigeria &Ors v. Lagos State Government &Anor*[39] certain sections of the Lagos State Infrastructure Maintenance and Regulatory Agency Law 2004 was challenged that it amounted to imposition of tax on their operations. The trial judge held:

> The IMRA Law from the name it looks very innocent… from the contents of the law, the driving force is just to make money for the state, as the state has numerous laws dealing with the issue of urban planning.

The court in that case saw that the revenue objective of the Lagos State Government is to create an agency that will get its own share of the booty as they suggest that the companies are making billions of naira in Lagos State. This decision notwithstanding; recently, the Lagos State Government enacted the physical planning law of Lagos State to tax telecommunication industries and banks on the use of their mast.[40] The trend is now beginning to introduce taxes and levies[41] in order to collect from the billions of naira alleged to be made by telecommunication companies. There is still controversy over the imposition

[39] (unreported) Suit No FHC/L/CS/517/2006 delivered by Justice Auta of the Federal High Court, Lagos on 25/02/2007.

[40] B Olakeye, 'Telecos, LSG at loggerheads over new telecom taxes' Daily Sun, January 15, 2013. p. 49.

[41] Anambra State Government with the Awka Capital Territory Development Authority Law 2009 demands levies from telecommunication companies.

of tourism taxes considering the provisions of Value Added Tax Act.[42] Cross River State introduced tourism tax[43] to tax tourism investments. Lagos State introduced hotel licensing and Hotel occupancy and Restaurant Consumption taxes.[44] In *Mas Everest Hotels Ltd &Anor v. A.G. Lagos State & 2 Ors,*[45] the court held Hotel Occupancy Law to be constitutional. However, in *Princel Court Ltd v. AG. Lagos State & 2 Ors,*[46] it held the law to be unconstitutional. The study maintains the position that intra-services or internal supply of goods within a state territory is to be controlled by the state. This position is maintained despite the overwhelming provision of section 68 of the Federal Inland Revenue Service (Establishment) Act.

There are avalanche of challenges confronting the tax system and tax authorities in Nigeria which are not contained in the existing literature reviewed. A holistic reformation of the tax system will contribute to the well-being of all Nigerians. Taxes which are collected by government should directly impact on the lives of the citizens. A tax system where the highest incomes should pay the highest percentage of tax and tax revenue should be utilized to provide Nigerians with affordable social amenities, basic infrastructure and other utilities. It is noted that a lasting and sustained solution lies in a critical review of the basis of the division of taxing powers in Nigeria. In the constitution a way out of the quagmire will help each level of government to raise its independent revenue to meet its responsibilities.

[42] Section 46 defines;
(a) entertainment to include any exhibition and performance in which admission of people is subject to payment by such persons.
(b) motel to mean premises on which accommodation, flats, service apartments, beach cottages, holiday cottages, game lodges.
(c) restaurant, means any establishment carrying out the business of restaurant services and includes cafeterias, fast-food outlets, snacks bars, food stuffs.
(d) Restaurant service means the supply of foods or beverages prepared for immediate consumption, whether or not such consumption is on the premises of the restaurant and including outside catering.

[43] Tourism Development Levy Law, Cross River State, 2007.

[44] Hotel Occupancy and Restaurant Consumption Tax Law Lagos State, 2009.

[45] (2010) 2 TLRN 1, *Mama Cass & 2 Ors v. Federal Board of Inland Revenue &Anor* (2010) 2 TLRN 98.

[46] (2010) 3 TLRN 30.

1.8 Definition of Terms

Some of the concepts used in taxation including taxation itself are not established terms in the field of taxation as some are peculiar to Nigerian Fiscal Lexicography.[47]

1.8.1 Taxation

Taxation spans over a wide gamut of human activity and is essentially aimed at providing the requisite revenue for the socio-economic development of a nation or reducing the incidence of inequality in that nation. The importance of taxation to nationhood is captured in the American case of *Nicholas v. Ames*[48] as follows:

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

Taxation is here viewed as an indispensable tool at the government's disposal for the effective delivery of economic and social dividends to the citizens.

The word taxation is defined as a process of collecting taxes within a particular location.[49] Taxation here is defined to be the series of things that are done in order to collect tax. Black's Law Dictionary[50] defines taxation as the imposition or assessment of a tax. The means by which the state obtains the revenue required for its activities is taxation. The Oxford Advanced Learners' Dictionary[51] defines it as the system of collecting money by taxes. The limitation in the dictionary definitions is that it defines taxation to concern only the things to be done in order to collect tax but it does not include tax itself. The definition saw

[47] See A Sanni, Multiplicity of taxes as a bane of tax compliance and yield, *op. cit.* p. 81
[48] 173 U.S. 509 (2899) at 515.
[49] The Proposed National Tax Policy, p. 1.
[50] B A Garner (ed) *Black's Law Dictionary,*(10th edn, USA: Thomson Reuters, St. Paul M N, 2014) p. 1688.
[51] A S Hornby (ed) *Oxford Advanced Learner's Dictionary of Current English,*(6th ed. Oxford: Oxford University Press, 2001)p. 1227.

taxation as the levying of tax. The Business Dictionary[52] defines taxation as a means by which governments finance their expenditure by imposing charges on citizens and corporate entities. This definition defines taxation as a tool which the government uses to encourage or discourage certain economic decisions. Investopedia defines taxation in the following words:

> Taxation refers to compulsory or coercive money collection by a levying authority, usually a government. The term "taxation" applies to all types of involuntary levies, from income to capital gains to estate taxes.[53]

This also defines taxation as an act which has the resulting effect of generating revenue called tax. Taxation has been defined as the imposition of an obligatory levy or contribution of an individual or corporate donate by recipient public authority.[54] In this definition, it also connotes two important attributes which are the levying authority and possession of the legal capacity to do so since taxation is a legal policy and it evolves an element of compulsion as opposed to voluntariness. Taxation is therefore the process of levying and collecting tax from taxable persons. Taxation is the imposition, assessment and enforcement of payment of tax by the appropriate authority.

1.8.2 Tax Authority

The word tax authority is not defined in any of the tax statutes in Nigeria, legal and ordinary dictionary. Oxford Advanced Learner's Dictionary[55] defines tax as:

> Money that you have to pay to the government so that it can pay for public services. People pay tax according to their income and

[52] www.businessdictionary.com/definition/taxation.htmlaccessed on 14/10/2016.
[53] www.investopedia.com/terms/t/taxation.aspaccessed on 14/10/2016.
[54] Taxation as a major source of funding to the government of Nigeria – nairaproject.com/projects/187.html accessed on 14/10/2016
[55] A S Hornby, Oxford Advanced Learner's Dictionary of Current English, op. cit.

businesses pay tax according to their profits. Tax is also often paid on goods and services.

Ayua[56] defines tax as a pecuniary burden laid upon individuals or persons or property to support the government and is a payment exacted by legislative authority. A tax is not a voluntary payment or donation but an enforced contribution exacted pursuant to legislative authority. In *Matthews v Chicory Marketing Board*,[57] a tax is compulsory exaction of money by a public authority for public purposes.

Authority[58] is defined as the right or permission to act legally on another's behalf; the power delegated by the principal to an agent. The term "tax authority" was giving contextual meaning in the statutes. Personal Income Tax Act[59] said tax authority means the Federal Inland Revenue, the State Board or the Local Government Revenue Committee. The Taxes and Levies Act[60]said tax authority are:

(a) The Federal Board of Inland Revenue, the State Board of Internal Revenue or the local government; or

(b) A ministry, government department or any other government body charged with responsibility for assessing or collecting the particular tax.

The proposed National Tax Policy said tax authority are represented by the Federal Inland Revenue Services and the States Board of Internal Revenue responsible for the administration of tax laws and are entrusted with the responsibility for advising government on all tax related matters. The definitions highlighted above is to the effect that tax authority is the person or persons that have the responsibility to ensure that tax administration at all levels of government is carried out in accordance with statutory provisions. It is surprised to find tax statutes still refer Federal tax authority as Federal Board of Inland Revenue whereas

[56] I A Ayua *op cit.*
[57] (1938) 60 CLR 263 at 276
[58] B A Garner (ed) Black's Law Dictionary *op cit*127.
[59] Personal Income Tax (Amendment) Act 2011, s. 108.
[60] Taxes and Levies (Approved List for Collection)Act, Cap T2 LFN 2004 S. 4.

the Federal Inland Revenue (Establishment) Act 2007 named the agency as Federal Inland Revenue Service. In Nigeria tax authorities are the Federal Inland Revenue Service, State Boards Internal Revenue and Local Government Revenue Committee.

1.8.3 Taxing Power

Black's Law Dictionary[61] defines taxing power as the power granted to a governmental body to levy a tax, especially, the congressional power to levy and collect taxes as a means of effectuating congress delegated powers. The Business Dictionary[62] defines it as constitutionally granted power of a government to impose and collect taxes as the means of raising revenue within its jurisdiction. Agbonika[63] attempted a definition of taxing power as a power inherent in sovereignty and unlimited in the absence of constitutional restrictions but subject in its exercise to the discretion of the authorities in whom it is reposed. The appropriate arm of the sovereign reposed with the power of imposing taxes is the legislature. It is the legislative arm of government that imposes or makes tax legislation. Taxing powers in accordance with the Constitution of the Federal Republic of Nigeria 1999 as amended was distributed to the Federal, State and Local Governments.

1.8.4 Fiscal Federalism

Fiscal federalism deals with the division of governmental functions and financial relations among levels of government.[64] In other words, it is the application of the federal principle in resource mobilization and allocation within and among the constituent units.[65] It is the division of powers, functions, duties and financial resources among different levels or tiers of

[61] B A Garner (ed) Black's Law Dictionary, op. cit. p. 1359.
[62] Businessdictionary.com/definition/taxing-power.html accessed on 14/10/2016.
[63] J A Agbonika, Problems of Personal Income Tax in Nigeria, *op. cit.* p. 195.
[64] Richard Musgrave. https://ww.google.com/ng/gusrd,accessed on 14/10/2016.
[65] E Ihedioha, "Legislative Issues in Fiscal Federalism in Nigeria" https://pointblanknews.com/pb/articleg, accessed on 14/10/2016.

government namely, Federal, State and Local governments. Nigerian fiscal federalism structure involves the allocation of expenditure and tax raising powers among Federal, State and Local government.[66] This is obtained in a country that practiced federalism or federal system of government where you find legal relationship and distribution of power between the national and regional governments.

In accordance with the concept of federalism, the present structure of taxation as stipulated by the Constitution of the Federal Republic of Nigeria reflects the three tier system of government at the Federal, State and Local Government levels. Under the constitution, each tier of government has been granted powers and responsibility in respect of the imposition and collection of taxes. Nevertheless, there is always struggle among the three tier of government which tax each had jurisdiction to impose and collect. The struggle has led to multiplicity of taxes and other illegalities going on in our system. It is the researcher's view that there is need to restructure the tax system.

1.9 Characteristics of a Good Tax System

Adam Smith in his treatise "Wealth of Nations"[67] set out canons that are used as criteria for judging a good tax system. They are:

a. Equity

This criteria is subdivided into horizontal and vertical equity. Horizontal equity requires that those with the same income should pay equal amounts of tax while vertical equity requires that those with different income should pay different amounts of tax. It is believed that the strongest tax systems create fairness, assure adequacy, simplicity, transparency and promote administrative ease. Equitable tax system bears a significant role in bringing the harmony in

[66] S Anigbepue and A E Aninabor, 'Issues and Challenges of Nigeria Fiscal Federalism'www.idjrb.com/articlepdf/ Interdisciplinary Journal of Research in Business vol. 1, Issue No 10, November 2011 p. 26 – 31.

[67] Cited in I A Ayua, *Nigerian Tax Law op. cit* p. 7.

the life style of the population of the country. The principle of equity follows argument of Adam Smith[68] that the taxes should be proportional to income, that is, citizens should pay the taxes in proportion to the revenue which they respectively enjoy under the protection of the State.

b. Certainty

Tax which an individual has to pay should be certain, not arbitrary. The taxpayer should know in advance how much tax he has to pay at what time he has to pay the tax and in what form the tax is to be paid to the government. In order words, every tax should satisfy the canon of certainty. A good tax system also ensures that the government is also certain about the amount that will be collected by way of tax.

c. Neutrality

A tax is neutral if it avoids distortions of the market. It does not discriminate between different activities in the economy. The Nigerian tax system has many rules, which break the principle of neutrality, worse, there are many technical rules which make significant tax differences according to which two or more methods are adopted to achieve a given result.

d. Administrative Efficiency

Tax personnel must administer the tax system efficiently. The administrative cost should not exceed the revenue realized from the tax. In Nigerian heavy sums of money are used to consult tax experts or tax consultants at the expense of government revenue. These wastes can be avoided by using minimal sums to fully train and equip internal officers of the FIRS or SIRS to carry out such duties usually contracted to tax consultants.

[68] G Akrani, 'Characteristics of a good tax system' – Wyan – city.blogspot.com.ng/2010/12 What is tax-definition-adam-smith.html, accessed on 14/10/2016.

CHAPTER TWO

REVENUE GENERATION AND ALLOCATION IN NIGERIA

2.1 Revenue Generation

Tax revenue is becoming a major tool for all round economic development in Nigeria since the drop in oil revenue. Tax revenue is important as it raises sufficient funds to satisfy the needs of the government such as the provision of services like defence, law and order, health services and education.[69] Revenue from taxation can also be spent on capital projects, creating a social and economic infrastructure which will improve the life of the people. These are legislations enacted that provided for different types of revenues sources which includes tax revenue in Nigeria.

The Constitution[70]of the Federal Republic of Nigeria, 1999, as amended, defines revenue to mean any income or returns accruing to or derived by the government of the federation from any source and includes:

(a) Any receipts, however described, arising from the operation of any law;

(b) Any return, however described, arising from or in respect of any property held by the government of the federation.

(c) Any return by way of interest on loans and dividends in respect of shares or interest held by the government of the federation in any company or statutory body.

Revenue[71] is defined as income received from all activities engaged in by the receiving entity. In governmental terms, revenue is the entire amount received by the government from sources within and outside the government entity. It further states as follows:

[69] I A Ayua, *Nigeria Tax Law* (Ibadan, Spectrum's Law Publishing, 1996) p. 4.
[70] S. 162(10).
[71] National Tax Policy, chapter one. Para 1(2).

> In Nigeria, government revenue includes proceeds from sale of crude oil, taxes (including import and excise duties), penalties, interests, fines, charges and other earnings received from government investments (bonds, dividends etc.), and the like. Revenue therefore, encompasses the entire gamut of government income, which is realised and available for expenditure by government within a particular fiscal year or period.

Blacks' Law Dictionary[72] defines revenue as income from any and all sources: gross income or receipts. It is income received by an organisation in the form of cash or cash equivalents. Government revenue includes all amounts of money received by the government. Revenue earned by government are received from sources such as taxes levied on incomes, wealth accumulation of individuals, corporations and on the goods and services. The non-taxable sources such as government owned corporations, Central bank revenue and capital receipts in the form of external loans and debts from international institutions are inclusive.[73]

The importance of revenue to the government is used in discharging the obligation of provision of security and for the welfare of the people. The lofty goals with other government spendings require funding or revenue raised through different sources.

2.2 Sources of Income

[72] B A Garner (ed) Black's Law Dictionary, 10th edn, Thomson Reuters, United States of America, 2014 p. 1513.
[73] E Malm and G Pranate, Annual State Local Tax Burden Ranking, http://taxfoundation.org/sites/taxfoundation.org/files/docs/b p 65 2010 accessed on 10 December 2012.

Revenue is the total fund generated by the government to finance its activities which could be internal or externally sourced. There are two major sources of revenue: tax and non-tax revenue.

2.2.1 Tax Revenue

This is a pecuniary burden laid upon individuals or corporate persons to support government expenditure. Tax in the decision in *Matthews v. Chicory Marketing Board (v)*[74] is a compulsory exaction of money by a public authority for public purposes. Summing the definitions of tax, Ayua[75] concludes that the most important thing is a pecuniary burden laid upon individuals or persons or property to support the government and is a payment exacted by legislative authority.

A tax is not a voluntary payment or donation but an enforced and compulsory contribution, exacted pursuant to legislative authority and is any contribution imposed by government, whether under the name of duty, custom excise, levy or other name. In Nigeria taxes are imposed on persons and corporate entities.

2.2.1.1 Individuals

i. Personal Income Tax: The Personal Income Tax (Amendment) Act[76] regulates personal income tax in Nigeria. It is the National Assembly that has powers to legislate on personal income tax.[77] The Constitution provides that the National Assembly can delegate to the states power to collect income tax.[78] In Nigeria, the federal and states collect Personal Income Tax.[79] The Act identifies taxable persons

[74](1938) 60 CLR 263, 276.
[75]I A Ayua, *Nigeria Tax Law* (Ibadan: Spectrum Law Publishing, 1996) p 4.
[76] Cap P8 LFN, 2004.
[77]*Ibid*.
[78]CFRN 1999 as amended, Items 7 and 8 Concurrent Legislative List.
[79] PITA, S. 88.

and chargeable income.[80] Personal income tax is imposed on the income of all Nigerians or residents who derive income in and outside Nigeria. The tax also determines the residence of the tax taxpayer[81] for the purpose of payment and collection of personal income tax.

In order words, residency and source are the bases for collection of personal income tax. In *Ecodril Nig. v. Akwa-Ibom Board of Internal Revenue,*[82] the court held:

> The bases for the imposition and/or collection of personal income tax in Nigeria are two fold "residence" and "source". In other words, one of the bases of tax liability on the taxpayer and the power of an appropriate tax authority to collect personal income tax is residence.

The issue of whether the taxpayer is resident in a particular jurisdiction is a question of fact which must be established in evidence. It is important that even on the remittance of Pay As You Earn (PAYE), where it is not proved that the employees reside within jurisdiction, the employer will not be compelled to remit same.

ii. **Development Levy** is a flat charge imposed on every taxable person typically within a state. The Act[83] provides that the levy is only to be collectable from individuals only and should not be more than N100 per annum on all taxable individuals. This is the most abused levy by states. The Taxes and Levies Act made the rate to be paid by an individual to be N100 (One Hundred Naira). The states in order to circumvent the rate as provided by the Act made a consolidated tax law that has an all embracing name. In Cross River State, it was passed as Urban Development Law.[84] This law contains provisions for Urban Development Tax, Tenement Rate, Sanitation Levy and Refuse

[80] PITA, S. 2 & 3.
[81] PITA, First Schedule.
[82] (2014) II ALL NTC 13 at 31.
[83] Taxes and Levies (Approved List for Collection) Act Cap 12 LFN 2004, Schedule, Section 1 Part II, Item 8.
[84] Urban Development Tax Law Cap U3 Laws of Cross River State, 2004.

Collection Charges. In *AG. Cross River State &Anor v Ojua*,[85] the law was challenged on the ground that the law was inconsistent with the provisions of the 1999 Constitution of the Federal Republic of Nigeria as amended.

In Rivers State, the state imposed it as a Social Services Contributory Levy.[86] The Rivers State Government enacted this law which imposed a social service levy on all persons who live, work or do business in Rivers State except a pensioner or an unemployed person. In fact, section 15(2) of the Law makes it mandatory for a company or organization operating in the state to deduct the prescribed levy from the remuneration of its employees. In *Institute of Human Right & Humanitarian Law v. Attorney-General of Rivers State &Ors*,[87] the court held:

> Looking at Part II of the Schedule of the Taxes and Levies (Approved List for Collection) Act, the only levy closest to the levies provided for in the social services contributory law is "development levy for individuals only" which is not more than N100 per annum on all taxable individuals. The social services contributory levy cannot by any stretch of imagination be translated to mean the same as development levy.

This levy being abused by the State Governments in Nigeria should be deleted in the statute books to avoid states using it to harass individuals.[88] There is no justification for its continued existence in the statute book.

[85] (2010) 7 ALL NTC 167.
[86] Social Services Contributory Levy Law Rivers State No 9, 2010.
[87] (2013) 9 ALL NTC 1 at 31.
[88] In Suit No A/MISC.69/2015 – *Basil Onwuzulume v. Brecco Nig. Ltd* pending at High Court, Awka, the applicant had gone to court for a warrant to distain the goods and chattels, bonds, securities and premises of the respondent, a construction company for failure to pay tax to Anambra State Government including a Development Levy of N162,500 covering the period of 2011 – 2013.

2.2.1.2 Companies (corporate entities)

i. Companies Income Tax: Companies Income Tax is imposed on all limited liability companies in Nigeria except companies engaged in petroleum operations. The tax is payable upon the profits of any company accruing in, deriving from, brought into or received in Nigeria.[89] A Nigerian or non-Nigerian company is chargeable to tax on profits received in or derived from Nigeria, on the contract agreements in respect of which are executed or signed outside Nigeria or because the money connected with such profits were paid outside Nigeria.

In *Offshore v. FBIR,*[90] the court on this note held:

> The plaintiff has got a trade or business in Nigeria, to wit, the oil drilling contracts in Nigeria. By a clause in the said contract agreements, the plaintiff chose to perform its side of the contract by sub-contracting to I.D.C. that part of this agreement with Shell BP which is to be performed in Nigeria, then the plaintiff have a trade or business in Nigeria.

Again in *Reiss v FBIR,*[91] the Court held that a Nigerian company acting as the agent of foreign company in respect of transaction carried outside Nigeria can only be liable to tax on the income it derived from the transaction. There are also several exemptions, reliefs and incentives under CITA.[92]

[89] Companies Income Tax (amendment) Act, S. 9
[90](1976) 2 ALL NTC 67 at 93.
[91](1977) 2 ALL NTC 309 at 334.
[92]*Op. cit.,* S. 23(1), Ss. 33, 34 and 35. See also Industrial Development (Income Tax Relief) Act LFN 2004, Ss. 1-10.

ii. Petroleum Profits Tax: It is the profits of oil producing companies that are chargeable to tax under the Petroleum Profit Tax Act.[93] Section 8 of the Act provides that a tax shall be charged, assessed and payable upon the profits of each accounting period of any company engaged in petroleum operations. The Principal Act is supplemented by the agreements entered between the Nigerian government and the operators, which include:

(a) Associated Gas Fiscal Arrangement (AGFA)[94]

(b) Production Sharing Contract (PSC) of 1993 which deals with exploration and production in deep offshore territorial waters of Nigeria.

(c) Memorandum of Understanding (MOU) of 2000.

Once there is a statutory or contractual obligation for a company engaged in petroleum operations to perform, such obligation is wholly, exclusively and necessarily for the purpose of the operations of the company. In *Shell v. FBIR*[95] the Supreme Court deciding on the deductibility of expenditures incurred based on statutory and contractual obligations, held that exchange losses incurred based on the mandatory directives from the government and agreements relating thereto are deductible expenditures for tax purposes. The Court considered that the meaning of the phrase "all operations incidental thereto" used in section 3 of the Petroleum Profit Tax Act shall not be circumscribed to drilling, mining, extracting and other like operations. The Supreme Court decision contradicts the provisions of sections 11 & 10(i) of the PPTA. This excludes any amount incurred in respect of duty, custom and excise duties, stamp duties, education tax, income tax, profit tax or other similar taxes from

[93] (as amended) LFN 2004. The principal enactment was the PPTA 1959. It was amended severally and consolidated into the PPTA Cap 354 LFN 1990 which was adopted by LFN 2004.

[94] of 1992 which was reviewed in 1997, 1998 and 1999 by Decree No 18, 19 and 20 of 1998.

[95] (1996) 3 ALL NTC 315 at 338.

allowable deductions. This decision has been criticized[96] and rightly as the contractual doctrine of accord and satisfaction should not be read into the law.

It is suggested that there is need to review the PPTA to incorporate the position of the Supreme Court. In *Nigerian Agip Oil v. FIRS,*[97] the tribunal appears to note the same kind of contradiction between the provisions of section 13(2) which disallows any tax deductions on sums incurred by a company through any inter-company loan transaction and section 10(1)(g) of PPTA that allows tax deductions on interests on loans between related companies when they deal at arm's length. The provisions are not necessarily inconsistent with each other. It is the law as held in *Ishola v. Ajiboye*[98] that seemingly conflicting parts are to be harmonized if possible so that effect can be given to all parts of the Constitution. In fact, the court could use a community reading on the interpretation to read that interest on inter-company loans are not deductible in computing adjusted profit, except as per section 10(1)(g) of PPTA where such loans are obtained under terms prevailing in the open market.

iii. **Education Tax:** Education Tax was introduced in 1993 by virtue of an Act[99] and amended as Tertiary Education Trust Fund charged with the responsibility for imposing, managing and disbursing the Education Tax to public tertiary education institutions in Nigeria and for related matters.[100] This tax is collected by FIRS on behalf of the Education Tax Fund (ETF) at the rate of 2% of assessable profits of all companies in Nigeria.[101]

In *African International Bank Ltd v. Education Tax Fund*[102] the trial court delivered judgment in the sum of N51,726,027.40k (Fifty-one million seven hundred and twenty-six

[96] M N Umenweke, *Tax Law and its Implications for Foreign Investments in Nigeria* (Enugu: Nolix Educational Publications, 2008) p. 417.
[97] (2014) 9 ALL NTC 525 at 532.
[98] (1998) 1 NWLR (pt. 532) 71.
[99] Education Tax Act No. 7 of 1993, codified in Education Tax Act (ETA) Cap. E4 LFN 2004.
[100] Tertiary Education Trust Fund (Establishment ETC) Act, 2011.
[101] *Ibid.* S. 2.
[102] (2010) 7 ALL NTC 155.

thousand, twenty-seven naira, forty kobo) against the appellant and on appeal, the Court of Appeal affirmed the judgment. In *Esso Exploration & Production Nig. Ltd &Anor v. Federal Inland Revenue Service,*[103] the appellant challenged the additional Education Tax of $2,572,155.65 and it was held that the appellants merely stated that they incurred interest cost and could not prove same and the part of the claim was rejected. In *Mobil Producing Nigeria Unlimited v. Federal Inland Revenue Service,*[104] it was held:

> The appellant is no longer entitled to make tax deductions allowed by the MOU in calculating their education tax. This is not saved by section II of PPTA, which did not have the 2000 MOU in contemplation.

The decision is to the effect that the Appellant can only rely on the 2000 MOU for the deduction as it is only provided to be enjoyed for a 3-year term only (from 1st January 2000 to 31st December 2002). It is observed that the centrality of education tax being a mandatory corporate social responsibility for the development and use of mental, moral and physical power for the all-round economic development of the society. The only input here is that the sharing of the fund should be extended to private-owned universities in the country.

iv. **Technology Levy:** The levy is established by a fund known as the National Information Technology Development Fund.[105] Section 2 of the Act[106] provides that the following monies shall be paid and credited into the fund:

   (a) A levy of 1% of the profit before tax of companies and enterprises enumerated in the third schedule to the Act with an annual turnover of N100,000,000 and above and such paid by the companies shall be tax deductible.

   (b) Grants-in-aid and assistance from bilateral and multilateral agencies.

[103] (2014) 9 ALL NTC 545 at 555.
[104] (2013) 8 ALL NTC 397 at 401.
[105] National Information Technology Development Agency Act, Cap N156 2007, S. 12(i).
[106] *Ibid*

(c) Gifts, endowments, bequest or other voluntary contributions by persons and organizations which terms and conditions must not jeopardize the functions of the agency.

The Federal Inland Revenue Service assesses and collects the levy imposed under this Act.[107] The levy is imposed on selected[108] corporate entities in Nigeria which include telecommunication companies, internet service providers. Pensions managers and pension related companies, banks and other financial institutions and insurance companies. The levy is imposed to support nationwide development of technology infrastructure and capacity building including designation and facilitation of the establishment of information technology centre/parks all over the country.[109] Information Technology is contained in the Exclusive Legislative List of the Constitution.[110] The states have no power to legislate on this area. In *Registered Trustees of Telecoms v. Lagos State Government &Ors*[111] wherein the Lagos State Law with the purpose of generating revenue for the state government simpliciter which amounted to taxing the telecommunication operators indirectly was declared unconstitutional.

It is worthy of note that the Act establishing the agency specified the duties of the agency including facilitating and designation of Information Technology parks in all the states, but the presence of the agency and its duties are not being felt in the states. In as much as it will be very difficult, where every state will enact laws to regulate technology driven infrastructure, the agency should sit up and live above board in discharging its functions.

2.2.1.3 Transactions (Goods and Services)

i. **Value Added Tax:**

[107] *Ibid,* section 16(1)
[108] *Ibid*, section 12(2) and third schedule to the Act.
[109] *Ibid*, S. 19(1)
[110] CFRN 1999 *op cit* S. 4 and 2nd schedule Part I, Item 46
[111] (2007) 6 ALL NTC 203.

Value Added Tax (VAT) is a consumption tax on goods and services. Value Added Tax was introduced to replace Sales Tax[112] in 1993. The Value Added Tax came in with an enactment Value Added Tax Decree[113] and later Value Added Tax Act[114]. The tax is chargeable and payable on the supply of goods and services[115] except the goods and services exempt.[116] The tax is administered and managed by the Federal Inland Revenue Service.[117]

The existence and collection of this tax is bedevilled by controversy over who either the federal or state government has jurisdiction to legislate on consumption tax after the enactment of Value Added Tax Act. In *AG Ogun State v Aberuagba*[118] the Supreme Court declared the Ogun State Sales Tax Law invalid to the extent that it imposes tax on taxable goods brought into the state which is a matter of inter-state commerce. The court held:

> Having regard to all relevant provisions of the constitution, the constitution does not confer on the federation exclusive power over trade and commerce in item 61. All the governments (federal, state and local) have been accorded their respective shares to control trade and commerce.

The import of the Supreme Court decision is that the federal government authority to legislate on trade, inter-state trade and commerce while trade and commerce within a state are left as residuary matter to the states. In *Nig. Soft Drinks v. AG Lagos State,*[119] the Court of Appeal distinguished the principle in *Attorney-General of Ogun State v. Aberuagba*[120] with the case and held:

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[112] Prior to VAT there were some expenditure taxes like sales tax, excise duty payable on goods.
[113] Decree No. 7, 1986.
[114] Cap VI LFN 2004.
[115] *Ibid,* S. 2.
[116] *Ibid,* S.3.
[117] *Ibid,* S. 7.
[118] (1985) 3 ALL NTC 17 at 37.
[119] (1987) 3 ALL NTC 133 at 147.
[120] *Supra.*

> The essential difference between the Sales Tax law of Ogun State and that of Lagos State is that the former is a tax to an extent on 'products brought into the state', which is clearly inter-state trade within item 61(a) of the Exclusive List. The later, on the other hand, is a tax on purchasers and consumers within the state. The incidence of the Sales Tax of Lagos State which is not upon the goods but upon the persons differs from the incidence of the tax in the Sales Tax of Ogun State which put such incidence upon the goods brought into the state.

The states of the federation can make law imposing a sales tax constitutionally. This followed dictum in the judgment of Sowemimo CJN in *Aberuagba* case[121] thus:

> Every state in Nigeria, in exercise of its legislative powers under the concurrent legislative list can legislate for sales tax within its own state, save that it does not restrict inter-state trade, once it does that, it exceeds its power and therefore, such state sales tax is liable to be declared invalid.

Another area worthy of note concerning Value Added Tax in Nigeria is that it involves 'goods and services' which do not include the assignment of the Production Sharing Contract (PSC) contractor rights. In *Cnooc v. AG of the Federation &Ors,*[122] the Court held that the assignment of contractor's right in oil mining lease did not quality as supply of goods and services for the purposes of the provision of the Value Added Tax Act. There is need to charge VAT on such incorporeal property like the contractor rights in PSC. It is suggested

[121] Supra.
[122](2011) 7 ALL NTC 371 at 380.

that a leaf should be borrowed from the United Kingdom VAT Act 1994 section 5(2) of the Act[123] provides that anything which is not a supply of goods but is done, for consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services.

Tourism tax is another aspect of consumption tax that is disputed between states and the federal government. The Lagos State House of Assembly passed a law to license, regulate, register, classify and grade hotels, motels, guest inns, travel agencies tour operating outfits, resorts, cafeterias, restaurants, fast food outlets and other related tourist establishments situated and located within the geographical boundaries of Lagos State.[124] In *Hon. Minister of Justice & AG of Federation v. AG of Lagos State*,[125] the Federal Government sought for an order of perpetual injunction against the following legislations of the Lagos State Government:

(a) Hotel Licencing Law Cap H6 Laws of Lagos State of Nigeria 2004.

(b) Hotel Licencing (Amendment) Law No. 23 Volume 43 Lagos State of Nigeria official gazette of 20th July 2010.

(c) Hotel Occupancy and Restaurant Consumption Law No. 30 Volume 42 Lagos State of Nigeria official gazette of 23rd June 2009.

The Supreme Court in dismissing the case held that regulation, registration, classification and grading of hotels and tourism and other related establishments are not within the Exclusive Legislative List. It is the phrase "tourist traffic" that is used in item 60(d) of the second schedule to the CFRN 1999 as amended and the court interpreted this to be an allusion to the ingress and egress of tourists from other countries. These are international visitors or foreigners.

[123]United Kingdom VAT Act, 1994.

[124]Hotel Licensing Law Cap H6 Laws of Lagos State of Nigeria 2004, later, Hotel Licensing (Amendment) Law No 23 Vol. 43 Lagos State, 2010.

[125](2013) 8 ALL NTC 425 at 449.

It is observed that this struggle over who has jurisdiction to legislate on VAT and tourism sector is as a result of the huge amount of money collected by the Federal Government from the area and there is nothing to show for it at the states that contributed majorly for it. For instance, the issue came up on 13th day of October 2016 during the passage of the bill on North-East Development Commission. The bill was passed and the commission will be partly funded with 3 percent of Value Added Taxes[126] accruable to Federal Government for 10 years. In reaction, the three Senators from Lagos State protested that what is good for the goose is also good for the gander, that Lagos State contributes 68 percent of VAT, and requested the other members to support their bill on strategic funding of Lagos State. The bill requested for approval of 1% VAT to Lagos State.

ii. **Capital Gains Tax**

Capital gains tax was introduced in 1967[127] and later amended three times in 1972, 1993 and 1998. The applicable Capital Gains Tax Act (CGTA) today is the Capital Gains Tax Act.[128] The rate for capital gains tax is 10%. By virtue of the Act,[129] chargeable assets are assets whose disposal will result in chargeable gains, which include:

(a) Options, debts, incorporeal property generally.

(b) Any currency other than Nigerian currency, that is, gains from foreign exchange transactions and

(c) All qualifying capital expenditure under CITA, PPTA, PITA or any form of property created by the person disposing of it, or otherwise coming to be owned without being acquired e.g. inventories.

[126] Vanguardng.com/2016/10/ senate passes bill establishing north-east development commission.
[127] Decree No 44, 1967.
[128] Cap C8 Laws of the Federation of Nigeria, 2004.
[129] CGTA, *Ibid* S. 3.

In *Excelsior Shopping Company Ltd v. Federal Board of Inland Revenue,*[130] the court held that the transformation of bonus shares as shares originally purchased is a fiction which cannot pass through the osmosis of reality. Bonus share has value as much as a gift has value in the hand of a receiver of it. But the receiver of such gift cannot say he purchased the gift. For tax purposes, bonus shares simply mean the ploughing back of the company's profits into its business. In *CFAO Paris v. Federal Board of Inland Revenue*[131], it was held that leasehold constitutes an interest in land and therefore should be considered in determining land owing for capital gains tax purposes.

In *Delta Oil (Nigeria) Ltd v. Federal Board of Inland Revenue,*[132] the sum paid to a taxpayer for petroleum farming is taxable under Capital Gains Tax Act. However, in *United Investments v. AG Federation &Anor*[133] it was held that what the plaintiff received was part of the proceeds of realization of the assets of NSDC as a member qua member and there is no tax due if there was no disposal of asset under the Capital Gains Act. Finally, incorporeal properties for capital gains tax include patents, copyright, trademarks and others.

iii. **Stamp Duty**

The tax came into being with the Stamp Duties Proclamation No. 8 of 1903, though it has gone through amendments and later to Stamp Duties Act.[134] The Act recognizes two types of duties, *ad valorem* duties and fixed duties. *Ad valorem* duties are those duties whose sum increases with an increase in the value of the document evidencing the transaction, for instance, company's share capital is subject to ad valorem duty of one naira for every 200 naira. Stamp duty is on Exclusive Legislative List[135] and under the Concurrent Legislative

[130] (1993) 3 ALL NTC 245.
[131] (1976) 2 ALL NTC 115 at 124.
[132] (1988) 3 ALL NTC 161.
[133] (1991) 3 ALL NTC 207.
[134] Stamp Duties Act Cap S8 Laws of the Federation of Nigeria, 2004.
[135] CFRN 1999 as amended Section 4, 2nd schedule, Exclusive Legislative List, Item 58.

List.[136] Both the Federal and State Government have power to impose any tax or duty on documents or transactions by way of stamp duties.

Taxes and Levies Act[137] have gone ahead to demarcate the boundaries on the imposition and collection of stamp duties. Federal Government collects stamp duties on corporate entities and residents of the Federal Capital Territory Abuja while the State collects stamp duties on instruments executed by individuals.

Today, the implementation of postal postage stamp use is seriously a cause of concern to professionals in the collection of stamp duties. Nigerian Postal Service is invariably usurping the powers of Federal Inland Revenue Service and State Board of Internal Revenue as enshrined in the Act.[138] It is surprising that courts entertains the claims of Nigeria Postal Service on the implementation of Stamp Duties Act. In *Nigerian Postal Service v. Keystone Bank Ltd*[139] the claim of the plaintiff through Ninutra Consulting that the implementation of the Stamp Duties Act relates to the use of postage stamps to denote stamp duty was allowed by the court. There is no such provision for the use of postage stamp to denote stamp duties. It is illegal for Nigerian Postal Service to parade itself in court as implementing Stamp Duty Act. In *Nigeria Liquefied Natural Gas Limited v. Federal Board of Inland Revenue*[140] the court stated:

> There was no clause under the Stamp Duties Act that stated that the assessment by Commissioner of Stamp Duties was final and could not be overridden by the Federal Board of Inland Revenue. Moreover, the Taxes and Levies (Approved List for Collection) Act recognized only the

[136] *Ibid*, Part II, Concurrent Legislative List, Item D paragraph 7(b).
[137] *Op. cit* Part I, Schedule paragraph 7 and part II Schedule paragraph 4.
[138] Stamp Duties Act *op cit* s. 4(1)(2). See also Federal Inland Revenue Service (Establishment) Act, 2007, S. 2, 25 and 68, First Schedule.
[139] (2012) 8 ALL NTC 3. See also Nigerian Postal Service v. Eco Bank Plc (2012) 8 ALL NTC 5.
[140] (2006) 5 ALL NTC 447 at 457.

> Federal Board of Inland Revenue (now FIRS) and not the commissioner for stamp duties with respect to corporate bodies.

Again, a contrary decision was handed down at the Federal High Court, Abuja in *Nigerian Bottling Company v. NIPOST & Anor*[141] wherein the court held that such revenue drive by Nigeria Postal Service (NIPOST) does not enjoy the backing of any extant law in the country including the Stamp Duties Act 2004. The court per Justice Kolawole held:

> NIPOST is not authorized by either of its establishment legislation, the NIPOST Act 1992 or SDA to enforce the collection of stamp duties. NIPOST's engagement of agents for purpose of enforcing the SDA by way of enforced sale of postage stamps is beyond NIPOST's statutory powers.

The decision in the above suit is commendable for the bold step taking by the court to declare the act of NIPOST in compelling businesses to purchase N50 postage stamp to denote stamp duties unlawful. It is worrisome that this is happening in the face of the Federal Inland Revenue Service and State Internal Revenue Service empowered by law to enforce the provisions of Stamp Duties Act. NIPOST before the conclusion of the case that refusal to purchase postage stamp will lead to loss of revenue to the Federal Government of Nigeria.

The suit followed the Court of Appeal decision in *Standard Chartered Bank Nigeria Limited v Kasmal International Services Ltd*[142] wherein the court made a distinction between adhesive postal stamps and ad valorem duties. The case declared the directive of the Central Bank of Nigeria for charge of N50 upon every deposit of above N1000 to be illegal.

iv. **Excise Duty:**

[141] FHC/Abj/CS/121/2016 – unreported

[142] CA/L/437A/2014, an unreported case decided at Court of Appeal Lagos on 21/4/2016. See also *Retail Supermarkets Nigeria Limited v. Citibank Nigeria Ltd &Anor* in FHC/L/CS/126/2016 – unreported.

The excise law in Nigeria was introduced as the Tobacco Excise Duties Ordinance 1933 which was repealed and replaced by the exercise ordinance.[143] Section 2 of the Ordinance defined excise duty as any duty other than an export duty of customs imposed on any good manufactured in Nigeria. The Customs and Excise Management Act[144] defined duty to include any royalty or fees leviable by the Board by virtue of any enactment. In *AG Ogun State v. Aberuagba*[145] the Supreme Court interpreted "excise" in item 15 of the CFRN 1979 to be a duty charged on goods manufactured or produced in Nigeria. Excise was held as:

> Excise is a duty charged on goods manufactured or produced in Nigeria whether in the process of their manufacture or production or their storage or distribution before their sale to the consumers in Nigeria but does not include a tax imposed on the sale of goods to a distributor, retailer or consumer.

Excise duty means duty imposed on locally manufactured goods and customs duties on imported goods. Sales tax is tax chargeable on the purchaser or rather the ultimate consumer of goods made in Nigeria and circulating in Nigeria. The difference is that in sales tax, the ultimate consumer will exclude the manufacturer or the wholesaler or indeed the retailer who is a middle man between the wholesaler and consumer. Finally, a tax will cease to have the character of excise at the point when it is sold to the ultimate consumer that is the man who does not sell the commodity again.

2.2.1.4 Assets

[143] Cap 65 Law of Nigeria 1948, Excise Ordinance Cap 65 LFN 1958, Customs and Excise Management Act 1958.
[144] Cap C48 LFN 2004.
[145] *Supra.*

The tax is imposed or charged on land and landed property. This includes taxes such as property tax and other such taxes imposed on property. The property tax include tenement levy, ground rents, premiums on farmlands, golf courses, gardens and others. In Nigeria, there has been controversy over which government had the requisite jurisdiction to collect these taxes. In *Knight Frank &Rutley (Nigeria) &Anor v. Attorney-General of Kano State*[146] the court held that it is clear that the collection of rates on rateable hereditaments and the assessment of rates on privately owned houses are subjects within the responsibilities of local government councils. In *AG Cross River State &Anor v. Ojua*[147] the court held:

> If the constitution had given the function of assessing and collecting property tax to local governments, the State House of Assembly could not validly make any law conferring the assessment and collection of that same tax to the state government or any agency of the state government.

The court declared the Urban Development Tax Law Cap 113 Laws of Cross River State, 2004 inconsistent with the 1999 Constitution. The State Government by these decisions are expected to design and collect the other types of property taxes that are residual to the provisions of the Constitution. The only challenge here is the willingness of the people to pay and comply with the payment of these taxes. The unwillingness of the people to comply with payment of these taxes is as a result of the fact that government today are negligent in providing social amenities for the people. Today many taxable persons create access roads to their houses, drill their borehole to get water, generate their electricity through generators, solar panels, security and others. It is worthy of note that people provide all these yet

[146] (1998) 7 NWLR (pt. 586) 1.
[147] (2010) 7 ALL NTC 167.

government agencies demand other payments. This problem will continue until the constitution is further amended and clear jurisdiction known or demarcated.

2.2.2 Non-Tax Revenue

This is the type of revenue obtained by government from sources other than tax. Such other revenue items are not usually income or transaction based, used for the provision of utilities or infrastructure. It is simply imposed on certain category of persons, activities, or group of persons. Some of the non-tax revenue includes:

i. Aid from another level of government (inter-governmental aid).[148] In Nigeria, federal grants may be considered non-tax revenue to the receiving states;
ii. Aid from a foreign country (foreign aid);
iii. Tribute or indemnities paid by a weaker state to a stronger one often as a condition of peace and for suffering military defeat;
iv. Loans or other borrowings from monetary funds and/or governments;
v. Money realised from the sale of state assets;
vi. Rents, concessions, royalties collected by the state when it contracts out the right to provide some good or service to a private corporation;
vii. Fines collected or imposed as penalty by government for an offence or indiscretion by a person within the jurisdiction of the government. It includes fines imposed for traffic violations, unauthorised usage of government property;
viii. An amount paid or forfeited for not meeting a particular condition or fulfilling an undertaking; for instance, payments for late filing of returns or for non-provision of information at the time it is required by government agencies.

[148] Constitution of Federal Republic of Nigeria, 1999 as amended, S. 164(1);

ix. Investment revenue (including interest or profit) from investment funds (collective schemes), for instance, sovereign wealth funds or endowments;

x. Fees for granting permits or licences, for example, vehicle registration plate permits, vehicle registration fees, water-crafts registration fees, building plan approval fees, drivers' licences, hunting and fishing licences, fees for visas or passports, fees for demolition or destroying native vegetation and cutting down healthy tree;

xi. User fees collected in exchange for the use of many public services and facilities, for example, toll charges for the use of the roads; and

xii. Donations and voluntary contributions to department and state.[149]

2.3 Revenue Generation by Government in Nigeria

Revenue generation is important to government of Nigeria as it is a necessary ingredient for civilisation. Development is highly associated with fund, revenue is needed to plan, execute and maintain infrastructures and facilities. Government generates revenue as incomes or returns in the form of receipts of different kinds, returns from property held by the government and interests on loans and dividends in respect of shares held by government in a company or statutory body.[150]

Revenue generated by government in Nigeria classified into tax and non-tax revenues is a product of legislative enactments which are vested in the three tiers of government in Nigeria. The three tiers of government, that is, Federal, State and Local government make laws regarding the various revenue items.

2.3.1 Revenue Generation by Federal Government

[149] https//en.wikipedia.org/wiki/nontaxrevenue accessed on 7/10/2016.
[150] *Ibid*, S. 164 (10) (a – c).

The Federal Government is empowered to make laws with respect to matters or items listed in the Exclusive Legislative list. This is contained in Part I of the Second Schedule to the Constitution of the Federal Republic of Nigeria, as amended.[151] This power is to be exercised to the exclusion of the Houses of Assembly of States.[152] The National Assembly also exercises power 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.[153] Both the federal and state legislature have power to impose tax on all matters in the Concurrent List. It must not be noted that the taxing power of a state on Concurrent list is subject to the rule of inconsistency and the doctrine of covering the field.[154]On this area, any law made by a State House of Assembly which is in conflict with the law made by the National Assembly shall to the extent of such conflict or inconsistency by void.[155]

It is important to note that by the provisions of the law[156] the revenue to be generated by the Federal Government of Nigeria shall be shared to the three tiers of government, that is, federal, state and local governments. The only exception[157] placed by the Constitution is on tax revenues which are proceeds from Personal Income Tax of the personnel of the armed forces of the federation, the Nigeria Police Force, the Ministry or Department for Foreign Affairs and the residents of the Federal Capital Territory, Abuja. This exclusively go into the treasury of the Federal Government.

The revenue to be shared between the three tiers of government shall be maintained or paid in a special account called "the Federation Account." Presently, the government of the

[151] *Ibid*, S. 4(2).
[152] *Ibid*, S. 4(3).
[153] *Ibid*, S. 4(4)(a).
[154] CFRN 1999, *Ibid* S. 4(5); *AG. Ogun State v. Aberuagba* (supra). *AG Ogun State v. AG Federation* (1982) 3 NCLR 166 at171.
[155] *Ibid*, S. 4(5).
[156] *Ibid*, S. 162(1) and (3).
[157] *Ibid*, S. 162(1).

Federation is maintaining a separate account named "Treasury Single Account" for the collection of all its revenue. Section 162(1) of the Constitution provides:

> The Federation shall maintain a special account to be called "The Federation Account" into which shall be paid all revenues collected by the government of the Federation, except the proceeds from the personal income tax of the armed forces of the federation, the Nigeria police force, the ministry or department of government charged with responsibility for foreign affairs and the residents of the federal capital territory, Abuja.

2.3.2 Revenue Generation by the State

The State Houses of Assembly have the power to make laws, for peace, order and good government of the state or any part thereof with respect to matters outside the exclusive legislative list. The matters must also be included in the concurrent legislative list set out in the first column of Part II of the Second Schedule to the Constitution.[158] The Constitution, empowers the States to make law in Nigeria for the generation of the following categories of revenues:

a. Any revenue not included in the exclusive legislative list set out in part I of the Second Schedule to the constitution;[159]
b. Any matter included in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule in the second column opposite thereto;[160] and
c. Any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.[161]

[158] *Ibid*, S. 4(7).
[159] *Ibid*, S. 4(7)(a).
[160] *Ibid*, S. 4(7)(b).
[161] *Ibid*, S. 4(7)(c).

It is to be noted that section 4(2) of the 1999 Constitution as amended excludes local governments from legislating for revenue generation in Nigeria. Umenweke[162] opines that section 4(7) of the Constitution by necessary implication vests residual legislative powers in the House of Assembly of States. This means that the state legislature is left with what is remaining after removing the matters in exclusive list and the items in the concurrent list of federal concerns as decided in *Attorney-General of Ogun State v. Aberuegba.*[163] The National Assembly cannot legislate on the areas known as residual legislative powers since its legislative competence is limited to those matters on which it is expressly empowered to make laws by the constitution.[164] The federal concern on the legislative powers to make law for collection of tax revenue is contained in the provisions of item 59 of the exclusive list and item 7 – D of the concurrent list. Item 59 of the exclusive list provides that the federal government shall have power to legislate on "taxation of incomes, profits and capital gains except as otherwise prescribed by this Constitution. Item 7 – D of the Concurrent Legislative List provides for delegation of powers of collection of any taxes or duty with regard to capital gains, incomes or profits of persons other than companies. The provisions of item 59 of the Exclusive List and item 7 – D (a) of the concurrent list did not expressly include taxation or revenue on consumption. This is another serious area of conflict between state and federal government. The position of law highlighted above is to the effect that the State Houses of Assembly have powers to impose taxes on items not vested on the National Assembly and on any other area the constitution has specifically vested legislative powers on them to legislate.

2.3.3 Revenue Generation by the Local Government

[162] M NUmenweke, *Tax Laws and its Implication for Foreign Investments in Nigeria* (Enugu, Nolix Educational Publications (Nig), 2008) p. 53.
[163] (1985) 1 NWLR (pt. 3) 395 at 405.
[164] Doherty v. Balewa (1961) 1 ALL NLR 604 at 608.

The local governments were assigned functions but with express powers to legislate on tax matters. The States are by the Constitution[165] given powers to legislate on the generation of revenue for the local government areas. The laws will enable them to collect revenue in addition to the items of revenue generation specified under the fourth schedule to the Constitution. Item 9 of the Concurrent Legislative List provides:

> 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.

It is noted that the law by the State House of Assembly must be done within the limits of the residual list in which the States have powers to legislate. The import of the provision is that a State House of Assembly will enact appropriate enabling law to determine revenue item, assessment procedure, method of collection and recovery of same by the local government. The local government councils have no powers of imposition of taxes and other revenues but only were permitted to collect the revenue already prescribed by the law. Sani[166] said that this type of power of revenue generation by the local government is a delegated power. The Constitution[167] further provides in addition to the ones to be created by the State, for the local government councils to have authority to collect the following:

a. Collection of rates, radio and television licenses;
b. Establishment of cemeteries, burial grounds and homes;
c. Licensing of bicycles, trucks (other than mechanically propelled trucks), canoes, wheel barrows and carts;

[165] *Ibid*, Concurrent Legislative list, items 9 and 10.
[166] A Sanni, Division of Taxing Powers in Abdulrazaq M T (edn) C.I.T.N Nigeria Tax Guide, Lagos, 2002, p. 654 – 656.
[167] 1999 Constitution of the Federal Republic of Nigeria as amended.

d. Establishment, maintenance and regulation of slaughter houses, slaughter slabs, markets, motor parks and public conveniences;

e. Establishment of streets, parks, gardens, open spaces;

f. Provision of public conveniences, sewage and refuse disposal;

g. Registration of all birth, death and marriage;

h. Assessment of privately owned houses or tenements for the purpose of levying rates;

i. Revenue from out-door advertising and hoarding;

j. Regulation of movement and keeping of pets;

k. Shops and kiosk;

l. Restaurants, bakeries and other places for sale of foods;

m. Laundries regulations; and

n. Licensing, registration and control of liquor and others.

It is worthy of note that the Constitution *ab initio* merely recognised the local government as an entity with any legislative powers concerning revenue generation. The Constitution of the Federal Republic of Nigeria 1999 as amended under section 2(2) excluded Local Government as a component of the special type of Federation. It only recognises the Federal, State and Federal Capital Territory. The contract of the Nigeria federalism is between the Federal Government, States and in addition the Federal Capital Territory.

In order to buttress this issue further, section 7(1) of the Constitution mandated the states to confer on the local government some legislative powers in addition to the ones spelt out under the fourth schedule to the Constitution. The functions to be conferred on the local government must be done in accordance or within the limits of the powers of the State to legislate, which is termed "residual list".[168] In *Attorney-General Ogun State v Aberuagba*[169] the court held:

[168] Attorney-General Ogun State v. Aberuagba (2009) TLRN 82 at 97 per Bello, JSC.

> A careful perusal and proper construction of section 4 would reveal that the residual legislative powers of government were vested in the states. By residual legislative powers within the context of section 4, is meant what was left after the matters in the Exclusive and Concurrent legislative lists and those matters which the constitution expressly empowered the federation and the states to legislate upon had been subtracted from the totality of the inherent and unlimited powers of a sovereign legislature.

The states under the 1999 Constitution can only legislate on the inherent or residual power to make law for revenue generation on matters not specified in the exclusive list. This include:

a. Revenue generation on landed property;
b. Revenue generation on entry of goods in the state of consumption;
c. Road and inland water-ways;
d. Pool tax;
e. License and registration fees;
f. Entertainment levies; and
g. Betting and gaming levies.

It is clear that the items 9 and 10 of the Concurrent Legislative List do not directly vest on the local government councils the power to collect taxes. The state must enact the enabling law and confer on the local government the powers. This power is abused by the State governments in Nigeria. The various States Houses of Assembly have almost appropriated and usurped the functions already assigned to the local governments by the

[169] *Ibid*.

Constitution.[170] These laws have also attracted judicial interpretation which will be discussed later in this work. Local government must exercise the authority within the limits so prescribed by the state enabling law. Another issue to contend here is whether the state has this legislative competence to legislate for the local government, wherein the powers to act on this by the State is a delegated one. An instance is the provisions in item D – 7 and 8 of the Concurrent Legislative List where it looks as if the state enjoys concurrent powers or legislative functions. It is the view of the author that the state does not enjoy any concurrent legislative power rather the constitution spelt out delegation of the function to the States.[171] There is no doubt that by a combined reading of the provisions of item D paragraphs 7 and 8 of the Concurrent Legislative List in the second schedule to the constitution, there is stipulated a delegation of some special exclusive legislative function of the Federal Government to the State Government and State Government to the Local Government. It is a principle in law that a delegate lacks the competence to delegate to another person.

2.4 Revenue Distribution among Tiers of Government in Nigeria

The revenue generated by Federal Government are distributed to the federal, state and local governments monthly in Nigeria. The revenue is kept in the federation account. The Constitution of the Federal Republic of Nigeria[172] provides that any amount standing to the credit of the Federation Account shall be distributed among the Federal, State and Local Government Council in each State on such terms and manner as may be prescribed by the National Assembly. Section 162(2) of the Constitution further provides:

[170] Land Use Charge Law Cap L61, 2001 of Lagos State, Sinage and Advertisement Agency Law 2010 of Anambra State, Social Services Contributory Levy Law, 2010 of Rivers State, Urban Development Tax Law Cap 113 Laws of Cross River State, 2004.

[171] Margret Okorodudu, Analysis of Federal and State Taxing Powers in M A Ojomo et al (ed) *Tax Law Administration in Nigeria,* NIALS, 1991 p. 64.

[172] Constitution of the Federal Republic of Nigeria 1999, as amended, S. 162(3).

> The President, upon the receipt of advice from the Revenue Mobilisation Allocation and Fiscal Commission, shall table before the National Assembly proposals for revenue allocation from the Federation Account and in determining the formula, the National Assembly shall take into account, the allocation principles especially those of population, equality of states, internal revenue generation, land mass, terrain as well as population density.

It is important here to note that the Constitution of Federal Republic of Nigeria, 1999 as amended left the principle and percentage of the revenue to be allocated to the various states to the discretion of the National Assembly except the revenue to be allocated on the principle of derivation from natural resources. The proviso[173] to the section 162(2) states as follows:

> Provided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen percent of the revenue accruing to the Federation Account directly from any natural resources.

The National Assembly is yet to enact any law relating to revenue allocation as it is empowered to do by section 162(2) of the Constitution. However, in order not to create a vacuum, the Constitution in section 313 provides:

> Pending any Act of the National Assembly for the provision of a system of revenue allocation between the federation and the states, among the states, between the states and local government councils and among the local government councils in the states, the system of revenue allocation in existence for the financial year beginning

[173] *Ibid*, proviso to section 162(2).

from 1st January, 1998 and ending on 31st December 1998 shall, subject to the provisions of this constitution and as from the date when this section comes into force, continue to apply.

By the provision above, Allocation of Revenue (Federation Account etc.) Act[174]Cap. 16 is to continue in operation or to be used in so far as it is not inconsistent with the provisions of the Constitution. The Act provides the formula to be used for the purposes of revenue allocation pending the time the National Assembly comes up with new formula as directed by the Constitution. The Act is only applicable in so far as it is not inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria, 1999, as amended. The Act by the combined reading of sections 313 and 315(4)(b) of the Constitution is an existing law.

Another important area in the revenue allocation is the state of the law on the allocation and distribution of revenue to the local government councils in Nigeria termed the third tier in the hierarchy of the governments. The reading of section 162(5), (6), (7) and (8) of the Constitution explains the quagmire the local governments face in Nigeria. Section 162 provides:

(5) The amount standing to the credit of local government council in the federation account shall also be allocated to the states for the benefit of their local government council on such terms and in such manner as may be prescribed by the National Assembly.

(6) Each State shall maintain special account to be called "State Joint Local Government Account" into which shall be paid all allocations to the local government councils of the state from the federation account and from the government of the state.

[174]Allocation of Revenue (Federation Account etc) Act Cap 16 as amended by Decree No 106 of 1992.

(7) Each state shall pay to local government councils in its area of jurisdiction such proportion of its total revenue on such terms and in such manner as may be prescribed by the National Assembly.

(8) The amount standing to the credit of local government council of state shall be distributed among the local government councils of the state on such terms and in such manner as maybe prescribed by the House of Assembly of the State.

The effect of the above provisions is that local government councils in Nigeria do not receive their share from the federation account directly but were left at the whims and caprices of the Federal and State Governments.

The allocation principles recognised by the Constitution are population, equality of states, internal revenue generation, land mass, terrain, population density and derivation. In August 2001, the Revenue Mobilisation, Allocation and Fiscal Commission proposed a formula to President Olusegun Obasanjo in compliance to the constitutional requirement. While the deliberations were still going on, the Supreme Court delivered judgement in *Attorney-General Abia State & 2 Ors v. Attorney General of the Federation &Ors (No. 2)*[175]in the year 2002. The Supreme Court nullified the practice of first line charges on the Federation Account and the provisions of section 1(d) of the Act which provides thus:

1(d)	special funds	-	7.5 percent;
(i)	Federal Capital Territory	-	1 percent
(ii)	Development of the mineral producing areas	-	3 percent
(iii)	General ecological problems	-	2 percent
(iv)	Derivation	-	1 percent
(v)	Stabilisation account	-	0.5 percent

[175] (2002) FWLR (pt. 102) 1 at 108 – 111.

The result was that paragraph (d) of the section 1 of the Act Cap 16 (as amended) is inconsistent with the provisions of the Constitution and to that extent section 1(d) is void.[176] Another importance of the decision is that it has in line with the Constitution of the Federal Republic of Nigeria declared the Federal Capital Territory not to be a state nor a local government. This is contrary to the provision of the Constitution that the provisions of the Constitution shall apply to the Federal Capital Territory Abuja as if it were one of the States of the federation. It means that Federal Capital Territory cannot qualify to partake in the distribution from the federation account. Again, the area councils in the Federal Capital Territory are not local governments "in a state" as provided in sub-section 3 of section 162 above. Prior to the judgment, the Federal Government deducted from the federation account funds meant for the judiciary, servicing of external debts, allocation to the federal capital territory, joint venture agreements and priority projects of the Nigerian National Petroleum Corporation before the balance from the federation account was shared among the three tiers of government.[177] Following the judgment of the Supreme Court abolishing first line charges, the Revenue Mobilisation and Fiscal Commission withdrew the formula earlier submitted in August 2001 and re-submitted a new formula reflecting the implications of the Supreme Court judgment to the President in December 2002. It is worrisome that the Revenue Allocation bill has not been passed by the National Assembly.

It is only noticeable that slight adjustment and modifications were effected on the formula used to allocate revenue from the federation account among the tiers of government to the Act introduced by the military government in 1992. The latest of such modifications following executive orders issued in March 2004 forms the formula for allocation of revenue k,ito date.[178] The formula is as follows:

[176] AG. Bendel State v. A.G. Federation &Ors (1983) ALL NLR 208.
[177] *Attorney General Federation v. Attorney General Abia State* (2002) FWLR (pt 102) 1 at 135.
[178] Ifueko O (ed), *A Comprehensive Tax History of Nigeria*(Ibadan, Spectrum Books Ltd, 2012) p. 26.

Federal Government	-	46%
State Government	-	23%
Local Government	-	18%
Derivation	-	13%

Related to the Federation Account is the Value Added Tax Pool Account. Section 40 of the Value Added Tax Act[179] as amended provides that proceeds of VAT Account should be allocated on the following basis:

Federal Government	-	15%
States and the Federal Capital Territory	-	50%
Local Governments	-	35%

The proviso to section 40 of VAT further provides for the principle of derivation of not less than 20% to be reflected in the share of States and Local Governments. Over the years the most explosive issue in Nigeria's fiscal federalism involved the conflict over the appropriate formula for the inter-state sharing of centrally collected revenues. The conflict is as a result of the extent of influence exerted by the Federal Government over the constituent units which is more noticeable in Nigeria, Germany, Australia, India and South Africa. The Value Added Tax amendment Act 2007 introduced generally improved on the principal act.

[179] Value Added Tax (Amendment) Act No. 53. 2007.

CHAPTER THREE

LAWS AND INSTITUTIONS FOR TAX ADMINISTRATION IN NIGERIA

The sole objective of taxation is to raise revenue for government. Kings or emperors levied their subjects to generate revenues to provide for the defence of the kingdom and also for the general welfare of the empire.[180] In modern times, generating revenue for government is still important objective of taxation but it is no longer the sole objective. Taxes are used by modern governments to generate revenue but also to fund governance, ensure resource redistribution, streamlining, consumption of certain goods, reduce inflation, generate employment and stimulate growth in the economy.[181] Taxation therefore has become a veritable tool of fiscal and economic policy. There are therefore certain efforts made to codify statutes that will aid in the effective revenue generation.

3.1 A Review of the Constitutional Provision relating to Taxation in Nigeria

Constitution is the fundamental and organic law of a nation or state, establishing the conception, character and organization of its government, as well as prescribing the extent of its sovereign power and the manner of its exercise.[182] The functions of government are embodied on this fundamental law. There are different constitutional arrangements in Nigeria which became the enabling framework for taxation. The impact of the constitutional arrangements had in defining the nature of relations among different tiers of government especially in fiscal matters is the focus of the discussion in this chapter.

[180] I O Okauru (ed) A Comprehensive Tax History of Nigeria, Ibadan, Spectrum Books Ltd, 2012, p. 34.
[181] *Ibid.*
[182] B A Garner (ed), *Black's Law Dictionary* (10th edition, USA: Thompson Reuters, St. Paul M.N. 2014) p. 316.

a. The Nigerian (Constitution) Order in Council, 1960 (Independence Constitution 1960)

On the first day of October, nineteen hundred and sixty (in this Act referred to as "the appointed day), the colony and the protectorate as respectively defined by the Nigeria (Constitution) Orders in Council, 1954 to 1960 shall together constitute part of her majesty dominions under the name 'Nigeria'.[183]

No Act of the parliament of the United Kingdom passed on or after the appointed day extended or was deemed to be extended to Nigeria or any part thereof as part of the law thereof. Her Majesty's government in the United Kingdom responsibility for the government of Nigeria or any part thereof on this day ceased. The provisions of the first schedule to this Act contained legislative powers in Nigeria.[184]The first schedule to the Act provided, inter alia; that,

> The colonial laws Validity Act, 1865 shall not apply to any law made on or after the appointed day by any legislature established for Nigeria or any part thereof.

In addition, section 10(1) of the Nigeria (Constitution) Order-in-Council 1960 provided that:

> The parliament of the federation of Nigeria may make laws for the peace, order and good government of any region of the federation with respect to taxes on income and profits, not being taxes on the income or profits accruing in or derived from that region of Africans resident in that region and African communities in that region.

The section 58(1)(a)(i) and (2)(a)(i) provided thus:

[183] Nigeria Independence Act No 1652, 1960, S. 1 (1).
[184] *Ibid* S. 1(2).

(1) The Senate shall not:

(a) Proceed upon any bill other than a bill sent from the House of Representative, thus, in the opinion of the person presiding, makes provision for any of the following purposes:

(i) For the imposition, repeal or alteration of taxation.

(2) Except upon the recommendation of the Governor-General signified by a Minister of the government of the federation, the House of Representatives shall not:

(a) Proceed upon any bill (including any amendment to a bill) that in the opinion of the person presiding makes provision for any of the following purposes:

(i) For the imposition of taxation or the alteration of taxation otherwise than by reduction.

The effect of section 58 of the Constitution was that the legislature could not initiate a tax bill or amend a tax bill. Section 64(5) provides that the legislature of a region could also make laws with respect to any matter not included in the Exclusive Legislative Lists.

The Constitution[185] expressly defined the taxing powers of the central and regional governments regarding income and profits. The legislative lists were contained in Parts I and II to the schedule. Part I and II of the Exclusive and Concurrent Legislative Lists. Custom duties including excise and export duties were listed as item 10 on the Exclusive list. Taxes on amount paid or payable on the sale of commodities (except produce, hides and skins, motor spirit, diesel oil sold or produced for use in road vehicles, diesel oil sold or purchased for other industrial purposes) were listed as item 38 on the Exclusive legislative list. Any matter incidental or supplementary to anything listed under the Exclusive list was also within the legislative competence of parliament. It must be noted that the regional parliament areas of jurisdiction was codified in the regions.

[185] *Ibid s.* 70.

b. The Constitution of the Federation 1963

The greatest challenge of this period was that everything concerning taxation was under the whims and caprices of the Governor General or regional governors. Under this constitution, the parliament did not have jurisdiction to initiate tax bills except upon recommendation by the President.[186] It is just like under the 1960 Constitution. Section 76(1) of the Constitution empowered the parliament to make laws for the taxation of incomes and profits of companies. Subsection (2) further empowered the parliament to tax income and profits other than those of companies for the purposes of:

a. Implementing a multilateral or bilateral agreement.
b. Securing uniform principles for the taxation of income and profits accruing to persons in Nigeria from other countries and income and profits derived from Nigeria by persons outside Nigeria.
c. Securing uniform principles for the composition of income and profits of persons for the purposes of tax assessment, treatment of losses, depreciation of assets and contributions to pension or provident funds and schemes.
d. Regulating the liability of persons in Nigeria regarding their places of residence to avoid tax liability under the laws of more than one territory and others.

The powers of the parliament under this constitution did not however extend to the imposition of any tax or penalty or the prescribing of rates of tax or personal allowances and reliefs.[187] This period like the 1960 Constitution witnessed an unhealthy development in the administration of tax in Nigeria. The regional legislations applied different rates of tax, different reliefs and allowances. The lack of uniformity in the existing tax regime and problems emanating therefrom caused the unhealthy and uncoordinated tax regime. Similarly the 1963 Constitution like the 1960 Constitution contained Exclusive legislative list and

[186] Republican Constitution of Nigeria, 1963, s. 63.
[187] *Ibid*, s. 76(4).

concurrent legislative list. It is also noteworthy that during this period the Northern region enacted its tax law called the Northern Nigeria Personal Tax Law of 1962 while the Eastern Regional Finance Law 1962 existed in the east. The Western and Mid-western tax laws were also made, making the tax legislations five (5) in number.

c. The Constitution of the Federal Republic of Nigeria 1979

The military regime had before the 1979 Constitution promulgated a Decree[188] which amended the Tax Management Act 1961 and the Income tax of Armed Forces and other persons (specified provisions) Decree No 51 of 1972. The Decree introduced an amendment into income Tax Management by the insertion of a new section 20(A) immediately after section 20. The Decree provided a uniform rate of tax relief and allowances throughout the country thereby ending the differences in the rates which were applicable under the multiple tax regimes.

Section 4 of the 1979 Constitution provided that:

1. The legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation which shall consist of a Senate and a House of Representatives.
2. The National Assembly shall have power 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 set out in Part I of the Second Schedule to this Constitution.

The Constitution[189] vested exclusive jurisdiction in the National Assembly with regards to matters contained in the exclusive legislative list which was Part I to the Second Schedule to the Constitution. Subsection 6 of section 4 vested legislative powers of a State in

[188] The Income Tax Management (Uniform Taxation Provisions, etc) Decree No 7 1975.
[189] The 1979 Constitution of the Federal Republic of Nigeria, s. 4(3).

the House of Assembly of each State. However, by subsection (5), any law passed by a State House of Assembly which was inconsistent with an Act of the National Assembly was to be null and void to the extent of its inconsistency. By subsections 4(a) and (7)(b) both the National Assembly and the State Houses of Assembly could make laws on the matters on the Concurrent Legislative List which was in Part II to the Second Schedule to the Constitution. Section 150 provided for allocation of tax revenue among the tiers of government on the basis of derivation. The States were required to pay to the Federal Government the cost of collecting tax revenue in proportion to the share of the proceeds received by the States in the financial year. [190]

The fourth schedule to the Constitution now listed the functions of local governments in section 1 to include, inter alia:

- Collection of rates, radio and television licences, licensing of bicycles, trucks (other than mechanically propelled trucks), canoes, wheel barrows and carts, 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. Section 2(d) also extend the functions of the local government to include "such other functions as may be conferred on a local government council by the House of Assembly of the State.

Under the 1979 Constitution of the Federal Republic of Nigeria, taxation of incomes, profits and capital gains fell under the Exclusive List which is under the control of the Federal Government. This position changed the state of the law which prior to 1979 Constitution was vested in the regions[191]. This Constitution suggests that the 1979 model of federalism considered taxation generally as a matter of common concern thus coming under exclusive

[190] *Ibid*, S. 152.
[191] The Republican Constitution of 1963, s. 76(1), (4) & (5).

legislative list.[192] The provisions of this Constitution made the imposition of taxes an exclusive reserve of the Federal Government. The implication therefore is that the 1979 Constitution did not do much to improve on the lot of states in terms of allocation of financial sovereignty, with the consequence that the Federal Government maintains its strong position.[193] Another important issue to be raised under the 1979 Constitution is that the Constitution transferred the powers of imposition of taxes on incomes and profits to the federal government. It did not expressly repeal the existing laws on taxation made by various regions which were in existence in accordance with the provisions of section 274 of the 1979 Constitution. It is apposite for the study to quickly suggest that there is the taken away of the powers of tax imposition from the State taxing authority to the Federal Government.The use of the word State rather than regions cannot by any stretch of imagination mean that the laws made by the regions on taxation before the coming into force of the 1979 Constitution can co-exist with the 1979 Constitution. This could therefore be regarded as repeal by implication[194].

d. The Constitution of the Federal Republic of Nigeria, 1999 as amended.

The military transition to civil rule in 1999 introduced a new constitution for the 4th republic named Constitution of the Federal Republic of Nigeria, 1999. The Constitution was later amended severally. This constitution like the 1979 Constitution is unique as it recognizes the special structure of Nigeria federalism. The 1999 Constitution recognises 36 States and Federal Capital Territory, Abuja. The relevant provisions concerning taxation under the 1999 Constitution of the Federal Republic of Nigeria as amended (hereinafter referred to as CFRN 1999 as amended) are contained in sections 4, 24(f), 163, 165, 174(4) and Parts I and II to the

[192] 1979 Constitution, *op cit.* Section 4(1)(2) & (3). See also item 58 of the exclusive list in part I of second schedule. See also Agbonika J A Problems of Personal Income Tax in Nigeria, (Ibadan, Ababa Press,2012) p. 43.

[193] M N Umenweke, *Tax Law and Its Implications for foreign Investments in Nigeria*, (Enugu, Nolix Educational Publications, 2008) p. 39; I A Ayua, *Nigerian Tax Law*, 1996 (Ibadan: Spectrum Books, 1996) p. 30.

[194] *Abacha v. Fawehnmi* (2000) FWLR (pt. 4) 533 at 600 para F – G, *N.P.A.S.F v Fasel Service Ltd* (2002) FWLR (pt. 97) 719 at 736 para A – B.

Second Schedule to the Constitution. The legislative powers of the Federal Government is vested in the National Assembly.[195] Similarly, the 36 State Houses of Assembly are vested with legislative powers with respect to matters contained in the Concurrent Legislative List as well as those in the residual list.[196] It is important to mention that subsection (5) prohibits a situation where the State House of Assembly law enacted is inconsistent with the Act of the National Assembly.

Section 24(4) of the Constitution makes prompt payment of taxes a duty of every citizen of the Federal Republic of Nigeria. It states that it shall be the duty of every citizen to disclose and declare his income honestly to the appropriate and lawful agencies and pay his tax promptly. Section 163 provides for the treatment of tax revenue where such is collected by the agent of the State pursuant to authority conferred on the agent of the State by the Federal Government while section 165 requires the states to pay to the federation, the cost of revenue collection by an agent of the federation. Pensions in respect of service in the public service of the federation are not to be taxed in accordance with the provisions of section 173(4).

The effect of the provisions above is that the Constitution of the Federal Republic of Nigeria, 1999 as amended, had only a slight improvement to the provisions of the 1979 Constitution. Although, it appears as if the said constitution conferred on the National Assembly the power to make legislation on the regulation of taxes in Nigeria, the reading of section 4(3) of the said Constitution says to the contrary. It reads:

> The power of the National Assembly to make laws for the peace, order and good government of the Federation with respect to any matter included in the Exclusive Legislative List shall, save as

[195] 1999 Constitution, s. 4(1), (2) & (3).
[196] 1999 Constitution, as amended, s. 4(7), *Attorney General of the Federation &Ors v. Attorney General Abia State* (2002) FWLR (pt 102) 1419 &*Attorney-General Ogun State v Aberuagba (1985) 1 NWLR (pt. 3) 395.*

otherwise provided in the CFRN 1999 as amended, be to the exclusion of the Houses of Assembly of States.

The Constitution of the Federal Republic of Nigeria, 1999 as amended did not intend to concentrate the jurisdiction over the taxation of incomes and profits, capital gains or stamp duties on the National Assembly. It shall be noted that there still exists the residual list which has been judicially recognised in *Aberugba v. Attorney General Ogun State*.[197]

3.1.1 Constitutional Powers to Collect Taxes

The Constitution of the Federal Republic of Nigeria, 1999 as amended provides for delegation of powers of collection of tax by the National Assembly to States and from States to the Local Government Council as highlighted above. Item 7-D of the Concurrent Legislative List provides thus:

> In the exercise of its powers to impose any taxes or duty on:
>
> (a) capital gains, incomes or profits of persons other than companies; and
>
> (b) documents or transaction by way of stamp duties; the National Assembly may, subject to such conditions as it may be 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.

In item 8 – D, it provides:

> where an Act of the National Assembly provides for the collection of tax or duty on capital gains, incomes or profit or the administration of any law by any authority of a state in accordance

[197] (1985) 1 NWLR (pt.3) 395 at 413.

> with paragraph 7 hereof, it shall regulate the liability of persons to such tax or duty in such manner as to ensure that such tax or duty is not levied on the same person by more than one state.

In paragraph 8 stated above, the Constitution provides that there must not be a duplication of taxes on the same person by more than one state. The Constitution merely stated that a person's liability to the tax delegated to the States to collect shall be once.

Item 9-D of the Concurrent Legislative List also provides thus:

> 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.

It has remained an unending argument whether considering the provisions of the CFRN 1999 as amended on Item 7-D and 9-D of the Concurrent Legislative List, it could be said that the States and Local Governments have been conferred with powers to impose tax. Fabura[198] commenting on the delegation of powers to collect taxes by the National Assembly to the states, said, items D7 and 8 merely empowered the Federal Government to delegate to the State governments the exercise of an executive function of the collection of taxes specified therein. It does not envisage the delegation of any form of concurrent legislative function to the State. The express wordings of the CFRN 1999 as amended demonstrate clearly that only the Federal Government can legislate with regards to the imposition, levy, collection and administration of any tax or duty envisaged under D7 and D8.The state governments are assigned the responsibility for the collection and administration of any tax or duty imposed by an Act of the Federal Government.

[198]M TFabura, Analysis of State Taxing Powers, in Akinle O. (ed) Tax Law and Administration NIALS quoted in M TAbdulrazaq (ed) C.I.T.N Nigeria Tax Guide and Statutes, 1st ed p. 654.

Sanni[199] in analysing the issues of delegation of powers under item D7 of the Concurrent Legislative List contained in the CFRN 1999 as amended on States, declared the view to be erroneous and relied on sections 2(2) of the Personal Income Tax Act and section 4(2) of the Stamp Duties Act. The sections 2(2) of PITA and 4(2) of Stamp Duties Act were enacted pursuant to item D7 of the CFRN 1979 which is identical with item D7 of the CFRN 1999 as amended.

The said section 2(2) PITA provides that:

> In the case of an individual other than an itinerant worker and persons covered under paragraph (b) of subsection (1) of this section, tax for any year of assessment may be imposed only by the state in which the individual is deemed to be resident for that year under the provisions of the first schedule and in the case of persons referred to in subsection (1)(b) of this section, tax shall be imposed by the Federal Board of Inland Revenue.

Section 4(2) of the Stamp Duties Act, on the other hand provides that the State government shall collect duties in respect of instruments executed between persons or individuals at such rate to be imposed or charged as may be agreed with the Federal Government. From the reproduced sections, it would appear that there is a conflict between the provisions and the state of the law on powers to impose tax. In the opinion of Agbonika,[200] she relied on the view of Sanni and said:

> A cursory reading of the provisions reproduced above especially with reference to the word 'imposed', would suggest that State Governments have the power to impose personal income tax and

[199] ASanni, Division of Taxing Powers in M TAbulrazaq (ed) C.I.T.N. Nigeria Tax Guide, (Lagos, NIALS; 2002) p. 654 – 656.

[200] J AAgbonika, *Problems of Personal Income Tax in Nigeria,* op. cit p. 200.

> stamp duties; however, if the entire provisions of section 2(2) of the PITA and S. 4(2) of the Stamp Duties Act are read together, it will become clear that the object is to identify the relevant tax authority in respect of the income of a taxable person and not to create undue conflict of jurisdiction between the administrative authorities of two or more states over the same income.

Umenweke,[201] in his view on the provisions of the Constitution said:

> The provision of the Constitution as stated above as it relates to the power to tax by the three levels of government cannot but create conflict. This conflict is more pronounced in the areas of payment of stamp duty, payment for business premises, development levy, withholding tax, sharing of value added tax (VAT) and capital gains tax.

Another area of great concern is the wordings of the section 2(2) of the Personal Income Tax (Amendment) Act which reads, "…tax shall be imposed by the Federal Board of Inland Revenue.The amendment of the Personal Income Tax Act 2011, still retained the Federal Board of Inland Revenue which has ceased to exist in 2007.It is the Federal Inland Revenue Service that was the Federal Tax Authority as provided.[202]Sanni introducing the reading of section 2(2) of Personal Income Tax and section 4(2) of the Stamp Duties Act concluded by recommending the amendment of the laws.

Noteworthy is the fact that the Personal Income Tax Act has undergone an amendment in 2011. The provisions of section 2(2)[203] reads:

[201]M NUmenweke, *Tax Law and Its Implications for Foreign Investments in Nigeria,* op. cit. p. 43.
[202] Federal Inland Revenue (Establishment) Act, 2007, S. 1.
[203]Personal Income Tax (Amendment) Act, 2011, s. 2(2).

> In the case of an individual other than an itinerant worker and persons covered under paragraph (b) of subsection (1) of this section, tax for any year of assessment maybe collected only by the State in which the individual is deemed to be resident for that year under the provisions of the first schedule to this Act and in the case of persons referred to in subsection (1)(b) of this section, tax shall be collected by the Federal Board of Inland Revenue.

The confusion created by the wordings of the items D7 and D9 of the concurrent legislative list continues as series of interpretations have come up but is not ending. The controversy led to the imposition of taxes arbitrarily whether they possessed the powers or not relying on the delegated power as justification. The consequences of this is the prevalence of multiple taxation, double taxation and persistent litigation suffered by tax payers and tax authorities. The only available remedy to the confusion and controversy is placing heavy reliance on the provisions of Taxes and Levies (Approved List for Collection) Act which made effort to streamline the taxes each tier of government should collect.

3.2 Taxes and Levies (Approved List for Collection) Act

The Act[204] was originally promulgated as Decree No 2 1998. It was aimed at reforming tax administration in Nigeria. Essentially, it demarcated the spheres of collectible taxes among the three tiers of government as enumerated.[205] The Decree now an Act of the National Assembly by virtue of section 315(4)(b) of the CFRN1999 as amended continued to be in existence and in force. Section 1(1) of the Act provides that:

[204] Cap T2 Laws of the Federation of Nigeria 2004; However, see schedule to the Taxes and Levies (Approved List for Collection) Act (Amendment) Order, 2015.

[205] *Ibid,* S. 1, Schedule Part I, II and III.

> Notwithstanding anything contained in the Constitution of the Federal Republic of Nigeria 1979, as amended or in any other enactment or law, the Federal Government, State and local government shall be responsible for collecting the taxes and levies listed in part I, part II and part III of the schedule of this Act respectively.

The effect of the letters of the Act as stated above suggests that the Act excludes the provisions of the constitution as it relates to taxing powers. The only answer to the wording of the Act above is to state that the Constitution is the supreme law of the land and cannot be subject to any other law. The only understanding of this misnomer is that the Act was promulgated as a Decree in a military dictatorship which has in its nature the tradition of suspending parts of the Constitution. The only problem is that in a democracy the parliament should have immediately after coming into session, modify the sections that are necessary and offending the Constitution and bring it into conformity with the provisions of the Constitution.[206] Section 1(1) and (3) of the said Constitution declares and renders any provision of a law or Act that is inconsistent with its provisions null and void to the extent of its inconsistency with the Constitution. Section 1(1) of the said Act offends section 1(1) and (3) of the CFRN 1999 as amended and shall to the extent of its inconsistency be void. The only thing left is that the National Assembly should as a matter of serious concern repeal the offending provisions in the Act.

The Taxes and Levies (Approved list for collection) was enacted in substantial conformity with items 16, 25, 36, 39, 58, 59, 62 and 66 of the Exclusive Legislative List of the 1999 Constitution which enumerates the taxing powers of the Federal Government. Item D paragraph 7, 8, 9 and 10 of the Concurrent Legislative List of the 1999 Constitution set out

[206] 1999 Constitution of the Federal Republic of Nigeria, as amended, s. 315(1).

the concurrent powers of both the Federal and State Government to legislate. The fourth schedule to the CFRN1999 as amended sets out the tax matters within the legislative competence of the local government. The court has expressed that the Act is in conformity with the Constitution and same is in tandem with the decision in *Knight, Frank &Rutley v. A.G. (Kano State).*[207] There is over 55 taxes and levies listed by the Act and this necessitated some overlap leading to multiplicity of taxes. Multiplicity of taxes overburdens the taxpayer and such is counter-productive.

The Federal and some State governments are engaged in serious battle over who has the jurisdiction to impose tax despite the enumeration of the limits by the Act. In *Hon. Minister for Justice& Attorney-General of the Federation v. Attorney-General of Lagos State,*[208]the Supreme Court held that the Federal Government lacks the constitutional *vires* to make law outside its legislative competence which by implication residual matters for the State House of Assembly on tourism. In *Eko Hotels Ltd v. Attorney-General of Lagos State*[209] the Court held that imposition of Sales Tax and Value Added Tax at the same time would amount to double taxation. In *AG Ogun State v. Aberuagba,*[210] it was held that inter-state trade and commerce are left for the Federal Government while the intra state trade and commerce are within the residual jurisdiction of the state. In *Institute of Human Rights & Humanitarian Law v. Attorney-General, Rivers State &Ors,*[211] it was held that a State House of Assembly has no power to enact laws on taxes and levies outside Section 4 of the CFRN 1999 as amended and Part II of the Second Schedule to the Taxes and Levies (Approved List for Collection) Act. In *AG Cross River v Ojua,*[212] it was held that State Government imposing levies outside Taxes and Levies (Approved List for Collection) Act was an usurpation of

[207](1998) 7 NWLR (pt. 556) 1 at 37.
[208](2013) 8 ALL NTC 425.
[209](2004) 5 ALL NTC 267.
[210](1985) 1NWLR (pt. 3) 395.
[211](2013) 9 ALL NTC 1.
[212](2010) 7 ALL NTC 167.

taxing powers of the local government. The conflicting decision of the Court of Appeal in *UAC of Nigeria Plc &Ors v. AG Lagos State &Ors*[213] is to the effect that the court has not resolved the issue. The court held:

> The Lagos State structures for signage and advertisement law was made for the control and regulation of outdoor advertisement is constitutional. The constitution does not prohibit states from performing the functions assigned to the Local Government under the Constitution.

The Court of Appeal decision was made despite that the same court maintained that signage and advertisement are functions assigned to the Local Government by the Constitution of the Federal Republic of Nigeria 1999. This decision was based on the Taxes and Levies (Approved List for Collection) Act (Amendment) Order 2015 which on its own existence is affected by same vice. This conflict will persist as some states[214] have also enacted laws usurping the functions assigned to the Local Government. Local Governments have been notorious for imposing several other levies outside the law.[215] In *Fast Forward Sports Marketing Company Ltd v The Port-Harcourt City Local Government Area*[216] it was held that the imposition of Agricultural Development Levy and Economic Development Levies by a local government amounts to double taxation. The imposition of corporate permit levy and frozen shop operational license by local government was declared illegal in *Eti-osa Local Government v. Mr. Rufus Jegede & Anor.*[217]

[213](2008) 6 ALL NTC.
[214] The Anambra State Signage and Advertisement Agency Law, 2010, S. 5(1) established an Agency whose functions include to manage and control outdoor structures to be used for signage and advertisement.
[215]J AAgbonika, Problems of Personal Income Tax, *op. cit*. p. 220.
[216](2010) 7 ALL NTC 183.
[217](2007) 6 ALL NTC 251; *Mr. Rufus Jegede & Anor v. Eti-osa Local Government* 5 ALL NTC 31.

It is also to be identified that there is a concentration of revenue imposition and collection on the Federal Government. This is a violation of the principles of federalism[218] which abhors overconcentration of fiscal powers at the center. This has led to the confusion experienced in the tax administration in Nigeria as some states maintained *status quo* that was in operation during the military, however, some have adjusted in conformity with the provisions of the CFRN 1999 as amended as experienced in some of the cases cited above. The only option is that the said Constitution should be further amended in line with the provisions of the Taxes and Levies (Approved List for Collection) Act. It is hoped that this amendment will salvage the situation.

3.3 Tax Laws

The advent of colonial masters helped to fashion out the various forms of taxation[219] already in place however with a lot of challenges. Sir Fredrick Lugard harmonised the taxes with the introduction of statutory enactments which for all intents and purposes laid the foundation for the regulation of income tax in Nigeria. The initial enactments were Stamp Duties Proclamation 1903 and Native Revenue Proclamation No 2, 1906. This was followed by the Native Revenue Ordinance No 1 1917; Income Tax (Colony) Ordinance No 23 1927 and the Non-Natives Taxation (Protectorates) Ordinance No 21 1931. The Income Tax (supplementary Ordinance) No. 28 1939 which was later repealed by Income Tax Ordinance No. 3 1940. A milestone was recorded in tax administration in Nigeria before Independence with the enactment of Income Tax Administration Ordinance No. 39 1958. The Ordinance

[218] 1999 Constitution, s. 2(2).

[219] The Gwandu (agricultural tax levied on one-eight of every farmers' crop); Zakkat levied on Moslems for charitable, religious and educational purposes; Kudin-Kasa, Jangali or cattle tax and others in the north. The Ishakole (land rent), Owo Ode Tax paid for the support of the chiefs and Owo Asiagbu personal service with contributions of food in the West/Midwestern States. Communal tributes in terms of obligatory personal services performed by age grades, for instance, communal clearing of foot paths, digging of wells and Egbunkwu tax paid to the village head before palm oil is harvested in the eastern part of the country.

provided for the establishment of three bodies involved in the administration of income tax which includes:

a. The Federal Board of Inland Revenue
b. The Scrutineer Committees
c. The Body of Appeal Commissioners

The Board was established under section 3 to consist of a maximum of six members including the chairman and the deputy chairman. The board was vested with the power to administer the Income Tax Ordinance and all the powers and duties exercised by the commissioner previously.[220] It is this achievement recorded that midwifed the new tax regime till date.

3.3.1 Companies Income Tax

The statutory framework for the regulation of companies' income tax was introduced by the enactment of Companies Income Tax Ordinance No. 14 1939 which was repealed one year after with the passage of the Income Tax Ordinance No. 3 1940. This Statute regulated the administration and collection of both personal and corporate taxation for about 21 years when the new legal regime was introduced. The Companies Income Tax Act No 22 1961 became the landmark legislation which marked the beginning of regulation of company taxation today. Tax on companies was imposed by section 17(now section 9 Companies' Income Tax Act, 2007) in respect of profits accruing in, received from, brought into or received in Nigeria, from;

a. any trade or business,
b. rent or any premium arising from a right or granted to any other person for the use or occupation of any property,

[220] Income Tax Administration Ordinance No 39, 1958, s. 3.

c. dividends, interests, discounts, charges or annuities and any profit not mentioned but qualifies as one.

The Companies' Income Tax Act 1961 was in force until it was repealed by the Companies' Income Tax Act No 28 1979 which was initially promulgated as a decree. The administration of tax under the Act was vested still in the Federal Board of Inland Revenue[221] which was established under section 1 of the decree. The Companies Income Tax Act 1979 was amended severally by various finance (Miscellaneous Taxation Provisions) Decrees[222]. In 2007, Companies Income Tax Act 1979[223] was further amended.[224] It introduced a far-reaching changes in the taxation of companies. The current companies' tax regime brought in various amendments which are listed below:

a. Sections 1 to 8 of the principal Act relating to the establishment, powers and proceedings of the Federal Board of Inland Revenue was repealed by section 2(1) of the 2007 Amendment Act in order to be in line with the provisions of section 1(i) of the FIRS (E) Act.[225]

b. Section 4 of the 2007 amendment requires an insurance company that engages the services of an insurance agents, loss adjuster or broker to include a schedule in its annual returns showing details of name, address, duration of employment and payments made to such agent, adjuster or broker.

c. Section 5 of the amendment Act exempts profits of companies operating in Export Processing Zones (EPZ) or free trade zones from tax provided 100 percent of the companies' production is for export otherwise proportionate tax is payable on local sales.

[221] The FIRS, the successor to the FBIR is now vested with the jurisdiction of the Act.
[222] Some of the Decrees include Nos 21 of 1991, 30, 31 and 32 of 1996, 18 and 19 of 1998 and 30 of 1999.
[223] otherwise called CITA 1979
[224] The Companies Income Tax (amendment) Act No 11 2007.
[225] This gives life to the Federal Inland Revenue Service Act, 2007, section 1, 2, 25 and 68 (see first schedule to the Act).

d. The Amendment Act provides greater incentives for donations to tertiary and research institutions by making such donations tax deductible expenses. It is to be noted that before the amendment, 10% limit of total profit was allowed for such donations but excluded capital donations. Section 7 of the Amended Act allows both capital and revenue donations and increased the limit to 15% of the total profits or 25% of payable tax whichever is higher.

e. Section II of the amendment Act increased the pre-operation levy payable by a new company requiring a Tax Clearance to 20,000 naira in the first year and 25,000 naira in every subsequent year which had under the old order was 500 naira in the first year a company remained out of business and 400 naira for every other year.

f. Sections 18 of the Act repealed sections 71 to 75 and replaced Body of Appeal Commissioners with Tax Appeal Tribunal (TAT). The tribunal took over the functions of BAC as well as Value Added Tax Tribunal.

g. By the provisions of section 21(a)(i) and (ii) of the Act, the penalty paid as fine under section 92 of the 1979 Act was increased from 200 naira to 20,000. The fine payable for failure to furnish statement or keep records was increased from 40 naira to 2,000 naira.

h. Section 23 removed the power to vary or revoke the rate of companies income tax earlier vested on the President by section 100 and now vests same in the National Assembly on the President's proposal.

3.3.2 Personal Income Tax Act

The Income Tax Management Act 1961 was the first to regulate personal income taxation and provided for uniform system. The Act did not repeal Direct Taxation Ordinance No. 4 1940 and the Income Tax Ordinance, hence they applied side by side with some

modifications. The Income Tax Management Act passed through several amendments which include Income Tax Management (Amendment) Decrees No. 35 1968; 24 of 1971, 41 of 1973, and Income Tax Management (Uniform Taxation provisions) No. 7 of 1975. The Income Tax Management (Uniform Taxation provisions etc) Decree No. 7 1975 amended both the ITMA 1961.The Income Tax (Armed Forces and other persons) (special provisions) Decree No. 51 of 1972 to provide for uniform taxation of income of individual's throughout the country. The Personal Income Tax Decree No. 104 1993 was promulgated to regulate the administration of personal income tax in Nigeria and which was retained.[226] The Act introduced the following changes:

a. the establishment of tax authorities;[227]
b. tax Clearance Certificate (TCC); and
c. the Pay-As-You-Earn Scheme.

Today, government ministries, departments or agencies (MDAs) or commercial banks demand TCC from any person with whom they are involved in transactions or that came under the ambit of the provisions of PITA.[228] The transactions include:

a. application for government loan for industry or business;
b. registration of motor vehicle;
c. application for firearms license;
d. application for foreign exchange or exchange control permission to remit funds outside Nigeria;
e. application for certificate of occupancy;
f. application for awards of contracts by government or its agencies and registered companies;

[226] chapter P8 of the Laws of the Federation of Nigeria 2004
[227] The tax authorities established by PITA are the Joint Tax Board, States Board of Internal Revenue, Local Government Revenue Committee, and Joint State Revenue Committees.
[228] Personal Income Tax Act Cap. P8 Laws of the Federation 2004, s. 85(4).

g. application for approval of buildings;

h. application for trade licence;

i. application for transfer of real property;

j. application for import or export licence;

k. application for agent licence;

l. application for pools or gaming licence;

m. application for registration as a contractor;

n. application for distributorship;

o. confirmation of appointment by government as chairman or member of a public board, institution, commission, company or to any other similar position made by the government;

p. stamping of guarantor's form for a Nigerian passport;

q. application for registration of a limited liability company or of a business name;

r. application for the allocation of market stalls; and

s. appointment or election into public office.

The Tax Clearance Certificate (TCC) must disclose for the last three years' the chargeable income; tax payable, tax paid and the outstanding tax or in the alternative a statement to the effect that no tax is due.[229] The Pay-As-You-Earn (PAYE) system of tax administration introduced under PITA[230] was to enable employer as an agent of collection and to deduct the tax from the salary/wage paid to the employee subject to PAYE.[231] This means that income tax chargeable on an employee by an assessment, whether or not the assessment has been made, shall, if the relevant tax authority so directs, shall be recoverable

[229] *Ibid*, s. 85(1).
[230] *Ibid*, s. 85(1).
[231] I D Sam Nig Ltd v. Lagos State IRS (2011) 5 TLRN 41.

from the emolument paid or from any payment made on account[232] of the emoluments, by the employer to the employee.

The Personal Income Tax Act was also subjected to series of amendments by virtue of various Decrees. The latest of the amendment is the Personal Income Tax (Amendment) Act, 2011. The Amendment Act 2011 amended 36 sections to the Principal Act. The three schedules to the Act was also modified. Some of the amendments are:

a. Sections 3 and 33 relating to chargeable income and personal relief have been amended. Pension was removed as chargeable income in line with the provisions of the Pension Reform Act.[233] Section 5 replaces personal relief of 5,000 naira plus 20 percent of earned income that was available under section 33(1) of the Principal Act with the Consolidated Relief Allowance (CRA) which is to be computed at the rate of 200,000 naira or one percent of gross income whichever is higher, plus 20 percent of gross income;

b. Section 4 modifies section 10(1)(a)(i) to (iii) as the Act now requires that in addition to performing the duties on behalf of non-resident employer, the remuneration of the employee must not be borne by affixed base of the employer in Nigeria. Furthermore, the days of annual leave or temporary leave of absence is now to be factored in the computation of the days spent by a non-resident in determining if the overall period of stay in Nigeria amounts to 183 days. It is also expected that employee is liable to tax only in countries that operates an avoidance of double taxation agreement with Nigeria to be exempt from tax. Again paragraph (b) of subsection (1) of section 10 was replaced with a new one which deems income or gain of employment to be derived in Nigeria, if the employer is in Nigeria or has a fixed base in Nigeria. This

[232] Means wages or salaries and includes allowance including benefits in kind, gratuities, superannuation or pension schemes and any other income derived solely by reason or employment as other rank.

[233] Cap P4 Laws of Federation of Nigeria, 2004.

extends the definition of an employer to include a non-resident with a fixed base in Nigeria.

c. The presumptive tax regime[234] and other serious amendments were also introduced.

The Rate[235] of tax now in accordance with the amendment Act is:

1. First N300,000.00 at 7 percent
2. Next N300,000.00 at 11 percent
3. Next N500,000.00 at 15 percent
4. Next N500,000.00 at 19 percent
5. Next N1,600,000.00 at 21 percent
6. Above N3,200,000.00 at 24 percent

The rate is applicable to employees of the Federal, State and Local Governments as well as employees of the private sector. The rate of minimum tax under section 37 of the Act has been increased from 0.5 percent to one (1) percent of gross income.[236] The schedule specifies the National Housing Fund Contribution, the National Health Insurance Scheme Contribution, Life Assurance Premium, the National Pension Scheme and gratuities are tax exempt. It is unfortunate that the authorities are not driving towards a shift from direct to indirect tax which is in vogue. The trend now is a shift towards indirect taxes charged on supply of goods and provision of services,[237] that is, Value Added Tax.

3.3.3 Petroleum Profits Tax Act

The enactment of Petroleum Profit Tax Legislation in Nigeria was in 1959 when the Petroleum Profits Tax Ordinance No. 15 1959 was made. The long title of the Ordinance is An Ordinance to Impose a Tax upon Profits from the winning of Petroleum in Nigeria to

[234] Personal Income Tax (Amendment) Act *op cit.*, s. 36(6).
[235] Ibid. s. 37, the sixth schedule to the Act.
[236] *Ibid*. s. 37.
[237] A U Aladesame, 'Diversification of Nigeria's Economy through tax Revenue' in J A Agbonika (ed), *Topical Issues on Nigerian Tax Laws and Related Areas,* (Ibadan: Ababa Press Ltd, 2015) 89.

provide for assessment and collection thereof and for purposes connected therewith. The administration of the Act[238]was vested in the Board. Section 2 defines the Board to mean Federal Board of Inland Revenue established and constituted in accordance with section 105 of the Companies Income Tax (amendment) Act, 2007. The Federal Board of Inland Revenue is now the Federal Inland Revenue Service as Part I of the Act comprising sections 1 to 8 are now repealed. The tax is levied upon the profits of each accounting period of any company engaged in petroleum operations during that period. The tax shall for each year of assessment be payable at the rate of 30 kobo per naira[239] upon the profits of any company accruing in, derived from, brought in or received in Nigeria. The petroleum industry bill which is yet to be passed by the National Assembly is expected to bring a lot of changes in the sector.

3.3.3.1The Petroleum Industry Governance and Institutional Framework Bill, 2015

This is an Executive sponsored bill on Petroleum Industry which is yet to be passed. The objectives of the bill include:

a. the creation of efficient and effective governing institution with clear and separate roles for the petroleum industry;
b. establishment of a framework for the creation (out of existing government-owned entities) of commercially oriented and profit driven entities that will ensure value-added and internationalization of the petroleum industry;
c. the promotion of transparency and accountability in the petroleum industry and;
d. the creation of a conducive business environment for operators in the petroleum industry.

[238] Petroleum Profits Tax Act Cap. 21 Laws of the Federation of Nigeria, 2004, s. 3.
[239] *Ibid*, S. 9 and 40(1).

It is the intention of the proponents of the Bill to ensure that there is high level of transparency[240] in the Nigerian petroleum industry while at the same time ensuring that the industry is commercially driven and attractive to potential investors.

The Bill sets out the functions and powers of the Minister of Petroleum Resources (the Minister).[241] The Minister shall upon the recommendation of the newly introduced Nigerian Petroleum Regulatory Commission grant, amend, renew, extend, or revoke petroleum exploration and production licenses and leases pursuant to the provisions of the Act or any other enactment.[242] This will fetter the discretion of the minister by subjecting it to the recommendation of the commission which is not the case under Petroleum Act,[243] wherein the minister exercise absolute discretion. The Bill is also significant as the President of the Federal Republic of Nigeria will appoint members of the Board not the minister. It is to be noted that the Bill did not make provision for the procedure for the appointment.

The Bill retains the minister's right of pre-emption on petroleum products. It increased the fine of N2,000 payable for failure to comply with a requisition by the minister to N10,000,000. The Nigerian Petroleum Regulatory Commission to be established shall assume the rights, interests, obligations and liabilities of the Petroleum Inspectorate, the Department of Petroleum Resources (DPR) and the Petroleum Products Pricing Regulatory Agency (PPPRA).[244] By the provisions of section 4, it does appear that the commission shall be independent but under section 15 of the Bill, the minister is empowered to ensure directives to the commission on matters pertaining to the Petroleum Industry and the Commission is bound to implement such directives provided that same are not in conflict

[240] G. Omoh, Malabu Oil Deal: New facts implicate more Nigerians, Vanguard, September 2, 2016, retrieved from www.vanguard.com/2016/09/malabu-oil-deal-new-facts-implicate-nigerians accessed on 21/3/17.
[241] Section 2 of the Petroleum Industry Bill. www.banwoighadalo.com/assets/resources accessed: 20/12/16.
[242] Section 2(i)(g) Petroleum Industry Bill, *ibid.*
[243] Cap P10 LFN 2004.
[244] Section 4, Petroleum Industry Bill, *op cit.*

with the provisions of the Bill. The Bill exempts the commission from Income Tax[245] and provides for the issuance of pre-action notice of one month[246] before a suit is brought against it. However, the suit must be instituted within 3 months after the occurrence of the Act and in the case of continuing injury within six months.[247]

The Nigerian Petroleum Assets Management Company (NPAMC) and the National Petroleum Company (NPC) were established.[248] They will be vested with certain liabilities and assets of the NNPC. Again, the provisions of all existing enactment or laws including but not limited to the Petroleum Act, the Pipeline Act, the Petroleum Profit Tax Act and the Companies and Allied Matters Act are to be read with modifications to bring them into conformity with the Bill and where any inconsistency is found the provisions of the Bill shall prevail.[249]

3.3.4 Capital Gains Tax Act

Taxation of capital gains was introduced in Nigeria in 1967 to provide for the taxation of capital gains accruing on disposal of assets. Section 2 of the Act fixes the rate of capital gains at 10 percent of chargeable gains accruing to a person in an assessment. Gains accruing to ecclesiastical, charitable or educational institutions of a public nature or registered friendly societies or registered trade unions are not chargeable to tax. Others exempted are gains that accrue to a Local Government Council, a company being a purchasing authority established by law to acquire any commodity for export from Nigeria or a corporation established by law for the purpose of fostering the economic development of any part of Nigeria but must not be gain derived from the disposal of asset acquired by the corporation in connection with any

[245] *Ibid* Section 30.
[246] *Ibid* Section 31.
[247] The NNPC enjoys a similar privilege, however, unlike the period here, there is a longer period of 12 months for both acts under NNPC Act.
[248] Paragraph 36 Petroleum Industry Bill, *op. cit.*
[249] Paragraph 84 part 6 Petroleum Industry Bill *ibid.*

trade or business. The administration of capital gains tax is vested in the Federal Inland Revenue Service (FIRS) and the State Board of Internal Revenue.[250]

3.3.5 Stamp Duties Act

The tax came into being with the Stamp Duties Promulgation No. 8 1903 but has gone through amendment and the enabling law now.[251] The Act recognises two types of duties; *ad valorem* duties and fixed duties. *Ad valorem* duties are duties whose sum increases with an increase in the value of the document evidencing the transaction; for example, a company's share capital is subject to *ad valorem* duty of one naira for every 200 naira.

The Act vests the Federal Government with the exclusive competence to impose, charge and collect stamp duties relating to instruments executed between companies *inter se* or between a company and an individual. The state government are vested with competence to administer stamp duties relating to instruments executed between individuals.[252] While state tax authorities administer the duties in the second category on behalf of their respective government; the Federal Inland Revenue Services administers the duties for federal government and instruments executed between individuals in the federal capital territory.

3.3.6 Value Added Tax Act

The enactment of Sale of Produce (taxation) Ordinance No. 12 1953 marks the beginning of collection of tax on sales but was amended by the Sales Tax Decree No. 7 1986. The Sales Tax Decree imposed a sales tax on such goods and services which included sales and services of registered hostels, motels, catering, catering establishments, restaurants and other personal

[250] The administration and collection of tax is released under section 4(4)(a) and 4(7)(b) of the 1999 Constitution as amended.
[251] Stamp Duties Act Cap S.8 Laws of the Federation of Nigeria, 2004.
[252] *Ibid*, S. 4(1) and (2).

service. The Sales Tax Act[253] was in force until the Value Added Tax Decree was promulgated in 1993.

The Value Added Tax Decree[254] was later revised and retained as Value Added Tax Act.[255] This Act repealed the Sales Tax Act 1986. The Act imposed tax at the rate of 5 percent of the value of goods and services. The Value Added Tax (Amendment) Act[256] was passed by the National Assembly and which is the current law.

Section 4 of VAT specifies the allocation formula for the proceeds between the Federal and State Governments. The said formula is stated below:

Federal Government	-	15%,
State Government and FCT, Abuja	-	50%, and
Local Government	-	35%.

The section 40 provides, notwithstanding any formula that may be prescribed by any other law, the revenue accruing by virtue of the operation of the Act shall be distributed as above stated. However, an amendment to section II of the Principal Act, now section 40 added a proviso that a derivation principle of not less than 20% shall be reflected in the distribution of the allocation amongst states and local governments.

3.4 Other related Laws

3.4.1 Tertiary Education Trust Fund Establishment Act

Education Tax was introduced in 1993 by virtue of the Education Tax Act No. 7 of 1993 which is now repealed.[257] The rate of the tax is 2 percent imposed on companies registered in Nigeria. The Education Fund was introduced as part of initiative to restructure the machinery

[253] Cap 399 Laws of the Federation of Nigeria, 1990.
[254] No 102 1993.
[255] Cap VI Laws of the Federation of Nigeria, 2004.
[256] No 53 2007.
[257] Education Tax Act Cap E4 Laws of Federation of Nigeria, 2004.

for the management of education tax revenue. The current Act[258]establishes the Tertiary Education Trust Fund charged with the responsibility for imposing, managing and disbursing the tax fund to public tertiary institutions in Nigeria. It created the Tertiary Education Trust Fund as a body corporate to replace and take over the powers and duties of the defunct education fund. The TETfund unlike the Education Fund restructured the application of education tax proceeds exclusively for the development of tertiary education in Nigeria. The Act imposes education tax on a company's assessable profits as ascertained in the manner provided under either the companies Income Tax Act or Petroleum Profits Tax Act.[259]

The Federal Inland Revenue Service is to remit all receipts from education tax into the fund.[260] This particular provision conflicts with the provisions of section 162, 1999 Constitution of Federal Republic of Nigeria as amended. Section 162 of the Constitution provides that all federally collected revenue should first be paid into the Federation Account. The fund is shared among universities, polytechnics and colleges of education on a ratio of 2:1:1.[261]

3.4.2 Nigeria Export Processing Zones Act

The Act[262] provides that the President may by order upon the recommendation of the Nigeria Export Processing Zones Authority designate such areas as he thinks fit to be an export processing zone.[263] The Act[264] creates the Nigeria Export Processing Zones Authority which is a body corporate with perpetual succession and common seal. The authority or any licensed enterprise is authorised to import into the zone free of customs duty the following

[258] Tertiary Education Trust Fund (Establishment, etc) Act, 2011 repeals the Education Tax Act Cap E4, Laws of Federation of Nigeria, 2004 and Education Tax Fund Act No. 17, 2003.
[259] Ibid, S.1(1) & (3).
[260] Ibid, S.3(3).
[261] Ibid, S.7(3).
[262] Nigeria Export Processing Zones Act No 63, 1992.
[263] Ibid, S. 1(1).
[264] Ibid, S. 2(1) and (2).

goods:[265] any capital goods, raw materials, components or articles intended to be used for the purposes 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. The articles are to include equipment for offices and ancillary facilities necessary for the proper administration of the premises and for the health, safety, hygiene and welfare of the premises and of persons employed therein. It is worthy of note that the Act[266] provides that the pre-import inspection scheme shall not apply to imports of goods into the zones for use by the approved enterprises in the zones.

The Third Schedule to the provisions of the Act[267] listed the approved activities to include:

1. Manufacturing of goods for export;
2. Warehousing, freight forwarding and customs clearance;
3. Handling of duty-free goods (transhipment, sorting, marketing, packaging etc.);
4. Banking, stock exchange and other financial services, insurances and reinsurance;
5. Import of goods for special services, exhibits and publicity;
6. International commercial arbitration services;
7. Activities relating to integrated zones; and
8. Other activities deemed appropriate by the Nigeria Export Processing Zones Authority.

The 4th schedule to the Act in line with the Act[268] specifies duty free articles as: building materials, tools, plant, machinery, pipes, pumps, conveyor belts, other appliances and materials necessary for construction, alteration and repair of premises, capital and consumer goods, raw materials, components of all articles intended to be used for the purpose

[265] Ibid, S. 12(1).
[266] Ibid, S. 12(10).
[267] *Ibid*, S. 6(2) and 9(3).
[268] *Ibid*, s. 12(3).

of and in connection with reconstruction extension or repair of premises in a zone or for equipping such premises and any other items approved by the Authority.

The next chapter shall discuss the authorities assigned the responsibility of imposing the various taxes and incharge of collecting same.

3.5 Taxing Authorities in Nigeria

The law conferred enormous powers on taxing authorities for the purposes of enforcing the provisions of the Act, particularly with the powers on recovery of tax. The law specified the jurisdiction of the authorities on the imposition and collection of the various taxes. The jurisdiction of the taxing powers and the various authorities assigned the duties of the collection of tax are also specified.

3.5.1 Taxing Powers

Taxing power is the power to impose or levy tax. It is a power inherent in sovereignty and unlimited in the absence of constitutional restrictions but subject in its exercise to the discretion of the authorities in whom it is reposed.[269] In the words of Kehinde, the appropriate arm of the sovereign, reposed with the power of imposing taxes is the legislature.[270] It is the legislative arm of government that enact laws imposing taxes and tax legislation. In other words, unless the legislature makes a law on the payment of a particular tax, such tax should not be due for payment by the tax payer and cannot be demanded by the taxing authority. The changes in the position of the taxing powers were initially introduced by the 1979 Constitution of the Federal Republic of Nigeria. The changes introduced by the 1979

[269] J A Agbonika, *Problems of Personal Income Tax in Nigeria* (Ibadan: Abada Press Ltd, 2012) p. 195.
[270] T Kehinde "Taxing Powers in Nigeria – Time for New Approach" *Modern Practice Journal of Finance & Investments Law* (MPJFIL) vol. 3 No. 2, 1999, p. 269.

Constitution were retained by the Constitution of the Federal Republic of Nigeria (CFRN) 1999 as amended. Section 4(2) of the said 1999 Constitution as amended provides that:

> The National Assembly shall have power 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 set out in part I of the second schedule to this Constitution.

The power of the National Assembly enumerated above is to be exercised to the exclusion of the Houses of Assembly of States.[271] The National Assembly which has power to legislate on matters in the exclusive legislative list to the exclusion of the State Houses of Assembly can also exercise legislative power on any matter in the concurrent legislative list set out in the first column of part II of the second schedule to the Constitution.[272]

The CFRN 1999 as amended has an inbuilt check placed on the legislative powers, wherein it stated that any law made by a State House of Assembly, which is in conflict with the law made by the National Assembly shall to the extent of such conflict or inconsistency be void.[273]The House of Assembly of a State shall have power to make law for the peace, order and good government of the State or any part thereof. This power is exercised with respect to matters outside the exclusive legislative list but included in the concurrent legislative list set out in the first column of part II of the second schedule to the Constitution.[274]

[271] Constitution of the Federal Republic of Nigeria, 1999 as amended, s. 4(3).
[272] *Ibid*, S. 4(4)(a).
[273] *Ibid*, S. 4(5).
[274] *Ibid*, S. 4(7).

3.5.2 Distribution of Taxing Powers

The Constitution distributed the taxing powers to the Federal, States and Local Governments in Nigeria. In the distribution, it has been observed that the Constitution has not done much to improve the lot of the States in terms of allocation of financial sovereignty, with the consequences that the Federal Government maintains its strong position.[275]

3.5.2.1 Distribution in other Federal States

In most of the Federal States, the division of taxing powers is constitutionally enshrined. In some of the federal states, more taxing powers were allocated to the federal government but in others, it is the states that exercises greater power on tax jurisdiction. The states include:

India

Indian Constitution divided the taxing powers as well as the spending powers (and responsibilities) between the Union and the state governments. The subjects on which union or state or both can levy are defined in the 7th schedule of the Constitution.[276] The Central Government imposes taxes on income (except agricultural income), excise on goods produced (other than alcohol), custom duties and inter-state sale of goods. The state governments are vested with the power to tax agricultural income, land and buildings, sale of goods (other than inter-state) and excise on alcohol.[277] An important restriction in the constitution[278] states that no tax shall be levied or collected except by the authority of law. It is also important to note that under section 248 (1 & 2) of the Constitution of India the parliament shall exercise on the residuary powers of legislation.

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[275] M N Umenweke, *Tax Law and its Implications for Foreign Investments in Nigeria*, (Enugu: Nolix Educational Publications (Nig). 2008) p. 39 I A Ayua, *Nigeria Tax Law*, (Ibadan: Spectrum Law Publishing, 1999) p. 30.
[276] www.gktoday.in/blog/taxation-powers-of-union-and-states-in-indiaaccessed 06/01/2017.
[277] The Constitution of India (one hundredth Amendment Act, 2015) Article 246(2), Seventh Schedule, List 111
[278] *Ibid* Article 265.

Switzerland

Switzerland's Federal Constitution was adopted in 1848. The Constitution has been revised in 1874 and 1999 respectively. All three levels of government (Federal, Cantonal and Municipal) may raise taxes.[279] The citizens pay about one-third of their taxes to each level of government.[280] In the areas of personal and corporate income tax and corporate capital tax, the confederation and the cantons have concurrent powers, but the Federal Government is very much the junior partner.[281] The Constitution explicitly limits the Federal Government's power to raise income tax to 11 percent of the income of individuals.[282] Value Added Tax is limited to 6.5 percent.[283] In Switzerland, there is less fiscal centralization.

United States America (USA)

Congress has power under Article 1, Section 8 to lay and collect taxes, duties, imports and excises to pay the debts and provide for the common defence and general welfare. The court has flip-flopped on the issue of whether congress has the constitutional power to tax in order to accomplish regulatory goals that would otherwise be outside of the scope of its enumerated powers.[284] In *Bailey v. Drexel Furniture*,[285] the court invalidated a 10% tax on the annual profits of employers who knowingly employ child labour. In *National Federation of Independent Business v. Sebelius*[286] the court ruled that the so-called 'individual mandate' (generally considered a requirement that individuals purchase health insurance) contained in

[279] T Fleiner, Swiss Confederation, www.forumfed.org/ibdoes/globaldialogue/booklet2/bl2-chaccessed on 13/01/2017.
[280] Article 127(1), Constitution of Switzerland, 1999.
[281] T Fleiner *op. cit.*
[282] Article 128, Constitution of Switzerland, 1999.
[283] Article 130, Constitution of Switzerland, 1999.
[284] The Constitution of the United States of America, 1787.
[285] www.californialawreview.org/wp-content/uploadsaccessed on 20/12/2016.
[286] 132 S. Ct 2566 (2012), U.S. Constitution, Art. 1 (8), the congress shall have power to lay and collect taxes, duties and excises to pay the debts and provide for the common defence and general welfare of the United States.

the Affordable Care Act could be sustained as a tax, even though the requirement is outside of Congress Power to regulate commerce.

3.5.2.2 Federal Taxing Powers

The federal taxing power is contained under section 4 of the CFRN 1999 as amended and better specified in the exclusive legislative list and concurrent legislative list. Under the Exclusive Legislative List, the federal government has jurisdiction to exercise power on the following taxes: customs and excise duties,[287] export duties,[288] revenue from shipping and navigation on international waters, inland water ways and from federal ports,[289] mining rents and royalties,[290] stamp duties,[291] taxation of incomes, profits and capital gains.[292]This is with the exception as otherwise prescribed by the Constitution.[293] The Federal Government has exclusive power to legislate on the taxation of individuals and companies throughout the whole federation.[294] The Federal Government has power to legislate on the following:

Trade and Commerce[295]which comprises of:

(a) trade and commerce between Nigeria and other countries, including import of commodities into and export of commodities from Nigeria and trade and commerce between the States;

(b) establishment of a purchasing authority with power to acquire for export or sale in world markets such agricultural produce as may be designated by the National Assembly;

[287] Constitution of the Federal Republic of Nigeria, Second Schedule, Part I, Item 16.
[288] *Ibid*, item 25.
[289] *Ibid*, item 36.
[290] *Ibid*, item 37.
[291] *Ibid*, item 58.
[292] *Ibid*, item 59.
[293] *Ibid,* S. 4(3).
[294] *Ibid,* s. 4(2) & item 59 Exclusive Legislative List.
[295] *Ibid*, item 67.

(c) inspection of produce to be exported from Nigeria and the enforcement of grades and standards of quality in respect of produce so inspected;

(d) establishment of a body to prescribe and enforce standards of goods and commodities offered for sale;

(e) control of the prices of goods and commodities designated by the National Assembly as essential goods or commodities; and

(f) registration of business names.

In wireless, broadcasting and television other than broadcasting and television provided by the government of a State; allocation of wave lengths for wireless, broadcasting and television transmission.[296]The Federal Government has to the exclusion of any other tier of government power to legislate on all the matters enumerated.[297] The implication is that no other level of government can impose tax on the following:

1. Excise duty
2. Import and export duty
3. Companies tax or any other type of tax on companies
4. Petroleum tax or taxes relating to mines and minerals
5. Stamp duties
6. Incomes, profits and capital gains taxes
7. Taxes relating to trade and commerce
8. Communication (e.g. radio and television license etc.) and telecommunication.

[296] *Ibid*, item 66.

[297] M N Umenweke, *Tax Law and its Implications for Foreign Investments in Nigeria*, (Enugu: Nolix Educational Publications, 2008) p. 40.

3.5.2.3 State Taxing Powers

The States Houses of Assembly were empowered under the Constitution[298] to impose and collect tax. The states also subject to the Constitution shall ensure the existence of a law that will provide for the establishment, structure, composition, finance and functions of the local government.[299] The states also enjoys the latitude to impose tax on residual matters.[300]

The powers of the State Houses of Assembly to impose tax has been a serious controversy between authors. Some hold the opinion that the state has the requisite powers whereas others hold to the contrary. In the view of Agbonika[301] leading one group, the States have not been conferred with taxing powers directly or positively. The State taxing powers could therefore be impliedly derived from the general provision conferring legislative powers on States, they cited section 4(7) of the Constitution.

Some other authors[302] on the other hand are of the view that States were conferred with taxing powers. Their view is that various states impose various taxes like capital gains, tax, withholding tax, stamp duties, business premises registration fees, pools betting, loitering, gaming and casino taxes, economic development levy, tenement rates and such other taxes. Individuals within the various states are also required to pay personal income tax, capital gains tax, stamp duties, withholding tax.[303] Section 4(7) of the Constitution conferred on the State governments, powers to make laws on any subject matter that is not on the exclusive legislative list. Moreover section 4(7)(b) of the Constitution states that 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;

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[298] The Constitution, *op cit*, s. 4(7).
[299] *Ibid*, s. 7(1).
[300] Attorney-General Ogun State v Aberuagba (1985) 1 NWLR (pt 3) 395 at 413.
[301] J A Agbonika, *Problems of Personal Income Tax in Nigeria*, (Ibadan: Ababa Press, 2012) p. 197.
[302] M T Fabura, Analysis of State Taxing Powers in O Akande (e) *Tax Law and Administration* NIALS quoted in M T Abdulrazaq (ed) C.I.T.N. Nigerian Tax Guide and Statutes, 1st edn. p. 564. S Abiola, Division of Taxing Powers in M T Abdulrazaq (ed) CITN Nigerian Tax Guide (Lagos: 2002) p. 656.
[303] M N Umenweke, *op. cit* p. 41.

Again, in respect of matters in the concurrent legislative list, the inconsistency rule inserted in section 4(5) of the Constitution restricts states from legislating on matters contained therein where the federal government has covered the field. It is against this background that the extent of the powers to make law to impose tax is described as the residual list. It is also in doubt whether there is anything left for the state government to legislate on. The National Assembly has made laws on the taxes to be collected, for instance, the Personal Income Tax Act, Value Added Tax Act,[304] and Stamp Duties Act covered the field on those areas of taxation. The argument continues for and against the state government powers to impose tax. It is our view that there are still areas where the state can legislate and same will be discussed subsequently in this work.

3.5.2.4 Local Government Taxing Powers

Local government is the third tier level of government in the country. The local government unlike the Federal Capital Territory Abuja exercises power to levy tax. The local government exercises the power reserved for them by the federal and state governments in the subject matter of taxation.

The Constitution of the Federal Republic of Nigeria, 1999 as amended did not directly assign legislative powers in the subject matter of taxation to the local government. It is a surprise to find this position in the Constitution, having regard that the same Constitution regarded the Local Government as the third tier in the levels of government of the federation. The first issue is that the Constitution[305] excludes local governments from partaking in the legislative power. The section 2(2) provides that Nigeria shall be a federation consisting of States and Federal Capital Territory. This implies that Nigerian federalism is a contract

[304] *Attorney General of Ogun State v. Aberuagba* (2009) 1 TLRN 82.
[305] Constitution, *op. cit,* S.2(2).

between the federal government and states. Furthermore, the Constitution under section 7(1) provides:

> The system of local government by democratically elected local government councils is under this Constitution guaranteed and accordingly, the government of every state shall subject to section 8 of this Constitution, ensure their existence under a law which provides for the establishment, structure, composition, finance and functions of such councils.

In the above provision the States are mandated to confer on the local government through a legislation for their establishment, structure, composition, finance and functions. The same Constitution[306] stated that the functions to be assigned to the local governments by the state shall include those set out in the fourth schedule to the Constitution. Furthermore, the functions conferred must be by legislation and must be matters within the reserved powers or residual list upon which the states have power to legislate. It is clear that local government is not a component part of the federation but the federal capital territory is one. Local government was assigned functions under the fourth schedule to the Constitution. The Federal Capital Territory is a component of the Nigeria federation yet it was not assigned powers in tax matters.

The local governments from the State of laws in Nigeria have no powers to directly impose taxes. It is the state government that must enact the appropriate enabling law which will determine the taxable persons, assessment, procedure and method of collection, recovery and penalty for non-payment of tax, but it must be exercised within the limits.

[306] *Ibid*, S. 7(5).

3.5.3 Taking of Power as a reflection of the need for Fiscal Federalism

The principles of fiscal federation are concerned with how taxing, spending and regulatory functions are allocated among the component parts of a federation and how inter-governmental transfers are structured among these parts.[307] The idea of fiscal federalism is relevant for all kinds of government, irrespective of whether they are unitary, federal or confederal systems.[308] Fiscal federation is not to be confused with fiscal decentralization. While the latter is practiced only in officially declared federations, the former is applicable even to non-federal states (having no formal federal constitutional arrangement) in the sense that it encompasses different levels of government which have *de facto* decision making authority.[309] Fiscal federalism constitutes a set of guiding principles that help in designing financial relations between the national and sub-national levels of government and fiscal decentralization refers to the application of such principles.

Federalism according to Suberu[310] involves constitutional and irrevocable division of governmental powers and functions on a territorial basis within a single country. It entails the division of power between the central and constituent authorities, the guarantee that the constituent units have a share in the central power and that the constituent units cannot be abrogated unilaterally by the central power. Wheare describes federalism as the method of dividing powers so that general and regional governments are each, within a sphere, coordinate and independent.[311] It is a principle of organization and practice whose ultimate test is how the federal system operates. Nigeria, Switzerland, United States, Canada, Germany, Malaysia, Brazil, India and Australia are some of the countries that have adopted federalism as a preferred system of discharging governmental responsibility. There are three

[307] S Anwar, 'Principle of Fiscal Federalism' in S Anwar & J. Kincaid (ed) *The Practice of Fiscal Federalism: Comparative Perspectives,* (Montreal: McGrill – Queen's University Press, 2007) p. 241.
[308] I O Okauru, *A Comprehensive Tax History of Nigeria,* (Ibadan: Safari Books Ltd, 2012) p. 5.
[309] *Ibid.*
[310] R T Suberu, *Federalism and Ethnic Conflict in Nigeria,* (Washington D.C: United States Institute of Peace Press, 2001) p. 3.
[311] K CWhare, *Federal Government* (New York: Oxford University Press, 1963) p. 12.

prominent aspects of federalism, political, administrative and fiscal. Political federalism deals with the division of powers among tiers of government such that within certain specified spheres, the powers exercisable by the different tiers are either coordinate or exclusive.[312] In order to ensure autonomy of each tier, there is usually some kind of constitutional or legal provision specifying the nature and extent of powers exercisable by each tier. Fiscal federalism therefore deals with the relations among levels of government pertaining to revenue generation, allocation and utilization in the discharge of defined responsibilities.

3.5.4 Taxing Authorities

Taxing authorities are those bodies that are reposed with the power of administration and collection of the various taxes. There are instances where the Federal Government or National Assembly due to preponderance of taxing powers delegate the administration and collection of federal taxes to state and state agencies. The authorities on which the authority is delegated to usually remit same back to the Federal Government through the Federation Account. The taxing authorities to be discussed are categorised according to the tiers of government.

3.5.4.1 The Federal Tax Authority

The Federal Tax Authority is reposed in the Federal Inland Revenue Service (FIRS).[313] Section 1(3) of the Federal Inland Revenue Act provides that the service shall have such powers and duties as are conferred on this Act or by any other enactment or law on such matters on which the National Assembly has power to make law. Section 2 provides thus:

[312] W E Qates, *Fiscal Federalism* (New York: Harcourt Brace Jovanovich, 1972) p. 27.

[313] The Federal Inland Revenue Service is a body established by the Federal Inland Revenue (Establishment) Act, No. 13 of 2007.

> 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 thereunder by the government of the federation and to account for all taxes collected.

The service by the Act[314] is charged with the administration of Federal Tax Statutes such as Personal Income Tax Act, Companies' Income Tax Act, Withholding Tax Act, Petroleum Profits Tax Act, Capital Gains Tax Act, Value Added Tax Act, Stamp Duties Act, Taxes and Levies (Approved List for Collection) Act and other laws and regulations specified. The body is a body corporate with perpetual succession with a common seal. Any action shall be maintained in its corporate name. The body is autonomous as a statutory body and not under the supervision of any parastatal. The Federal Inland Revenue Service replaced the former body known as the Federal Board of Inland Revenue (FBIR) which administered the federal taxes before the year 2007. Section 3 of the Act provides that:

> There is established for the service a board known as the Federal Inland Revenue Service Board (in this Act referred to as "The Board") which shall have overall supervisory of the service as specified under this Act.

The functions of the Board of the Federal Inland Revenue Service are as enumerated under sections 7 and 8 of the Act to include:

(a) provide the general policy guidelines relating to the functions of the service;

(b) review and approve strategic plans of the service;

(c) manage and superintend the policies of the service on matters relating to the administration;

[314] Federal Inland Revenue Service (establishment) Act, S.2, 25 and 68 and the first schedule to the Act.

(d) employ and determine the terms and conditions of service including disciplinary measures of the employees of the service;

(e) stipulate, remuneration, allowances, benefits and pensions of staff and employees in consultation with the National Salaries, income and wages commission; and

(f) do such other things which in its opinion are necessary to ensure efficient performance of the functions of the service under this Act.

The Act[315] listed out the functions of the service to include;

a) asses persons including companies, enterprises chargeable with tax.

b) Asses, collect, account and enforce payment of taxes as may be due to the government or any of its agencies and others.

3.5.4.1.1 Composition of the Federal Inland Revenue Service

a. Composition of the Board

The board comprises of:

a. The executive chairman of the FIRS, who shall be a person experienced in taxation to be appointed by the President as chairman;

b. Six members with relevant qualifications and expertise appointed by the President to represent each of the six geo-political zones;

c. Chairman of the Revenue mobilisation, allocation and fiscal commission or his representative;

d. Representative of the minister of finance not below the rank of Director;

e. Group Managing Director of the Nigerian National Petroleum Corporation or his representative;

[315] *Ibid*, S. 8(1).

f. The Chief Executive Officer of the National Planning Commission or his representative not below the rank of a Director;

g. Comptroller-General of the Nigerian Customs Service or his representative not below the rank of a Deputy Comptroller-General;

h. The Registrar General of the Corporate Affairs Commission or his representative not below the rank of Director;

i. A representative of the Attorney-General of the Federation; and

j. The Governor of the Central Bank of Nigeria or his representative.

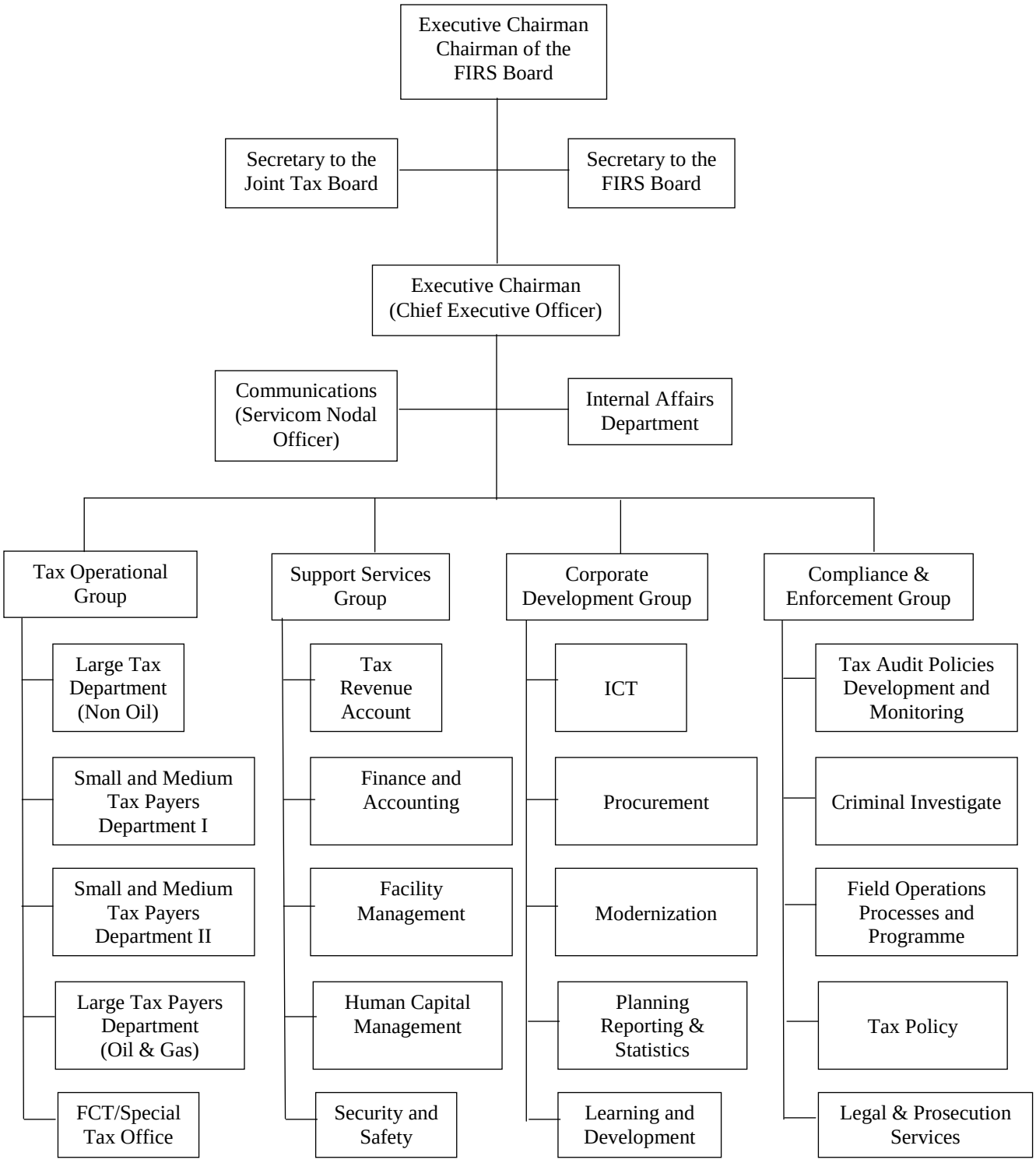
There is also a Technical Committee of the Board comprising of the Executive Chairman of the Service as Chairman, all the Directors and Head of Departments of the Service; the Legal Adviser of the Service; the Secretary to the Board and any person co-opted from the service by the committee. The functions of the committee are:

a. consideration of all tax matters' requiring professional and technical expertise and making recommendations to the Board;

b. advising the Board on any aspect of the functions and powers of the service; and,

c. such other matters as may from time to time be referred to it by the Board.

The Organizational Structure of FIRS[316]



[316]B Sanni, *The Journey So Far*, a handbook of FIRS (Abuja, ESOjay Digital Ltd, 2012) 26.

3.5.4.1.2 Taxes administered by the Federal Government.

The Taxes and Levies (approved list for collection) Act[317] spelt out taxes to be collected by the federal government to include:

1. Companies income tax;
2. Withholding tax on companies, residents of the federal capital territory, Abuja and non-resident individuals;
3. Petroleum profits tax;
4. Value Added Tax;
5. Education Tax;
6. Capital gains tax on residents of the Federal Capital Territory Abuja, bodies corporate and non-resident individuals;
7. Stamp duties on bodies corporate and residents of the Federal Capital Territory, Abuja;
8. Personal income tax in respect of;
   (a) Members of the armed forces of the federation.
   (b) Members of the Nigeria Police Force,
   (c) Residents of the Federal Capital Territory Abuja; and,
   (d) Staff of the Ministry of Foreign Affairs and non-resident individuals.

In addition to the eight taxes enumerated above, the National Information Technology Development Act 2007[318] empowers the FIRS to administer the National Information technology Development Levy. Again the Federal Inland Revenue Service (Establishment) Act 2007 empowers the Service to administer all fees, levies and tax relating to oil

[317] Taxes and Levies (approved list for collection) Act, Schedule I part I.
[318] The Levy is imposed under section 12 of the Act. Also see schedule to the Taxes and Levies (Approved List for Collection) (Act Amendment) Order, 2015.

exploration licence, oil mining license, oil production licence, royalties and rents.[319] Item number 11 in the first schedule to the Act reads:

> 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 licences, fees for Oil Exploration Licence (OEL), Oil Mining Licence (OML), Oil Production Licence (OPL), 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.

Federal Inland Revenue Service is expected to be in control and administer the 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 thereto and to account for all taxes collected.[320] Section 68(2) of the FIRS Act provides:

> If the provisions of any law, including the enactments in the first schedule are inconsistent with the provisions of this Act, the provisions of this Act shall prevail and the provisions of that order law shall to the extent of the inconsistency be void.

The import of the above section is that the provisions of Companies Income Tax Act, Personal Income Tax Act, Petroleum Profits Tax Act, Value Added Tax Act, Capital Gains Tax Act or any other law on taxation in Nigeria should be read with such modification to bring them into conformity the provisions of the FIRS(E) Act. It is worthy to note that section 25 of the Act gave the service the powers to collect all taxes levied under the Acts listed in the first schedule. Sections 2, 88 and 91 of the Personal Income Tax Act empowered the State

[319] Federal Inland Revenue Service (Establishment) Act op. cit. S. 2, 25 and 68.
[320] FIRS (E) Act, s. 2.

Board of Internal Revenue and Local Government Revenue Committee to collect. The courts had decided on the legality or otherwise of the State Board of Internal Revenue to collect tax. The State Board of Internal Revenue and Local Government Revenue Committee were conferred with the necessary power to collect tax.[321] It is submitted that the provisions of sections 2, 25 and 68 of the FIRS(E) Act juxtaposed with provisions of the 1999 Constitution of the Federal Republic of Nigeria cannot stand. The provisions of sections 2, 25 and 68 of the FIRS(E) Act offends section 1(3) of the Constitution, therefore, sections 2, 25 and 68 of FIRS(E) Act to the extent of its inconsistency is void.

3.5.4.2 The Joint Tax Board

The Joint Tax Board was created under section 8(1) of the Personal Income Tax Act, 1993.[322] The Board coordinates the various aspects of taxation between the states and promote uniformity in the rates and other indices relating to personal income tax in Nigeria. It acts as a unifying body for tax administration among states to avoid cases of conflicts and double taxation. The chairman of the Federal Inland Revenue Service is the chairman of the Board.[323]

Composition of the Board[324]

The Board is composed of the following:

1. Chairman (The Executive Chairman of FIRS); and,
2. One member from each state of the federation to appointed by the Governor.

The functions of the Board[325]

The functions of the Board are to:

[321] Knight, Frank and Lutley v AG (Kano State) (1998) 7 NWLR (pt. 556) 1 at 37, Hon. Minister of Justice & AG Federation (2013) 8 ALL NTC 425.
[322] Now Personal Income Tax (amendment) Act 2011, s. 86(1).
[323] *Ibid*, s. 86(2).
[324] *Ibid*, s. 86(2)(a &).
[325] *Ibid*, s. 86(a).

a. Exercise the power or duties conferred on it by express provisions of the Act and any other powers and duties which may be agreed by the government of each territory to be exercised by the Board;

b. 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;

c. Advise the Federal Government on request in respect of double taxation arrangement concluded or under consideration with any other country and other matters affecting taxation throughout the country;

d. Use its best endeavours to promote uniformity both in the application of this Act and in the incidence of tax on individuals throughout Nigeria; and,

e. Impose its decisions on matters of procedure and interpretation of the Act on any State for the purposes of conferring with agreed procedure and interpretation.

The recurrent expenses and emoluments of the Secretary and of any other officers or employees of the Board are paid by the Federal Government and states.[326]The board performs a very important function of harmonizing the application of the Act and incidence of tax on individuals throughout the country. The only bottleneck encountered by the decision of the board is on the implementation of the decisions of the Board by the States.As a result, it has been suggested[327] that the composition of the board should be expanded to include the various State Board of Internal Revenue Chairman.

3.5.4.3 The State Tax Authorities

State Board of Internal Revenue Service (SIRS) were established by virtue of section 85(2) of the Personal Income Tax Decree No. 104 of 1993 for every state. This marked the beginning

[326] *Ibid*, s 86(10).
[327] J A Agbonika, Problems of Personal Income Tax in Nigeria *op. cit* p. 209.

of uniformity in the institutional structures of tax administration in the States. Before the 1993 Decree, there was no uniformity in the composition of the State Boards of Internal Revenue. The closest thing to a tax authority before 1993 restructuring was the office of a Director of Tax Revenue.[328] Now the provision was retained by the Personal Income Tax (Amendment) 2011 and the relevant section is section 87. The section provides that:

> There is hereby established for each State, a Board to be known as the State Board of Internal Revenue (in this Act referred to as "the State Board") whose operational arm shall be known as the State Internal Revenue Service (in this Act referred to as "the Service").

3.5.4.3.1 The Composition of State Board of Internal Revenue

The State Board of Internal Revenue retained under section 82 of the Personal Income Tax (Amendment) Act 2011 shall consists of:

a. The Chairman as the executive head of the State Service who shall be a person experienced in matters of taxation and to be a member of relevant recognised professional body appointed by the State Governor subject to confirmation of the State House of Assembly.
b. The Directors from within or outside the state service.
c. A Director from the State Ministry of Finance
d. The Legal Adviser to the State Service;
e. Three other persons nominated by the State Governor on their personal merit, one each representing a senatorial district in the State and;
f. The Secretary of the State Board of who shall be an ex-officio member.

[328] I Okauru, (ed) *Comprehensive Tax History of Nigeria,* (Ibadan, Safari Books Ltd, 2012) p. 125.

Functions of the State Board of Internal Revenue[329]

The State Board of Internal Revenue plays the following role in the administration of taxes:

a. ensuring the effectiveness and optimum collection of all taxes and penalties due to the government under the relevant laws.

b. doing all things as may be deemed necessary and expedient for the assessment and collection of the tax and accounting for all amounts so collected in a manner to be prescribed by the commissioner.

c. making recommendations, where appropriate to the Joint Tax Board on tax policy, tax reform, tax registration, tax treaties and exemptions as may be required from time to time.

d. generally controlling the management of the state service on matters of policy; subject to the provisions of the law setting up the State Service and;

e. appointing, promoting, transferring and imposing discipline on employees of the state service.

The State Board is autonomous in the day-to-day running of the technical, professional and administrative affairs of the State Service.[330] The State Board may by notice in the gazette or writing authorise any person to perform or exercise on behalf of the state board, any function, duty or power conferred on the State Board; and receive any notice or other document to be given or delivered to or in consequence of this Act or any subsidiary legislation made under it. The powers under sub-section (3) of section 88 above must be exercised subject to the provisions in sub-section (4). The sub-section (4) provides thus:

> Notwithstanding the provisions of subsection (3) of this section, the State Board shall not delegate any power conferred on it under

[329] Personal Income Tax (Amendment) Act, *op. cit,* s. 88(1).
[330] *Ibid*, s. 88(2).

sections 2, 6, 7, 17, 46, 47, 50, 53, 54, 55, 57, 78, 86, 99, 102, 103 and 104 of this Act to any person.

The implication of the provision is that the powers enumerated in the above mentioned seventeen sections must be exercised by the Board in the official name of the tax authority simpliciter. In *Standard Chartered Bank Nigeria Ltd v Kasmal International Services & 22 Ors,*[331] the court held that under section 89 of the NIPOST Act, NIPOST has no business or authority in sending Kasmal International Services on illegal errand to compel the plaintiff on N50 stamp duty tax. The running cost of tax administration and collection shall be defrayed by an amount not less than 5 percent of revenue collected as may be approved by the State House of Assembly.[332] Finally, the Act[333] for administrative efficiency created two committees. The committees are the technical committee of the State Board and the Joint State Revenue Committee.

3.5.4.4 The Technical Committee of the State Board

The Committee comprises of the Chairman of the State Board as Chairman, Directors within the State Service, Legal Adviser and Secretary of the State Service. The functions include:

- co-opting additional staff from within the state service in the discharge of duties;
- considering all matters that require professional and technical expertise and making appropriate recommendations to the Board;
- advising the board on all its powers and duties as specifically mentioned in section 85(b) of the Act; and,
- attending to such other matters as may from time to time, be referred to it by the board.

[331] CA/L/437A/2014 unreported.
[332] *Ibid*, s. 88(1)(b) the proviso.
[333] *Ibid*, s. 89 and 92.

3.5.4.5 Taxes Administered by the State Government

Under the provisions of the Taxes and Levies (approved list for collection) Act,[334] the State Board of Internal Revenue are vested with the authority to administer the following taxes:

1. personal income tax in respect of Pay-As-You-Earn (PAYE) and direct taxation (self-assessment);
2. withholding tax (individuals only);
3. capital gains tax (individuals only);
4. stamp duties on instruments executed by individuals;
5. pools betting and lotteries, gaming and casino taxes;
6. road taxes;
7. business premises registration fees in respect of urban and rural areas which includes registration fees and per annum renewals as fixed by each State;
8. Development levy (individuals only) not more than N100 per annum on all taxable individuals;
9. Naming of street registration fees in the state capitals;
10. Right of occupancy fees on lands owned by the state government in urban areas of the state;
11. Taxes and levies (approved list for collection) Act part A II;
12. Land use charge, where applicable;[335]
13. Hotel, restaurant or event centre consumption tax, where applicable;
14. Entertainment tax, where applicable;
15. Environmental (ecological) fee or levy;
16. Mining, milling and quarrying fee, where applicable;

[334] Taxes and Levies (Approved list for Collection) Act, Part A& B.
[335] Schedule to the Taxes and Levies (Approved List for Collection) Act (Amendment) Order, 2015, Federal Republic of Nigeria Official Gazette, No. 77 Vol. 102.

17. Animal trade, tax, where applicable;
18. Produce sales tax, where applicable;
19. Slaughter or abattoir fees, where state finance is involved;
20. Infrastructure maintenance charge or levy, where applicable;
21. Fire service charge;
22. Property tax, where applicable;
23. Economic Development Levy, where applicable;
24. Social services contribution levy, where applicable;
25. Signages and mobile advertisement, jointly collected by States and Local Governments;
26. Market taxes and levies where state finances is involved.

3.5.4.6 The Joint State Revenue Committee

Section 92 of the Personal Income Tax (amendment) Act created a body known as the Joint State Revenue Committee.

a. Composition of the Committee

The composition of the committee is as stated below:

a. The Chairman of the State Internal Revenue Service as the Chairman;
b. The chairman of the Local Government Committee;
c. A representative of the bureau on local government affairs not below the rank of Director;
d. A representative of the Revenue Mobilisation Allocation and Fiscal Commission as an observer;
e. The State sector commander of the Federal Road Safety Commission, as an observer;
f. The Legal Adviser of the State Internal Revenue Service;

g. The Secretary of the Committee who shall be a staff of the State Internal Revenue Service.

Section 93 of the Act enumerated the functions of the Act as follows:

(i) Implement decision of the Joint Tax Board;

(ii) Advise the Joint Tax Board, the state and local governments on revenue matters;

(iii) Harmonize tax administration in the State;

(iv) Enlighten members of the public generally on state and local government revenue matters; and,

(v) Carry out such other functions as may be assigned to it by the Joint Tax Board.

3.5.5 Local Government Tax Authorities

The local government, the third tier in the government of the Federal Republic of Nigeria was directly assigned functions by the Constitution of the Federal Republic of Nigeria.[336] Prior to the promulgation of the Personal Income Tax Decree 1993 (now an Act), the local governments were not statutorily recognised as tax authority. Their respective revenue departments were bodies incharge and responsible for the collection of taxes, rates and levies. Presently, the Local Government Revenue Committee created under the relevant tax laws is created to assist in the collection of taxes and levies.

3.5.5.1 The Local Government Revenue Committee

Decree No. 104 of 1993 established Local Government Revenue Committee for every local government in all the States. The relevant provision of the Act[337] now provides that: there shall be established for each local government area of a state a committee to be known as the

[336] CFRN 1999, *op. cits.* 7(5) and fourth schedule.
[337] Personal Income Tax (amendment) Act 2011, s. 90(1).

Local Government Revenue Committee (in this Act referred to as "the Revenue Committee").

3.3.5.1.1Composition of the Committee

Section 90(2) of the PITA 2011 provides that the Revenue Committee shall comprise:[338]

a. supervisor for finance as chairman;

b. three local government councillors as members; and,

c. two other persons experienced in revenue matter to be nominated by the chairman of the local government on their personal merits.

Functions of the Revenue Committee[339]

The Committee shall be responsible for the assessment and collection of all taxes, fines and rates under the jurisdiction of the local government and accounting for all amounts so collected in a manner to be prescribed by the chairman of the local government.

The controversy trailing the activities of the Local Government Revenue Committee is the question about their autonomy from the local government administrators especially the Executive Chairman of the local government. The Act[340] provides that the revenue committee shall be autonomous of the local government treasury and shall be responsible for the day-to-day administration of the department which forms its operational arm.

It is submitted that it is not clear whether it is the Chairman of the Local Government, whom it is to determine the manner in which the committee shall account for the taxes collected or the Chairman of the Local Government Revenue Committee created by the Act.[341] On a holistic reading of the provisions, the Act did not contemplate the Executive Chairman of the local government. However, if the Act contemplates the Executive Chairman

[338] *Ibid*, s. 90(2).
[339] *Ibid*, s. 91.
[340] *Ibid*, s. 91(2).
[341] *Ibid,* S. 90(2)(a) J A Agbonika Problems of Personal Income Tax op. cit. 215.

of the Local Government, the Act must have created room for the local government chairman to deal or treat the proceeds of the tax, fines, levies and other internally generated revenue as his personal estate.

3.5.5.2 Taxes administered by the Local Government

By virtue of the Taxes and Levies (Approved List for Collection) Act, the following taxes and levies are to be collected at the local government level:[342]

a. shops and kiosks rates;
b. tenement rates;
c. on and off liquor license fee;
d. slaughter slab fees;
e. marriage, birth and death registration fees;
f. naming of street registration fee, excluding any street in the state capital;
g. right of occupancy fees on lands in rural areas, excluding those collectable by the federal and state governments;
h. market taxes and levies excluding any market where state finance is involved;
i. motor park levies;
j. domestic animal license fees;
k. bicycle, truck, canoe, wheel barrow and cart fees, other than a mechanically propelled trucks;
l. cattle tax payable by cattle farmers only;
m. merriment and road closure levy;
n. radio and television license fee (other than radio and television transmitter);

[342] Taxes and Levies (Approved List for Collection) Act, op. cit. part III Schedule I.

o. vehicle radio license fee (to be imposed by the local government of the state in which the car is registered);

p. wrong parking charges;

q. public convenience, sewage and refuse disposal fees;

r. customary burial ground permit fees;

s. religious places establishment permit fees;

t. signboard and advertisement permit fees; and,

u. wharf landing charge, where applicable.[343]

The drafters of the Act seem not to understand the distinction between a tax and other related terms such as fees, levies and charges. There are a lot of user charges and licensing fees contained in the Act as well as the fourth schedule to the Constitution of Federal Republic of Nigeria 1999 as amended. The Act gave room or leverage to local government to see these fees as tax and upon that see the basis for serving assessment notices on corporate bodies as parking fees[344] and mounting of road blocks.[345]

[343] Schedule to the Taxes and Levies (Approved List for Collection) Act (Amendment) Order 2015.
[344] Eti-Osa Local Government v. Mr. Rufus Jegede & Anor (vol. 6 ALL NTC 251).
[345] *Mobil Producing Nig. Unlimited v. Tai Local Government Council & 2 Ors* vol. 5 ALL NTC 241.

CHAPTER FOUR

THE CHALLENGES, ISSUES AND PROSPECTS OF TAX COLLECTION IN NIGERIA

The collection of taxes begins with the process of legislation. The various tax authorities are reposed with the power of enforcing tax payment. The Nigerian tax system is not in good shape by any measure;[346] policy, law, administration, revenue-yield, equity, impact on the economy, consistency with federalism, dynamism and so on. Undoubtedly, the system is unduly loaded with too many taxes, most of which are overlapping. Additionally, corruption, arbitrariness, high-handedness, extortion, sabotage, fraud and general lawlessness, heavily characterise tax management particularly at Local Government and also at the State and Federal levels.[347]

It is most unfortunate that the system remains paralyzed by fundamental lack of tax information and data.[348] The Nigerian tax system has increasingly become a nuisance and burden on the citizens in general and taxpayers in particular.[349] The dilemma and unfortunate situation are seriously calling for concerted efforts to remedy them include:

4.1 Complex Tax Legislations

In a country of over one hundred and forty million population where over fifty million are illiterates,[350] it is quite hard to make taxpayers understand the legislations relating to tax. It is important to consider the psychology of the people when framing tax legislations aimed at receiving an acceptable degree of voluntary compliance among taxpayers. The socio-

[346] A Sani, *Multiplicity of taxes as a bane of tax compliance and yield* in O. Adebiyi (ed). *Tax Journal of Nigeria,* (Aeta Publishers Nigeria Ltd, 2012) p. 81.
[347] *Ibid.*
[348] *Ibid*.
[349] *Ibid*.
[350] *The Nation*, Tuesday, September 6, 2011, p3.

economic factors no doubt dominate the lives of the people of our country and ought to be the foundation on which tax legislation should be based.

The Nigerian tax system places huge burden on taxpayers as a result of overreliance on direct taxes such as Companies Income Tax, Petroleum Profit Tax, Education Tax, Stamp Duties, Personal Income Tax and others. It is to be noted that a single company is mandated by law to pay Companies Income Tax, Education Tax and National Information Technology Development Agency Levy as the case may be.[351] The fact is that transporting tax legislation from developed countries like the United Kingdom and USA which is modified here and there would not reflect the peculiarities of our socio-economic and cultural values.[352] The difficulty in understanding such comprehensive and complicated legislations fashioned after that of the developed countries will therefore be a common feature in our tax statute books. It is to be noted that this was one of such reasons that led to the Capital Transfer Tax to be abolished in Nigeria, since it was quite difficult to relate the issue of taxation to the estate of a deceased person.

Tax legislations which Nigerian courts are called upon to interpret and enforce from time to time provide for both criminal and civil sanctions without a clear understanding on the part of the tax authorities.[353] There is need for improvement in the techniques of framing tax legislations as suggested by Faley[354] thus:

> What is at fault at present is the attitude of those responsible for framing legislation. They have become obsessive with the notion that what is needed is a series of effective anti-avoidance provisions. They might, I suggest fare better if they identified the

[351] Price water house coopers "Nigeria at 50: Top 50 Tax Issues", available at http://www.pwc.com/enNG/ng/pdf/nigeria-top-50-taxissues accessed on 15/2/2015.
[352] J A Agbonika, *Problems of Personal Income Tax in Nigeria,* (Ibadan, Ababa Press Ltd, 2012) p. 285.
[353] M T Abdulrazaq, *Nigerian Revenue Law,* (Malthouse Press Ltd, 2005) p. 121.
[354] Olusola Faley, FCA in October 1981 in a paper presented at the 11th Annual Senior Staff Conference of the Federal Inland Revenue Department.

> real problem as the much simpler problem of defining the initial scope of a tax in clear and intelligible terms. If tax legislation are well understood, tax payers may be at home with compliance.

The process of either passing or amending a federal tax bill starts with the management of Federal Inland Revenue Service presenting a proposal to the Federal Ministry of Finance. It retains its supervisory role over FIRS inspite of the autonomy conferred on it by the Federal Inland Revenue Service Act, 2007. This process is slow and cumbersome.

A nation's tax system is often a reflection of its communal values or the values of those in power.[355] In order to create a system of taxation, a nation must make choices regarding the distribution of the tax burden as regards who pays taxes and how taxes collected will be spent. In Nigeria, the tax system dates back to 1904 when direct taxation was formally introduced in northern Nigeria before the unification of the country by the colonial master. Since then, different governments have continued to try to improve on Nigeria's taxation system by formulating policies which invariably culminate into tax legislations when passed by the Legislature.[356] The introduction of direct taxation by the colonial masters became imperative as a response to a request for fund from Britain to run colonial government.

In other jurisdictions indirect taxes, that is, Value Added Tax (VAT),a consumption tax plays a prominent role. An instance is that Value Added Tax is the third highest source of income of the United Kingdom Central Government. Her Majesty's Revenue and Custom (HMRC)'s revenue collection stands at£476 billion as at April 2014 with £101 billion or 21 percent of total tax being from Value Added Tax.[357] This is not the situation in Nigeria where Value Added Tax is charged at 5%, except the recent attempt by the Minister of Finance in a

[355] National Tax Policy, www.nigeriantaxpolicy.org 1.

[356] M O Agoro 'Story on Tax Administration in Nigeria', *JTB News*, a *Quarterly Magazine* of the Joint Tax Board, vol. 1 No 2, Jan – March, 2007 p. 42.

[357] U A Adeyemi 'Diversification of Nigeria's Economy through Tax Revenue' in J A Agbonika (ed) *Topical Issues on Nigerian Tax Laws and Related Areas* (Ababa Press Ltd, Ibadan, 2015) p. 89.

legal notice to amend section 4 of Value Added Tax (Amendment) Act 2007 to increase the rate from 5% to 10%. This was visited with an uproar and was revoked by the then President of the Federal Republic of Nigeria on the legal advice of the Attorney General of the Federation and Minister of Justice.[358] This increase is however being presently contemplated by the Minister of Finance to make up for the fall in revenue due to the fall in the crude oil price in the international market. The Value Added Tax rate of 5% in Nigeria is the lowest in the world. In the United Kingdom Value Added Tax is a standard 20%.[359] Value Added Taxes charged at the rate of 15% in South Africa, in Ghana it is 17.5% and in Kenya it is 16%.[360]

The justification for the increase in the VAT rate is that it will reduce over tax burden of taxable person's on direct taxes under which Nigeria economy will grow. There should be a harmonization of different taxes so as one company, for instance, should not be mandated to pay companies income tax, education tax and NITDA levy and others. Tax payers will readily pay VAT which is charged on goods and services. This glamour for shift from direct to indirect taxes for instance Value Added Tax is one of the objectives captured in the National Tax Policy. It has been observed that taxes may not be the most important source of revenue to the government in terms of magnitude of revenue derivable from it as compared to revenue from petroleum proceeds, fines and royalties, grants and advances, *et cetera* but its importance stems from the point of view of certainty and consistency.[361] This observation is to the effect that the qualities of taxation such as certainty and consistency stand it out from other revenue sources. In this period of economic recession, the thinking must be narrowed

[358]M T Abdulazaq 'An Examination of the Powers of the Minister of Finance to increase the tax rate under the Value Added Tax (Amendment) Act of 2007' in *Topical Issues on Nigerian Tax Laws and Related Areas,* J A Agbonika (ed) ibid, p. 1.

[359] VAT Rates. Available at http://www.gov.uk/vat-rate accessed on 18/2/2015.

[360] Taxes and VAT Refunds. Available at http://www.southafrica-netyork.net/consulate/vat%20refund, http://www.myjoyonline.com/business/2014/January-10th/new-175vat-rate-takes-effect accessed on 30/2/2015.

[361]T O Gloria "Revenue Generation in Nigeria through e-taxation in a study of selected states", European Journal of Economics, (2012) 126 – 132.

towards indirect tax. An increase in custom duties for importation of goods in Nigeria will encourage investment by Nigerians in other sectors of the economy and attract foreign direct investment.

The major tax legislations in the country are federal statutes and the tax is administered by the Federal Inland Revenue Service on behalf of the federal, State Board of Internal Revenue for state and local governments Revenue Committee for Local Governments. There is need for the further amendment of tax laws to make it more result oriented. The present state of the laws creates series of issues in tax administration. An instance is the jurisdiction of the tax authority or the relevant tax authority with the requisite authority to collect the various taxes. The confusion created in the tax system by the Federal Inland Revenue (Establishment) Act[362] contravenes the provisions of the Constitution. The provisions of sections 2, 25 and 68 of FIRS (E) Act 2007 are in sharp contrast with sections 2, 88 and 91 of Personal Income Tax (amendment) Act 2011. Nigeria tax system will be certain when the provisions of Federal Inland (Establishment) Act and Personal Income Tax Act are harmonized in line with the provisions of the Constitution.

4.2 Multiplicity of Taxes

Multiplicity of taxes is not an established term in the field of taxation. The term seems to be peculiar in Nigerian fiscal lexicography.[363] The National Tax Policy document regard multiple taxation to occur where the tax fee or rate is levied on the same person in respect of the same liability by more than one state or local government councils.[364] The definition by the National Tax Policy is rather too narrow to the extent that it implies that multiplicity of

[362] FIRS (E) Act 2007. S. 2, 25 and 68.
[363] A Sanni Multiplicity of Taxes as a Bane of Tax Compliance and Yield in Tax Law Journal of Nigeria, Olaleye A (ed) Lagos, AETA Publishers Nigeria Limited, 2012, p. 81.
[364] The National Tax Policy *op. cit.* p. 78.

taxes occurs only with regard to state and local taxes. Multiplicity of taxes can manifest in the following ways:

a. The various unlawful compulsory payments being collected by the local and State governments without appropriate legal backing through intimidation and harassment of the payers. Collection of it is characterised by the use of stickers, mounting of road blocks, use of revenue agents/consultants including motor park touts.[365]

b. It also occurs in a situation where a taxpayer is faced with demands from two or more different levels of governments either for the same or similar taxes. An example is the different levies collected by Anambra State Government and local governments in the State. Anambra State Government levy the moderate transport companies in the state a levy of N150,000.00 monthly as park management fee.[366]

It is not only that the above levy charged by the state and local government in Anambra State is unreasonable, arbitrary and capricious, the levy is unlawful and illegal. Another instance is the administration of the Value Added Tax (VAT) and Sales Tax simultaneously. The constitutionality of the Sales Tax Law[367] of states was the subject of two cases. In *Attorney-General, Ogun State v. Aberuagba*,[368] the Supreme Court was invited to decide on the validity or otherwise of the Sales Tax Law[369] of Ogun State, which provides in section 3(1) 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

[365] A Sanni Multiplicity of Taxes as a Bane of Tax Compliance and Yield *op. cit* p. 82.

[366] On the side of local government, a transport company Star Sunny International Agency Ltd which pays the levy of N150,000.00 monthly will also pay business premises registration fee to the local government. From the payments already made to Awka South Local Government for three years as follows: N10,000.00 for 2014, N40,000.00 for 2015 and N41,000.00 for 2016.

[367] The Sales Tax was a tax on consumption: *AG. Ogun State v. Aberugba* (1985) 1 NWLR (pt. 3) 395 at 431 per Irikefe JSC (as he then was). VAT is a replacement of the Sales Tax. The validity of the Sales Tax Decree was indisputable because it was enacted by erstwhile Federal Military Government in the exercise of its omnibus powers to make law on any matter whatsoever.

[368] (supra).

[369] Sales Tax Law, cap 175 of Ogun State.

> 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 Court held;

> Now, section 3(1) of the law imposes sales tax on products brought into Ogun State… since the sales tax is only chargeable on the products brought into Ogun State from another state or from outside Nigeria, it follows that the tax is a discriminatory tax directed against inter-state or international trade and commerce within the exclusive regulatory power of the federation under item (a). Accordingly, I hold that, in so far as the law purports to impose sales tax on taxable products brought into the state, it offends the provision of inter-state or international trade and commerce and contravenes section 4(3) of the Constitution.[370] I declare the law unconstitutional to that extent…[371]

Another case is *Attorney-General, Lagos State v. Eko Hotels Ltd & Anor*.[372] The facts of the case is that Eko Hotels Ltd took out an originating summons and sought for determination whether it was supposed to remit money collected as tax on its sales from its customers to the Federal Board of Inland Revenue (now Federal Inland Revenue Service) or the Lagos State Government (1st and 2nd defendants respectively) in view of the provisions of the Value Added Tax Decree No 12 of 1993, Sales Tax Law, Cap 175 and Sales Tax (schedule amendment) Order, 2000. Again, a declaration that it could only pay tax to the state

[370] 1999 Constitution of the Federal Republic of Nigeria as amended, Section 4(3).
[371] *AG Ogun State v Aberugba* (supra) at 417.
[372] (2009) 1 TLRN 198.

or federal agency and not to the two agencies, that until the rightful body to collect the tax is determined, it is not entitled to pay tax. The trial court held that the Federal Board of Inland Revenue was the body to which the plaintiff's taxes were to be paid. On appeal, it was held that the Sales Tax Law of Lagos State was void for being inconsistent with the Value Added Tax Act and Taxes and Levies (Approved list for collection) Act.[373]

The decision of the appellate court is a reinstatement of the law. The collection or administration of both Sales Tax and Value Added Tax in a state will amount to double taxation. It is noteworthy that both Value Added Tax and Sales Tax are charged on consumable items. The burden is carried by the same consumer. Allowing the two to exist alongside each other would amount to double taxation upon the tax payer.[374]

c. Multiplicity of taxes refers to a situation where the same level of government imposes two or more taxes on the same tax base. It means a particular tax payer will be expected to pay different taxes from an income. A good example is payment of Companies income tax, Education Tax and Technology Levy by the same company.

d. Again, multiplicity could result where various agencies of government "impose taxes" in the form of fees or charges. In *Registered Trustees of Association of the Licensed Telecommunications Operators of Nigeria &Ors v. Lagos State Government &Ors*[375] some telecommunication companies challenged certain sections of the Lagos State Infrastructure Maintenance and Regulatory Agency Law, 2004 on the basis that the law amounted to imposition of tax on their operations. The trial judge held:

> The IMRA law, from the name it looks very innocent… from the contents of the law, the driving force is just to make money for the

[373] Value Added Tax *op. cit*.

[374] M N Umenweke, The power to impose and collect consumption tax in Nigeria – *Attorney-General of Lagos State v. Eko Hotels Ltd and Anor* (2008) 235, Revisited in *Tax Law Journal of Nigeria,* vol. 1 p. 120.

[375] Unreported Suit No FHC/L/CS/517/06 deliver on 25/2/07.

state as the state has numerous laws dealing with the issue of urban planning.[376]

The revenue objective of the law is as the judge said is that what the Lagos State is doing is to create an agency that will get its own share of the booty, as their counsel said that the operators are making billions in Nigeria.[377]

The above objective as reiterated by the judge reveals that the state government is determined to collect money from companies that are making much money irrespective of the effects and hardship that will be encountered by the taxpayer. An instance of this nature of law and unnecessary imposition of taxes is also found in Anambra State between the newly inaugurated Awka Capital Territory Development Agency (ACTDA) and Anambra State Physical Planning Board, wherein, the new Board charges exorbitant fees for inspection of documents already prepared and approved by the planning board. It does appear that courts show some degree of dynamism when it comes to federal agencies. In *National Inland Waterways Authority v. Shell Petroleum Development Company*[378] the trial court held that the claimant had the power to tax. The court rejected the contention of the defendant that the regulations under which the authority purported to tax the defendant company were ultra vires the plaintiff. The court considered that the regulations were validly made under the provisions of section 28(b), (g), (h) and (r) of the National Inland Waterways Act.

Multiplicity of taxes makes investment climate tempestuous as investors are not sure the extent to which their incomes would be taxed.[379] The acts of government and its agencies have made some large corporate entities that have moved their operations out of some states or from Nigeria to neighbouring countries on account of multiplicity of taxes and rising cost

[376] *Ibid*, p. 22.
[377] *Ibid*, p. 23-24.
[378] (2005) 8 CLRN 150.
[379] A Sanni Multiplicity of Taxes a bane of tax compliance and yield, op. cit. p. 83.

of doing business in Nigeria.[380] Notwithstanding the above assertion, multiplicity is not synonymous simply with being taxed at different levels of government. In Nigeria as found in all the federations, it is typical to have federal, state and local government taxes. This is expressed clearly in the National Tax Policy Document thus:

> Multiple taxation in Nigeria first needs to be defined before it is tackled. The word multiple connotes "numerous", "several", "various" etc. A certain level of multiplicity is unavoidable in a federal structure as each tier of government may want to charge certain taxes, fees, charges as may be applicable. The only aspect of multiplicity that is avoidable and for which the Constitution itself abhors is that where the tax, fee or rate is levied on the same person in respect of the same liability by more than one state or local government council.

From the above, it is clear that an aspect of multiplicity could be gleamed from the Constitution, however, it is kept on check. In recognition of the fundamentals of federalism, the Taxes and Levies (Approved list for collection) Act[381] contains as much as 9, 25 and 21 taxes and levies for Federal, State and Local Governments respectively. There is need for introspection on whether the current thinking is to ensure that taxes, fees and charges do not exceed those listed in the Act or whether to streamline the number of taxes into just a few simple broad based taxes with elastic revenue potentials as being advocated by protagonist of flat tax.[382]

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[380] A Sanni *ibid.*

[381] No 21 Cap T2 Laws of Federation 2004, schedule to the Taxes and Levies (Approved List for Collection) Act (Amendment) Order, 2015.

[382] A flat tax advocates that instead of having different types of taxes with different rate should be applied to all income at source with no exception. It attempts to simplify tax laws which are said to be bedevilled by many loopholes, dedication and exemptions which render the collection and enforcement of tax law complicated and inefficient. See also A Sanni Multiplicity of Taxes as a Bane of Tax Compliance and Yield op. cit. p. 84.

Multiplicity of taxes infringes the cardinal principles of taxation. The hallowed principle is that in as much as government requires revenue to discharge its responsibilities to the citizens, the administration and assessment of tax should not be done in a haphazard, arbitrary and capricious manner. A taxpayer is entitled to know and determine in advance how much he is obligated to pay and in what circumstances.[383]

The Taxes and Levies (Approved list for collection) Act[384] gives a false impression that there are 55 taxes in Nigeria. It is important to know that the Taxes and Levies (Approved list for collection) Act is not a taxing statute since it deals with only the "power to collect" and not power to impose taxes. The language of the statute is phrases or words such as collecting,[385] "collects"[386] and "shall assess or collect".[387] It is on the strength of this that it could be submitted that the Taxes and Levies Act has never been and is presently not a tax statute. It is not relevant for the purpose of determining the extent of taxing powers of government under the 1999 Constitution of the Federal Republic of Nigeria as amended as the Act purports to be. The attempt to either trace the power of a government or lack of it to impose a particular tax or levy to the Act will be misdirected.[388]

The report of the 2003 Tax Study Group in an attempt to curb this development and menace on the number of taxes, has recommended that the fourth schedule of the Constitution should be amended. The report stated the same thus:

> The fourth schedule of the 1999 Constitution which has given powers to local government to control and regulate many items

[383] This underscores why certainty is the first principle of taxation. See Ian T.G. Lambert, some modern principles of taxation – Adam Smith revisited in http://www.cooperativeindividualism.org/lambert-ianonadam-smith.html accessed on February 2012.
[384] No. 21 Cap T2 Laws of the Federation Nigeria 2004.
[385] *Ibid*s.1(1), 2(2), 3(6).
[386] *Ibid* s. 3(a).
[387] *Ibid* s. 2(1).
[388] This point seems not to be appreciated by the courts in a number of cases where certain State Laws and Local Government bye laws have been declared to be inconsistent with the provisions of the Taxes and Levies (Approved List for Collection) Act.

> should be urgently amended to expressly limit the taxing powers of local government to tenement rate on private houses, capitation rate and clear cut user charges for services directly beneficial to the payers. This is because the words "control and regulate" as used in the fourth schedule has been misinterpreted by local governments as granting them taxing powers for virtually every type of business as shown in Appendix IV with over 21 types of local government taxes. Unless this major constitutional amendment is made to restrict local government's taxing powers, the lawlessness and confusion will continue and cripple the nation's economy.[389]

This recommendation is however criticised by authors[390] as it misses the point. The criticism is because there is inherent regulatory power in any government otherwise there would be no means of controlling activities within a territory. The real issue is the needless reference to user charges and fees in the schedule to Act No 21 and others. The fourth schedule to the Constitution has clearly made laudable objectives which are to prescribe irreducible minimum function which every state must confer on their local governments in their respective local government laws. It is rather disappointing that this laudable objective is not being realised as a result of corruption and lack of vision of the ruling class and their cohorts.

Multiplicity of taxes in Nigeria is as a result of over dependence of the States and Local Government on the Federation Account since the 1990's. This was when some states did not have a functional Board of Internal Revenue (BIR) and left the task of administration and collection of taxes on the whims and caprices of consultants.[391] It is in response to curb

[389] Nigerian Tax Reform in 2003 and beyond: Main report of the study group on the Nigerian Tax System (2003) available at www.nigeriantaxpolicy.org.
[390] A Sanni Multiplicity of Taxes as a Bane of Tax Compliance and Yield op cit. p. 87.
[391] *Ibid*.

the menace that Joint Tax Board had to draw a list of taxes collectable by each tier of government. It is this list that eventually got the backing of law during the military era and was promulgated as Taxes and Levies (Approved List for Collection) Act. The military which do not have a law making arm merely promulgated the recommendations of the committee without calling for views or the contributions from States and Local Governments. This has led to a lot of confusion and multiplicity of taxes in Nigeria.

The current thinking is that a complex tax system is neither in the interest of government nor the taxpayer.[392] The 2003 Tax Study Group condemning the list as leading to an inefficient tax system, said that a multiple tax system is always a tedious and bewildering system to the taxpayer, and the antithesis of a simple tax system…. The bewilderment of the taxpayer, resulting from a multi-tax system creates enormous work and opportunities for tax consultants and tax advisers. It also creates the semblance of busy tax administrators. The pertinent question here is whether the tax systems created for the benefit of tax consultants and tax administrators? Of course, the answer is No! The Joint Tax Board with the cooperation of state governments should team up in order to address the problem of multiplicity of taxes because they are responsible for creating a situation which led to financial desperation of their Local Governments by withholding the revenue due to local governments from the Federation under the guise of Joint State and Local Government Committee.

4.3 Residence and Permanent Establishment Issues

Residence and Permanent Establishments are two very important concepts in taxation as they form the basis and factor to be considered in taxation generally. It is because tax is generally

[392] The Nigerian Tax Reform in 2003 and beyond: op cit.

imposed on individuals.[393] It is where an individual or corporate body is resident or deemed to be resident or where a non-resident corporate body has its' permanent establishment for a particular year of assessment that determines the taxing authority of that individual or corporate body. The first schedule to the Personal Income Tax (Amendment) Act, 2011classified "principal place of residence" in relation to an individual with two or more places of residence on a relevant day, not being both within anyone territory means:

a) In the case of an individual with no source of income other than a pension in Nigeria, that place of those places in which he usually resides;

b) In the case of an individual who has a source of earned income other than a pension in Nigeria, that place of those places which on a relevant day is nearest to his usual place of work.

c) In the case of an individual who works in the branch office or operational site of a company or other body corporate, the place at which the branch office or operational site is situates. The operational site however is to include oil terminals, oil platforms, flow stations, factories, quarries, construction site with a minimum of 50 workers and others.

The importance of the concept of residence and permanent establishment lies in the fact that they give jurisdiction to taxing authorities and without which it will have no legal basis to put a taxpayer to tax. The implication of this is that the income from business, trade, profession or vocation of a tax payer from whichever sources (within or outside Nigeria) is taxable in Nigeria, if and only if, they are carried on by a Nigeria resident. It will mean that the two concepts activate the jurisdiction of a taxing authority. It is important that without establishing first the issue of residence and/or permanent establishment as the case may be,

[393] Personal Income Tax (Amendment) Act, 2011, First Schedule, paragraph 1 defines place of residence in relation to an individual means a place available for his domestic use in Nigeria on a relevant day and does not include any hotel, rest-house, or other place at which he is temporarily lodging unless no permanent place is available for his use on that day.

then the question of jurisdiction to tax will not be established. The courts have consistently decided that any action by a tax authority without first settling the question of jurisdiction is a nullity.[394] In *Registered Trustees of Association of Fast Food Confectionaries of Nigeria & 2 Ors vs AG. Lagos State & Anor,*[395] the applicants in an originating motion sought the following relief;

> An order of interlocutory injunction restraining the 1st defendant/respondent, their officers, agents, servants and privies from harassing, intimidating the 1st defendant from harassing, intimidating the plaintiffs/applicants' properties or by any means coercing the plaintiffs/applicants to commence collection and remittance of the said hotel occupancy and restaurants consumption tax until the determination of this suit.

In support of the relief sought, the plaintiffs established from the originating summons and supporting affidavit that they fear they would suffer double taxation if the new state law is enforced by the 1st defendant while the 2nd defendant continues to enforce the existing VAT Act. The plaintiffs/applicants carry on the business of proprietors, managers of and occupiers of recreation, relaxation, restaurants, catering establishment, gourmets, fast food producers and dispensers including operation of restaurants and food outlets having several outlets within Lagos State. The Lagos State government insisted that the business is in Lagos State and it is subject to Lagos State Sales Tax and not Value Added Tax, however, the court held otherwise.[396]

On the other hand, it is also in consideration of the requirement of residence and/or permanent establishment under the general principles of taxation that assessment is done. The

[394] *Registered Trustees of Association of Fast Food Confectionaries of Nigeria & 2 Ors vs. Ag. Lagos State &Anor* No. 2 (2010) 2TLRN 47.
[395] (supra).
[396] Supra at 57.

assessment of the non-resident individual or corporate personality is limited to the income derived by him from a business, trade, profession or vocation carried on by him or on his behalf in Nigeria.[397] In the same vein, Nigerian tax laws apply to a taxpayer on the basis of his residence and not nationality, such that a Nigerian becomes a non-Nigerian for tax purposes because he was not resident in Nigeria throughout the taxing period of assessment. A non-Nigerian becomes a Nigerian because he was resident in Nigeria within the period of assessment. Infact, if a taxpayer is resident, no matter his nationality, the same conditions will apply to him as every other Nigerian resident but where a citizen of Nigeria is not resident in Nigeria the same standard will apply to him as a foreign-national who is non-resident. In the same manner, a company is either a resident company or a non-resident company. A company set up by a non-Nigeria maybe fully owned by the non-Nigerian but once the company meets the requirements for registration and qualifies to operate in Nigeria, it is regarded as a Nigerian company. A Nigerian national may set up a company abroad and the company is not registered in Nigeria, the law would see it as a non-Nigerian company. Again, the importance of residence on international transactions and bilateral tax treaties will come to play where treaty is the basis of allocating taxing rights between the two contracting tax jurisdictions; that is, the country of residence and the country of source, to avoid double taxation. Where the agreement confers exclusive rights to tax on the country of residence, the country of source does not tax and therefore double taxation is eliminated.[398] Another critical and important factor of consideration under the bilateral treaties is that residence is used in determining the tie breaker of an individual or of a company. This consideration comes up where the laws of the two countries regard the same person or company as resident in their respective countries, hence creating the problem of dual residence. In *IRC v. Cadwalader*[399]

[397] This is because the income is said to be a Nigerian income.

[398] A B Ahmed, Residence and Permanent Establishment Issues in Nigeria taxation, *Tax Law Journal of Nigeria*, vol. 1 April 2012 at pg. 99.

[399] (1904) S.T.C. 101.

the court held that a tax payer could be held to reside simultaneously in more than one country if he maintained an establishment like abode in each. The tie-breaker is used[400] in considering where the individual has a permanent home among the two countries and then to consider where he has his usual abode and finally his nationality.

4.3.1 Jurisprudence of Using Residence as a Prime Basis for Taxation

The concept of residence as a prime basis for taxation lies in the fact that it activates jurisdiction of taxing authorities and without which it will have no legal basis to put a taxpayer to tax. The implication of this is that the income from business, trade, profession or vocation of a taxpayer from whichever (within or outside Nigeria) is taxable in Nigeria, if and only if, they are carried on by a Nigerian resident.[401] It means that residence gives jurisdiction to tax authority and without residence determined first, the legal question of jurisdiction of the tax authority will be raised. The question of jurisdiction in tax matters have long been established and where residence of the taxpayer is not determined first, the courts have consistently decided that any action by a tax authority without first settling the question of jurisdiction is a nullity.[402]

Again, it is a general principle of taxation that the assessment of a non-resident individual or corporate personality is limited to the income derived by him from a business, trade, profession or vocation carried on by him or on his behalf in Nigeria.[403] The Nigerian taxation laws apply to a taxpayer on the basis of residence and not nationality. This means that a Nigerian will become a non-Nigerian for tax purposes because he was not resident in

[400] as provided by paragraph 2 of Article 4 of the Nigerian Tax Treaties. Paragraph 3 of Article 4 provides a tie-breaker by giving priority to the country where management is located.

[401] *Offshore International S.A. v FBIR* (2011) 4 TLRN 58 at 78.

[402] *Registered Trustees of Fast Food Confectionaries of Nigeria & 2 Ors. V. A.G. Lagos State &Anor* (2010) 2 TLRN 36, *Cadbury Nigeria Plc v. FBIR (2010) 2 TLRN 16. Mama cass & 2 Ors v. FBIR* (2010) 2 TLRN 99.

[403] CITA s. 9, PITA, s. 2 and 3.

Nigeria throughout the taxing period and a non-Nigerian becomes a Nigerian because he was resident in Nigeria within the period of assessment.

Another importance of residence in tax matters lies on bilateral tax treaties, where it serves as the basis of allocating taxing rights between the two contracting tax jurisdictions, that is, to avoid double taxation.[404] The jurisprudence of residence as basis for determining liability to tax is also important for determining the tie breaker of an individual or a company. This occurs where the laws of two countries regard the same person or company as resident in their respective countries, hence creating the problem of dual residence as in *IRC v. Cadualader*.[405] In this, the tie breaker is where the taxpayer has a permanent home among the two countries. This could be followed as where his usual abode is and finally his nationality.

4.3.2 Factors Establishing Residence

There are factors that guide the courts in determining the residence of a taxpayer among different jurisdictions. They are:

i. Physical Presence

The general principle of taxation is that tax being a compulsory contribution to the state for it to perform its social responsibilities; it is only persons who benefit from the provision of such social amenities that should make the contribution. It is for this reason that physical presence within a given tax jurisdiction brings the taxpayer under that tax jurisdiction because of the simple reason that he enjoys directly the benefits of the social amenities provided by the government. In *Turnbull v. Foster*[406] the court held that absence for a whole year brings United Kingdom residence to an end and that a more positive case is needed to prove its resumption then is required where there has been no full year's absence.

[404] A B Ahmed, *op. cit*. pg. 100.
[405] (1904) STC 101.
[406] (1904) 6 T.C. 206.

ii. Family and Business Ties with the Tax Jurisdiction

The question of family ties is usually an important factor in deciding whether a person has given up residence from a given tax jurisdiction.[407] In *Rogers v. IRC*[408] it was held that a master mariner who had been physically absent from the United Kingdom throughout the year of assessment but who hold a house in which his wife and family lived during his absence was nevertheless resident. In *Brown v. IRC,*[409] it was held that Mr. Brown had four sons living in the United Kingdom, two of them were married and he visited the United Kingdom each year to see "relations", presumably including his sons can ordinarily be said to be resident in the United Kingdom for tax purposes.

Again, related to family ties is business interest, for instance, the existence of a bank account within the tax jurisdiction and membership of a club indicating as both may do, a continuing association with the tax jurisdiction and an intention to return there, serve as very strong factors in leading the tax administrators conclusion that the taxpayer is ordinarily resident within the tax jurisdiction.[410] In *IRC v. Zorab*[411] where Mr. Zorab an Indian civil servant born in India and lived there all his life until 1920 when he retired and had to spend his life travelling and visiting friends. He had no business interests here and had no intention of setting up a permanent home, but he spent five or six months in each year in the United Kingdom. It was held that he was merely a visitor.

iii. Nationality

Nationality is not a strong factor in establishing residence. It is true that residence does not depend on nationality but it nevertheless, a commonsense to tax administrators that where an individual is a citizen, either by birth or has adopted it, he is less likely to abandon his

[407] A B Ahmed, Residence and Permanent Establishment Issues, op cit p. 102.
[408] (1879) I.T.C. 225.
[409] (1926) 11 T.C. 292
[410] A B Ahmed, Residence and Permanent Establishment Issues op. cit pg. 103
[411] (1926) 11 TC 289

residence there than a person who is not a citizen and may therefore reasonably be supposed always to have been a visitor. In *Leven v. IRC*[412] Lord Cave said:

> The most difficult case is that of a wonderer who having no home in any country, spends a part only of his time in hotels in the United Kingdom and the remaining and greater part of his time in hotels in abroad…. If such a man is a foreigner who has never resided in this country there may be great difficulty in holding that he is resident here. But if he is a British subject the commissioners are entitled to take into account all the facts of the case including facts such as those referred to….

Upon the facts of his past and present habits of life, it would be difficult to determine his tax liability.

iv. Past History as to Residence

It is generally accepted that where a taxpayer is a citizen of the tax jurisdiction and his ordinary residence within that jurisdiction, he will be liable to income tax notwithstanding that he is temporarily resident abroad. The only controversy here is that ordinary residence is something different from residence and it is probably easier to be ordinarily resident than merely resident. This was the issue in *Miesegaes v. IRC*[413] where it was held that it is necessary to first determine residence before considering the question of ordinary residence. In *Leven's* case,[414] the taxpayer had retired from business in England and lived for several years in London, having thus been for the whole of his life both resident and ordinary resident in the United Kingdom. For a time after his retirement he had no place of abode in the United Kingdom and lived at hotels either in United Kingdom or abroad. He spent four or

[412] (1928) 13 TC 488 at 506
[413](1957) 37 TC 493.
[414] (supra).

five months in each year in the United Kingdom for the purpose of obtaining medical advice, visiting relatives and the graves of his parents and taking part in certain Jewish religious observances. He was held to have left the United Kingdom on his visit abroad for the purpose of occasional residence only, notwithstanding that they constituted the greater part of the year. The House of Lords held that the Commissioners were correct in taking into account with regard to the years of assessment conduct which occurred subsequently. Lord Summer said:

> Light may be thrown on the purpose with which the first departure from the United Kingdom took place by looking at his proceedings in a series of subsequent years. They go to show method and system and so remove doubt which might be entertained if the years were examined in isolation from one another. The evidence as a whole disclosed that Mr. Levene continued to go to and fro during the years in question, leaving at the beginning of winter and coming back in summer, his home thus remaining as before. He changed his sky but not his home.

From the above, where a taxpayer is temporarily abroad he is to be charged as a person actually residing within the tax jurisdiction upon the whole of his income, whether it arises within the tax jurisdiction or elsewhere.

v. Frequency, Regularity and Duration of Visits

In a situation dealing with residence of those who claimed only to be visitors to the taxing jurisdiction, the regularity and duration for the visits has been a major factor for consideration. In *IRC v. Iysaght*[415] frequency was held to be a very important factor in the case, Mr. Lysaght had worked for many years in a family business in England with his family

[415] (1927) 13 TC 511.

to Ireland where his parents had lived before him and he inherited an estate. He sold his property in England and after 1920 had no definite place of abode there. He remained a non-executive director of the company and made monthly visits to the United Kingdom for the purpose of director's meeting, staying usually for about a week at a time. In all the years of assessment concerned the maximum number of days he had ever spent in any one year in the United Kingdom was 101. On these occasions he stayed in a hotel. It was held, despite the fact that he had no settled residence here and did have one in Ireland and spent such short time here both on each visit and in the aggregate that he was resident and ordinarily resident in the United Kingdom.[416]

4.3.3 Residence under Nigerian Law

The general scheme of the tax system is to tax all incomes arising in Nigeria, no matter to whom it belongs and to tax all residents in Nigeria, no matter where their income arises. The residence of a taxpayer is a paramount consideration and of great importance. In some instances, the taxpayer is only liable if he is not only resident but ordinarily resident[417] or in other instances, domiciled in Nigeria. Citizenship or nationality may also be relevant in certain circumstances. Under the Personal Income Tax Act,[418] relief is available to an individual who ordinarily resides in Nigeria or who in an assessment year, becomes ordinarily resident in Nigeria in connection with any trade, business, profession or vocation carried on by him. The residence of an individual is primarily a question of fact which will be determined by the conduct of the taxpayer in the years both previous and subsequent to the year of assessment in question. Nigeria tax administrators are always guided by these factors

[416] See *Kinloch v IRC* (1929) 14 TC 736.
[417] Personal Income Tax (Amendment) Act 2011, *op. cit* S. 15.
[418] Personal Income Tax (Amendment) Act op. citS.33 (3). Personal relief and children, dependants in the case of an individual (other than a person to whom paragraph (b)(iv) of section 2 (1) of the Act relates) who ordinarily resides in Nigeria, or who at any time during the year of assessment becomes ordinarily resident in Nigeria in connection with any trade, business, profession or vacation carried on by him.

in the consideration of whether a taxpayer is or is not resident within the tax jurisdiction. Such consideration includes:

i. The first in the consideration is the period of physical presence in Nigeria in the year in question;

ii. Whether he was or was not resident in Nigeria in the year of assessment previous to that under consideration;

iii. The regularity or otherwise of his visits in successive years;

iv. The reason for those visits; and,

v. Whether there is a place available for his domestic use in Nigeria during the year in question.

By the provisions of the Personal Income Tax Act[419] tax is normally charged in respect of residence although the income of an employee even though paid abroad can be assessed to Nigeria tax if the employee is resident in Nigeria for more than 183 days in any year of assessment and the profit of non-Nigerian companies are assessed to Nigerian tax to the extent to which they are attributable to any part of their operations carried on inside Nigeria. Section 9(1) of CITA[420] provides:

> Subject to the provisions of this Act; the 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 determining whether or not a person is taxable under the Nigerian laws, it is necessary to determine first when the person becomes or ceases to be resident. Ahmed[421]

[419] *Ibid* s. 3(1).
[420] Companies Income Tax Act chapter C21 Laws of the Federation of Nigeria 2004; s. 9(1).
[421] A B Ahmed, Residence and Permanent Establishment Issues *op. cit* p. 107.

rightly highlighted the established practice of the revenue authorities in Nigeria on tax matters to be in observance of the following principles:

a. A visitor who does not maintain a place of abode in Nigeria and does not make habitual visits to Nigeria is not resident unless he is present for more than six months in all during the tax year.
b. A visitor who maintains a place of abode here in Nigeria is resident for any year in which he pays a visit, however short.
c. A visitor who habitually visits Nigeria for substantial periods becomes a resident, even if he does not maintain a place of abode or spend six months in Nigeria in all in the tax year, and for this purpose visits are treated "habitual" if they have occurred in four or more consecutive years and substantial if they have averaged three months a year.

4.3.4 Taxation of Employment

By the provisions of the Personal Income Tax (Amendment) Act,[422]employment includes any appointment to office, whether public or otherwise for which remuneration is payable for tax purposes, a person in paid employment should be distinguished from another person who is self-employed as an independent contractor. The distinction stated above is somehow muddled up by the Personal Income Tax Act[423] which defines employment as including "any service rendered by any person in return for any gains or profits". This definition does appear to cover independent contractors but in practice they are never taxed as employee. They claim deductible expenses, capital allowances and loss relief, where applicable, before declaring a chargeable profit. In contract, employees are only entitled to some tax-free personal allowances and reimbursement.

[422] Personal Income Tax (Amendment) Act op. cit s. 109.
[423] *Ibid*, s. 3(1)(d).

On corporate residence, subject to the exceptions, a non-resident company can only operate directly in Nigeria through a subsidiary and the subsidiary is legally seen as a separate entity and a Nigerian resident company. The domicile, nationality or residence of a company must be determined for tax purposes since a corporation tax is charged on the profits of a company resident in Nigeria.[424] A Nigerian company is one in which the control and management of its activities are exercised in Nigeria and all other companies fall into the category of non-Nigerian companies. The same principle was arrived at by Lord Lore Burn in *De Beers Consolidated Mines Limited v. Howe*[425] thus:

> …A company resides for the purpose of income tax, where its real business carried on… and the real business is carried on where central management and control actually resides.

This distinction is important in relation to profits, which are deemed to be derived from Nigeria and therefore subject to tax wherever they arise, compared with the profits of a non-Nigerian company which are only deemed to be derived from Nigeria to the extent that they are attributable to some part of the operations of the company carried on within Nigeria.

4.3.5 Permanent Establishment

Permanent establishment is a fixed place of business through which activities of an organization are wholly or partially carried on. It includes place of management, a branch, an office, a factory, a workshop and a mine, oil or gas well, quarry or other places of extraction of natural resources residing in a foreign jurisdiction.[426] There are two types of permanent establishment: a fixed place of business and a dependent agent. In *Offshore – International*

[424] Companies Income Tax Act op. cit s. 10.
[425] (1906) A.C. 445.
[426] As noted in the Conventions (OECD) commentaries at the enterprise must carry on business in the contracting state through a fixed place.

S.A. v FIBR,[427] the plaintiff was a company incorporated in panama and having its principal office in Huston. It entered into several contracts to carry out oil drilling operations for different companies. Each of the contracts contained a clause to the effect that the drilling operations would be sub-contracted to International Drilling Company (Nig) Ltd, a wholly owned subsidiary of the plaintiffs, incorporated in Nigeria. The plaintiff hired out rigs and other equipment to this subsidiary which contracts/agreements were executed outside Nigeria. The plaintiff sought a declaration that they were not liable to pay tax in Nigeria. The declaration was refused on several grounds, the main one being that they entered into contracts to render service in Nigeria. As Omo Ebor J. said:

> The fact that the plaintiffs chose to perform the oil drilling operations in Nigeria through another company simply shows the mode or means by which the plaintiff adopted to honour their obligations under their contract agreements and does not affect the fact that plaintiffs are carrying on trade or business in Nigeria as evidenced by the contracts entered into by the plaintiffs to dig oil wells in Nigeria.

The court held that the plaintiffs were under legal obligation to prepare their returns of income as requested by the defendant. This is because by necessary implications they have a permanent establishment in Nigeria, which brings them under the Nigerian tax jurisdiction. In Nigeria the general principle for the jurisdiction of Nigeria over the profits of a company other than a Nigerian company from any trade or business is fixed base (permanent establishment). The law provides certain conditions under which the profits of a non-resident company would be deemed to be Nigerian-source profits. These are:

i. If it has a fixed base;

[427] (unreported) Suit No FRC/L/36/75 decided on June 7th 1976 by the Federal Revenue Court Lagos.

ii. If it has a dependent agent in Nigeria;

iii. If it operates a turnkey projection in Nigeria; and,

iv. If the transactions between associated members are artificial or fictitious.

It therefore means that where a company is registered outside Nigeria but derives income from Nigeria, such income will be liable to tax in Nigeria.

4.4 Tax Evasion and Avoidance

Tax evasion and avoidance are two different tax terms, though sometimes wrongly used interchangeably as one. They constitute the greatest impediment to revenue generation through taxation.

4.4.1 Tax Evasion

Tax evasion is of serious concern to tax administrators and Nigeria in general on three reasons, it results in a loss of tax revenue, it gives opportunities to evade taxes which impairs the chances of realising the distributional or equity goals of taxation.[428] It also makes honest taxpayers to lose faith in tax administration and be tempted to join the ranks of tax evaders. The Nigerian tax statutes provide no legislative definition of tax evasion except where it is stated that[429]:

> A person who:
>
> (a) participates in or
>
> (b) takes steps with a view to making evasion of the tax by him or any other person, is guilty of an offence and liable on conviction to a fine of N30,000 or two times the amount of the

[428] M T Abdulrazaq, *Nigerian Tax Offences and Penalties,* (Lagos, Princeton & Associate Publishing Co. Ltd, 2014) p. 24; see also Jegede, et al (1988) *Five Billion Naira lost through tax evasion.* The President 31 July vol. 1 No. 3 p. 12.

[429] Value Added Tax Act chapter VI Laws of the Federation of Nigeria, s. 26.

tax being evaded, whichever is greater or to imprisonment for a term not exceeding three years.

Although it would appear that these provisions were made with good intent to deal with tax evasion, it is doubtful if the objective could be attained. The reasons are that three years imprisonment is a waste of life, manpower in a society where productivity is at a very low level and there is a discontent whether our prisons presently are serving as rehabilitation homes. The punishment for evasion should be reconsidered and be reduced as it is clear that the sanctions imposable by the tax authorities do not carry the stigma attached to criminal cases.[430] A taxpayer who is penalized for defaults by the tax authorities is not subject to disabilities attached to a conviction which an accused carries in a criminal case.

The impression or meaning of tax evasion in our tax laws can only be gleaned from the various offences and penalties sections. The offences stated there provide an insight into what may be regarded as tax evasion. Under the Nigerian tax statutes, tax evasion may thus be perpetuated in some of the following ways:

i. failure to make return for income tax or capital gains tax;
ii. failure to make return for corporation tax;
iii. incorrect return or accounts.

The various acts must be done with fraud, wilful default or neglect,[431] and knowingly[432] to constitute the offence of tax evasion. Ayua[433] says tax evasion is usually defined to mean the failure to pay one's tax or the reduction of one's tax liability through illegal or fraudulent returns or failure to make a return or even failure to pay tax on time.

[430]M T Abdulrazaq, *Nigerian Tax Offences and Penalties*, op. cit. p. 79.
[431] Companies Income Tax Act C21 Laws of the Federation of Nigeria 2004 s. 94(1)(b)(iii).
[432] Personal Income Tax (Amendment) op. cit s. 96(1)(b)(iii) Companies Income Tax op. cit S. 94(1)(a).
[433]I A Ayua, Nigerian Tax Law, (Ibadan, Spectrum Law Publishing 1999) p. 245.

The Black's Law Dictionary[434] defines tax evasion as the wilful attempt to defeat or circumvent the tax law in order to illegally reduce ones tax liability. The act of the illegality of paying less in taxes than the law permits; committing fraud in filing or paying tax. The Oxford English Dictionary[435] defines evade as:

> to get away, escape or to escape by contrivance or artifice from (attach, pursuit, adverse designs); to avoid, save oneself from (a threatened evil or inconvenience); to elude (a blow), avoid encountering (an obstacle) or, to contrive to avoid (doing something); to get out of performing (a duty) making (a payment) or to defeat the intention of (a law, stipulation etc. by specious compliance with its letter.

Some related studies[436] have revealed or indicate several reasons likely to be responsible for tax evasion in the country**.** The reasons advocated ranges from social, economic and political to religious. They include excessive corruption on the part of government officials, problems of assessment, collection and enforcement of tax, administrative incompetence on the part of tax authorities; general dishonesty among Nigerians, low political culture, ignorance, unfairness of the tax system, lack of regard for equity, law and justice, historical issues and unpatriotism. Other factors that may affect compliance is belief about the fairness of the tax system, rigidity of enforcement. Put simply, the above variables could be further highlighted as:

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[434] B A Garner (ed), Black's Law Dictionary, (10th ed., U.S.A., Thomson Reuters, 2014) p. 1690.

[435] A S Hornby, Oxford Advanced Learner's Dictionary of Current English, (6th ed., Oxford, Oxford University Press, 2000) p. 396.

[436] O A Philips, A Note on the Determinant of Income Tax Evasion, Nigerian Journal of Public Affairs, October, 1973, P.A. Omoroguiwa, Administrative Problems of Tax Collection and Tax Evasion in Nigeria, paper presented at the seminar and workshop on New Avenues in Tax Collection in Nigeria, University of Jos, O Oladunjoye, Tax Administration. The problems of assessment and collection, paper presented at the National Seminar on Tax Laws and Tax Administration, November, Nigerian Institute of Advanced Legal Studies, J I Obi, Tax Evasion and its Solution. All cited in M T Abdulrazaq Nigerian Tax Offences and Penalties *op. cit* p. 39.

a. Social factors:

The socio-economic factors, no doubt, dominate the lives of the people of the various countries and ought to provide the solid foundation on which the tax legislations are based which will aim at receiving an acceptable degree of voluntary compliance among taxpayers.

i. **Lack of justification for taxpayers' money:** The failure on the part of government to justify the huge sums collected as taxes from Nigerians has been identified as the major factor that encourages tax evasion. There is abysmal failure on the part of government to provide social and other amenities (the principal reason for which taxes are collected). The existing public utilities are epileptic while there is apathy on the part of government to make them functional. The abnormality is captured in the speech of the former chairman of Institute of Chartered Taxation of Nigeria (C.I.T.N.) Foluso Fasoto as cited by Agbonika[437] as follows:

> Generally, nobody would like to pay tax but the belief that government will carry out certain functions with tax proceeds has been convincing many to comply. But those who are against increase in VAT, such as Manufacturers Association and Chamber of Commerce are not doing so for nothing. These are organizations and individual investors who had been made to believe that with the tax proceeds, they would have the facilities which would make them feel comfortable doing business. But you have them installing their own power plants here, having their own borehole and security and perhaps roads to and from their business premises are maintained by them. That is ironic having paid all their taxes.

[437] J A Agbonika, Problems of Personal Income Tax in Nigeria op. cit. p. 298.

The simple indication of the above is that government should live up to expectation in order to encourage and attract maximum compliance to payment of tax.

ii. Inequitable distribution of resources

Infrastructural development and provision of social amenities is usually politicized in Nigeria. Communities that have representatives serving in government benefit from amenities while those that do not have political office holders are benefit of such facilities. The provision of social amenities is based on nepotism rather than equity. This creates tax apathy from communities that feel marginalized. Social services must be extended to rural communities and that the legislature properly oversights the executive arm to ensure that money is applied for what it is voted for.

iii. Inefficient tax administration machinery

As observed earlier, there is no available statistics or records of business or taxable persons who pay or evade taxes. This is due largely to our crude tax administrative system and manual handling of assessment and collection of taxes as against the computerised system in other jurisdictions. It is always very difficult for them to effectively identify individual taxable persons and business for purposes of assessing them to tax.

4.4.2 Tax Avoidance

Tax avoidance and tax planning are used inter-changeably. At times, what the tax authorities call avoidance is referred to by the taxpayers and their consultants as planning.[438] Tax planning does not have any statutory definition. This could be attributable to the fact that it is a scheme and that the legislature does not encourage or contemplate such as a vice to hamper

[438] J A Agbonika, Problems of Personal Income Tax in Nigeria, *op. cit* p. 301.

enforcement of tax obligations. There are however, definitions and meanings proffered by text writers and jurists.

Tax avoidance is the arrangement of a taxpayer's affairs that is intended to reduce his tax liability and although the arrangement could be strictly legal, it is usually in contradiction with the intent of the law it purports to follows.[439]

It is defined as a deliberate arrangement of the taxpayers financial affairs in such a way as to take advantage of the fiscal opportunities presented by relief provisions and/or loopholes in tax legislation.[440] In *IRC v. Willoughby*,[441] Lord Nolan adopted the definition as presented by the counsel to the Inland Revenue who said:

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

In addition, the court held that avoidance is a course or action designed to conflict with or defeat the evident intention of parliament. It is thus understood to mean some acts by which a person so arranges his affairs in such a way that he is liable to pay less tax than he would have paid but for the arrangement. It is the act of winning games without actually cheating, thereby beating the internal revenue and the government to their own game. It is in effect, the act of dodging tax without breaking the law.

In *I.R.C. v. Duke of Westminster*[442] Lord Tomlin held;

> Everyman is entitled, if he can order his affairs so that the attaching under the appropriate acts is less than it otherwise would

[439] OECD, Center for Tax Policy and Administration Glossary of Tax Terms cited in O Oke, Judicial Approach to Tax Avoidance in Tax Law Journal of Nigeria, Lagos, AETA Publishers Nigeria Limited, 2012, p. 75.
[440] A A Olowofoyeku, et al. *Revenue Law: Principles and Practice,* Liverpool: Liverpool Academic Press, 2003 p. 663.
[441] Cited by Lord Hope in *Westmoreland Investments Ltd vs MacNiven* (2001) ALL ER 865 at 889.
[442] (1936) A.C 1 at 19 – 20.

> be. If he succeeds in ordering them so as to secure this result, then however unappreciative, the Commissioner of Inland Revenue or his taxpayers may be of his ingenuity he cannot be compelled to pay an increased tax.

It is the view of Umenweke[443] that tax avoidance is unpatriotic and anti-social. The avoider normally increases and sheds the burden of tax on others, mainly the illiterates in the society. Weatcroft,[444] view listed that tax avoidance is a transaction which:

a. avoids tax
b. is entered into or the same purpose of avoiding tax or adopts some artificial or unusual form for the same purpose;
c. is carried out lawfully and;
d. is not a transaction which the legislature has intended to encourage. In other word, it is the art of winning games without actually cheating.

Tax evasion and avoidance used interchangeably as one have been x-rayed in the above discussion. The fundamental difference between tax evasion and avoidance therefore is that whereas evasion denotes the violation of the law which makes it criminal in nature, tax avoidance does not denote the transgression of the law and may be considered as not offending the law. It is surprising that the tax administrators did not want to exploit the provisions of the law to recover the said tax. In section 17 of Personal Income Tax (Amendment) Act it provided a sufficient anti-avoidance and tax evasion measures. Section 17 PITA provides;

> Where a tax authority is of the opinion that this position is not infact given to or that any transaction which reduces or would

[443] M N Umenweke, *Tax Law and its Implications for Foreign Investments in Nigeria,* (Enugu, Nolix Educational Publications (Nig), 2008) p. 172.
[444] Cited in M N Umenweke, *ibid*.

> reduce the amount of any tax payable is artificial or fictitious, the tax authority may disregard the disposition or direct that such adjustment shall be made as respects the income of individual, an executor or a trustee as the tax authority considers appropriate so as to counteract the reduction of liability to tax affected, reduction or which would otherwise be affected by the transaction.

The provision of subsection 3(b)[445] also deems transactions between related persons, persons who are controlled by another person or between persons, one of whom is controlled by the other as artificial or fictitious. It is clear from the above that more of administrative measures are required to combating tax avoidance and evasion menace. It is also possible, these tax issues of evasion and avoidance will continue since there is existence of many allowances and reliefs in our tax statutes. It is possible that where these allowances and reliefs are consolidated into one allowance, it will help in reducing the incidence of tax avoidance as every taxpayer would be entitled to the consolidated allowance only.

The amendment Act[446] attempted this but created problems. The amendment under section 34 created a consolidated relief allowance; however, section 33 that created other allowances is still part of the law. In failing to delete section 33 it would appear that in addition to the consolidated relief, taxpayers can still rely on the provisions of section 33 to demand further reduction on the amount to be paid. However, the tax authority will maintain that section 34 of the Act[447] has replaced the old 5th schedule with new sixth schedule providing in paragraph one for a consolidated relief allowance of flat rate of N200,000 plus 20% of gross income.[448] The lack of clarity in the provisions of the amended Act has created a different challenge while attempting to resolve one.

[445]Personal Income Tax (Amendment) Act op. cit S. 7(3b).
[446]*Ibid.*
[447]*Ibid.*
[448]*Ibid*, S. 33(1).

A further review and amendment of the provisions of PITA is necessary in order to consolidate all reliefs and allowances into one allowance. This will reduce incidence of tax avoidance as every taxpayer would be entitled to the consolidated allowance only. Furthermore, administrative measures rather than legislative should also be considered.

4.5 Fiscal Federalism Issues

Nigeria, a name given to this geopolitical entity by the colonialists was as a result of the amalgamation of the Southern and Northern Protectorates in 1914. The two protectorates had different political, cultural and religious orientation. At 1960, Nigeria gained her independence from the British imperialists. Nigeria as a nation is running a federal system of government.[449] Section 2(1) & (2) of the 1999 Constitution of the Federal Republic of Nigeria provides:

> Nigeria is one indivisible and indissoluble sovereign state to be known by the name of the Federal Republic of Nigeria. Nigeria shall be a federation consisting of States and a Federal Capital Territory.

The essential feature of federalism is the distribution or allocation of jurisdictional powers between the federal and state governments.[450] It follows therefore that the financial powers of the federation must be distributed between the federal and the state governments under the federal constitution. Nigeria being a federal state and the government's fiscal power is based on a three tier tax structure, that is, the Federal, State and Local Governments each of which has different tax jurisdictions. By this position in Nigeria, it is assumed that the financial powers of the federation will be neatly distributed between the federal and state governments. The taxing power of the respective governments should be independent of each

[449] 1999 Constitution of the Federal Republic of Nigeria as amended, S. 2(1) & (2).
[450] I A Ayua, Nigerian Tax Law, *op. cit* p. 24.

other, to raise financial resources necessary to meet the needs of each government. The matter is not as simple as this might appear to be desirable. Indeed the whole question of the division of financial powers of a federation constitutes an intricate and complex problem.[451] It is simple to put it that Nigerian arrangement and tax system is lopsided.

In terms of revenue assignment, the federal system in Nigeria grants minimal fiscal autonomy to the sub-national governments. While the Federal Government controls all major sources of revenue and taxes, all broad-based taxes such as Company Income Tax, Value Added Tax (VAT), Customs and Excise Duties, Petroleum Profit Tax and Education Tax, the State and Local Governments tax individuals. This limits their ability to raise independent revenue, thereby making them depend solely on allocation from the Federation Account to meet up with their responsibilities.[452] The Federal dominance of the inter-governmental fiscal relations which is not properly controlled had made the states completely dependent financially and thereof generally, upon the central government, thereby denying them of their autonomy in matters that directly concern them. This is not a recipe for political unity particularly in a developing heterogeneous society like Nigeria where there is differential socio-economic development with the central government apparently lacking any definitive policy to bring about even development. In areas of concurrent taxation such as the Personal Income Tax, Capital Gains Tax and Stamp Duties, the Federal government retains legislative power while sharing administrative powers with the states.[453] States impose minor levies such as gambling taxes, motor vehicle license fees and user fees on economic and social services.[454] The local governments on the other hand exercise greater revenue powers than

[451] A Ladipo, *Public Administration,(* London, Longman Publishers, 1984) p. 93.
[452] J A Magbonika and J A Agbonika, "Fiscal Federalism and the Challenges of Administration of Personal Income Tax in Nigeria" in *Topical Issues on Nigeria Tax Laws and Related Areas,* (Ibadan, Ababa Press, 2015) p. 408.
[453] 1999 Constitution of the Federal Republic of Nigeria as amended, second schedule, part II, items 7 and 8.
[454] Taxes and Levies (Approved List for Collection) Act, First Schedule, part II.

the states. They can levy property taxes, rates on radio, television, bicycle, canoe and user charges on utilities like water, sewage and waste disposal.[455]

Under the Nigerian law, section 4(1) of the 1999 Constitution of the Federal Republic of Nigeria as amended, the legislative powers of the Federal Republic of Nigeria shall be vested in the National Assembly of the federation, consisting of both the Senate and House of Representatives. The National Assembly has power to make laws for peace, order and good government of the federation, regarding any matter provided in the Exclusive legislative list shall be to the exclusion of the House of Assembly of the States.[456] It is of a serious concern to the tax revenue administration especially where the legislating federal authority only delegates power of collection to the state authorities. In a federation like Nigeria, states are component parts of the federation and are not answerable to the federal government on the amount collected under the power delegated to it by federal legislation. In Nigeria, there are Federal Government, 36 States, a Federal Capital Territory and 774 Local Governments.[457]

The fiscal arrangement among the different tiers of government in a federal structure is often referred to as Fiscal federalism. Thus, fiscal federalism refers to the allocation of tax-raising powers and responsibilities and expenditure responsibilities between levels of governments.[458] Fiscal federalism concerns the division of public sector functions and finances among different tiers of government. This is the one severe challenge facing the country today dealing with revenue rights and jurisdiction. This has led to agitations for resource control and complete operation of fiscal federalism. It has remained the most dominant and contentious issue in the relationship between the government at the centre and the federating units, within the Nigeria political landscape. In a country with a federal system

[455] *Ibid*, part III, 1999 Constitution op. cit, part II, items 9 and 10.
[456] 1999 Constitution op. cit S. 4(2) & (3).
[457] *Ibid*, S. 2(1), 3(1) and 3(6).
[458] S T Akindele, and M Olaopa, "Fiscal Federalism and Local Government Finance in Nigeria: An Examination of Revenue, Rights and Fiscal Jurisdiction" in *Contemporary Issues in Public Administration,* F Omotoso (ed) (Lagos, Bolabay Publications) p. 46 – 64.

of government, the different levels of government are deemed to be autonomous and should enjoy some level of independence in the area as they have some measure of "sovereign" powers as provided for in the Constitution.

4.6 Delegation of Powers to Collect Taxes in Nigeria

Section 4 of the 1999 Constitution of the Federal Republic of Nigeria as amended addresses the division of taxing powers between the Federal, State and the Local Government Councils. However, where there is a conflict, the law enacted by the federal government prevails.[459] It is therefore the constitutional responsibility of the National Assembly to make laws or amend existing laws as provided in the second schedule to the Constitution. In the Federal taxes, it is specifically stated in item D part II of the Nigerian Constitution, the powers of the State House of Assembly are restricted to collection and administration of certain taxes subject to authorization by the National Assembly.

Item D7 of the concurrent legislative list provides that:

> In the exercise of its powers to impose any tax or duty on –
>
> (a) capital gains, incomes or profits of persons other than companies; and
>
> (b) documents or transactions, by way of stamp duties.
>
> The National Assembly may subject to such conditions as it may prescribe, make, 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.

Item D9 of the Concurrent Legislative List provides that:

[459] 1999 Constitution op. cit S. 4(5).

> A House of Assembly may subject to such conditions as it may prescribe, provide that the collection of any tax or duty or the administration of the law providing for such collection by a local government council.

The consideration of the above provisions by various authors has left one wondering whether the correct interpretation of the provision should be that Federal Government is empowered to delegate functions to the state. Fabura[460] was of the view that items D7 and 8 merely empowered the Federal Government to delegate to the state governments the exercise of an executive function of the collection of the taxes specified therein. The view expresses that the provision does not envisage the delegation of any form of concurrent legislative function to the state. In his own view, Sani[461] considered the issue of delegation using section 2(2) of the Personal Income Tax Act and 4(2) of Stamp Duties Act. Reflecting on the provisions he stated the word "impose" was used rather carelessly in section 2 of the PITA and should be amended immediately. This seems to have been taken care of by S. 2(a) PITA which now substitutes the word "impose" in the marginal note with the word collect. In the opinion of Umenweke[462], the provision of the constitution in this area rather than proffer solution created conflict as he put it thus:

> The provision of the constitution as stated above as it relates to the power to tax by the three levels of government cannot but create conflict. This conflict is more pronounced in the areas of payment of stamp duty, payment for business premises, development levy,

[460]M T Fabura, Analysis of State Taxing Powers in O Akanle (ed) *Tax Law and Administration NIALS* quoted in M T Abdulrazaq, (ed) C.I.T.N. Nigeria Tax Guide and Statues, 1st edition p. 654.

[461] S Abiola, Division of Taxing Powers in M T Abdulrazaq (ed) CITN Nigeria Tax Guide and Statutes, Chartered Institute of Taxation of Nigeria, Lagos, 2002, p. 651.

[462]M N Umenweke, *Tax Law and its Implications for Foreign Investments in Nigeria*, Enugu, Nolix Educational Publications (Nig), 2008 p. 43.

withholding tax, sharing of Value Added Tax (VAT) and capital gains tax.

The Nigerian Constitution provides the powers of the State House of Assembly in relation to imposition of federal, state and local governments' taxes. With regard to federal taxes specifically stated in item D part II of the Nigerian Constitution, the powers of the State Houses of Assembly are restricted to collection and administration of certain taxes subject to authorization by the National Assembly. In the exercise of any such power granted by the National Assembly, the State Houses of Assembly of each of the 36 states are expected to work closely with their respective State Executive councils in exercising their responsibilities for the collection and administration of the taxes. The State Houses of Assembly are required to maintain a liaison with the National Assembly. It is required to facilitate changes in the relevant legislation that will assist the State House of Assembly to effectively discharge its duties.[463]

The issue is whether the State can legally enact laws on the taxation of income of individuals outside the provisions of the Personal Income Tax Act. The next issue being the fact of who owns the tax collected especially since the state in collecting taxes do not act as delegates of the federal government. It is now pertinent to consider the provisions of section 4 and paragraph 7 and 8 of item D wherein the National Assembly is required to make law for the peace, order and good governance of the federation or any part thereof with respect to any matter in the exclusive and concurrent legislative lists.[464] In paragraph 7 of item D[465] the National Assembly in exercising this power to impose capital gains tax, personal income tax and stamp duties; may considering certain conditions provide that the collection of any tax shall be carried out by the government of a state or other authority of the state such as the

[463] S Abiola, Division of Taxing Powers in M T Abdulrazaq (ed) CITN Nigeria Tax Guide and Statutes, Chartered Institute of Taxation of Nigeria, Lagos, 2002, p. 651.

[464] 1999 Constitution op. cit. Second Schedule, parts I & II. Note that by the provisions of section 4(5) of the constitution, the state cannot make a law that is inconsistent with that of the Federal Government.

[465] *Ibid*.

local government. This assertion gives impression of the fact that sates of the federation do not have legislative authority under the Constitution to make laws concerning the income of individuals. The State Houses of Assembly can impose on any individual any legal obligation to pay personal income tax. The obligation of individuals to pay tax on their income and the rate at which the tax shall be paid was created by Personal Income Tax Act, which is a legislation of the National Assembly. Consequently, Personal Income Tax though collected by the State government, is a federal taxation. This is a serious challenge to the administration of tax in Nigeria. This challenge is even now being experienced in our political upheavals of militants in the Niger Delta and Boko Haram in the North, the Independent People of Biafra (IPOB) that are still shaking the togetherness of the country and the long periods of military interregnum. Ayua captured this in his assertion as follows:

> In the history of Nigeria one issue that has touched on many major political/legal controversies at times bordering on violent upheavals is revenue sharing which is a fundamental issue in federalism. The sharing of revenue resources between the states *inter se* is, in the words of Professor Nwabueze, almost like a matter of life and death, exciting their deepest concern and their strongest emotions, hence the intensity of the question concerning it.[466]

The position is that the collection of Personal Income Tax mentioned in item D7 of the Concurrent Legislative list on individuals is the constitutional responsibility of the state government. The Court of Appeal in *LBIR v Motorola Nigeria Ltd & Anor*[467] held that the law is unequivocal that it is the relevant state that can enforce the payment of Personal

[466] I A Ayua, Nigeria: Issues in the 1999 Constitution cited in J A Agbonika, Fiscal Federalism and the Challenges of administration of Personal Income Tax in Nigeria op. cit p. 425.
[467] (2012) LPELR 14712.

Income Tax. It is to be noted that whereas it is the exclusive preserve of the federal government to legislate on imposition of taxes including Personal Income Tax,[468] same cannot be said of collection of taxes where a state has been empowered to collect or administer such taxes, for example, Personal Income Tax. The processes and modalities for such collection fall within the concurrent legislative powers of both the state and the federal government. Suffice it to say that the states have been empowered to collect and administer Personal Income Tax. There are two major positions on the controversy over the ownership of the money collected by the states. The first group is of the view that the Federal government being initiator of the Personal Income Tax Act by the provisions of section 4 of the Constitution owns the money collected under the Personal Income Tax by the states. It can at best give state governments a percentage of the collection pending division of money from the Federation Account.[469]The second group believes that since Personal Income Tax is residence-based and belongs to collecting states even though they were acting as delegates of the Federal government.

In other to resolve the controversy, reference will be made to the provisions of the Constitution and the Personal Income Tax Act. The Constitution provides for two separate consolidated revenue funds one being for the Federation and the other for the States.[470] Section 80(1) of the 1999 Constitution provides that:

> All revenues or other moneys raised or received by the federation (not being revenues or other moneys payable under this constitution or any Act of the National Assembly into any other public fund of the federation established for a specific purpose)

[468] See item 59 of the exclusive legislative list, part I of the second schedule to the constitution of the Federal Republic of Nigeria.
[469] 1999 Constitution op. cit. S. 162.
[470] Ibid, S. 80(1) and 120(1).

> shall be paid into and form one consolidated revenue fund of the federation.

Furthermore, section 120(1) of the Constitution provides that:

> All revenues or other moneys raised or received by a state (not being revenues or other moneys payable under this constitution or any law of a House of Assembly into any other public fund of the state established for a specific purpose) shall be paid into and form one consolidated revenue fund of the state.

The two provisions above created two special accounts for money or funds made and earned by the federal and state governments. While section 80(1) is with respect to the federal government and section 120(1) applies to revenue made by the state government. This consolidated revenue fund is different from the federation account[471] and state joint local government account.[472] The federation account is a special account which all revenues collected by the government of the federation are paid into, except the proceeds from the Personal Income Tax collected by the Federal Inland Revenue Service. The state joint local government account on the other hand is a special account comprising of all allocations to the local government councils of the state from the federation account and from the government of the state are paid into (that is, excluding the proceeds or revenue internally generated by the state).[473]

The fund in the Consolidated Revenue Fund of the federation exclusively belongs to the federation. It is administered by the National Assembly to meet the administrative and other needs of the federal government and its agencies as they deem fit.[474]Fund in

[471] Ibid, S. 162(1).
[472] Ibid, S. 162(6).
[473] Ibid. each state shall maintain special account to be called, "State Joint Local Government Account" into which shall be paid all allocations to the local government councils of the state from the Federation Account and from the government of the state.
[474] Ibid, S. 80 – 87.

Consolidated Revenue Fund of the state belongs to the state and is similarly utilized by the state, under the exclusive appropriation of the State House of Assembly, to meet its needs.[475] Apart from the taxes collected from personnel of the Armed Forces, Nigeria Police, Ministry or Department of Government charged with foreign affairs and the residents of Federal Capital Territory which by operation of sections 80 and 162 of the Constitution go into the Consolidated Revenue Fund of the federation and by implication belongs to the federal government, the rest enter the "Federation Account" and into its final destination which is the Consolidated Revenue Fund of the states. Section 163 of the 1999 Constitution was apt and it stated;

> Where under an Act of the National Assembly, a tax or duty is imposed in respect of any of the items listed in item D part II of the second schedule to this Constitution (that is, to say incomes or profits from persons other than Companies/Personal Income Tax, etc) the net proceeds of such tax shall be distributed amongst states on the bases of derivation and accordingly:
>
> (a) where such tax or duty is collected by the government of a state or other authority of the state, the net proceeds shall be treated as part of the Consolidated Revenue Fund of that state.
>
> (b) Where such tax or duty is collected by the government of the federation or other authority of the federation, there shall be paid to each state at such time the National Assembly may prescribe a sum equal to the proportion of the net proceeds of such tax or duty that are derived from the state.

[475] Ibid, S. 120 – 127.

It is our view that proceeding from the above provisions of the Constitution, it could be seen that the Federal Government is not a beneficiary of the Personal Income Tax collected by the State government. This is so as from the combined reading of the provisions of the Constitution, the tax collected by the state government shall be paid into the Consolidated Revenue Fund of the state and used for the benefit of the state.[476]

4.7 Corruption by Tax Officials

This challenge to effective tax revenue generation cannot be over-emphasized. The high level of corruption manifest in extortion, bribery, compromise and expropriation of tax revenue is seen among tax officials. This is occasioned by lack of effective monitoring mechanism, lack of motivation of tax officials and a general apathy by tax administrators.[477] The other view is the near neglect by government since tax is notoriously barren in terms of revenue. Huge revenue loss is occasioned by the government as a result of the corrupt attitude of tax officials.[478]Adebowale quoting the Transparency International Corruption Barometer in 2005 list of the tax authorities constituting the gravest cause of concern among government institutions said:[479]

> If the tax collection apparatus is inefficient, incompetent and corrupt, it is a strong disincentive for potential taxpayers. It is therefore, imperative that the tax administrator's skills are sharpened to keep pace with the needs of a constantly changing business environment.

[476] See section 120(2) of the 1999 Constitution which provides that "No money shall be withdrawn from the Consolidated Revenue Fund of the state except to meet expenditure that is charged upon the fund by this constitution or where the issue of those moneys has been authorised by an Appropriation Law, Supplementary Appropriation Law or law passed in pursuance of section 121 of this constitution.

[477] J A Agbonika, *Problems of Personal Income Tax in Nigeria*, op. cit p. 271.

[478] *Ibid.*

[479] H E Adebowale, Taxation in Nigeria; Issues and Challenges in *Tax Law Journal of Nigeria,* Ukpebor, M (ed), (AETA Publishers Nigeria Ltd, 2012) p. 160.

When revenue collectors turn out to be the major actors in the depletion of state revenue, the state becomes helpless. There is need to devise means of curbing or reducing significantly, the incidence of corruption among its revenue personnel. There is an efficient system of collection of tax as the officers only issue assessments which the taxpayers pay at designated banks which is in vogue in many states internal service. This helps in the computerization of the tax system, a well-managed and a systemic electronic data management which is another antidote to corruption. The Lagos and Delta State Governments have recently launched the e-tax payment system. In Lagos State the electronic Tax Clearance Certificate has since been launched to replace the corrupt-ridden paper receipts.[480] This laudable initiative as it has not only ensured prompt assessment, payment and documentation of tax, it will also computerise data of taxpayers and therefore make verification and updating better.

It is however true to suggest that this system is very expensive and may encounter some problems with implementation given the level of literacy among our people. It is however true to suggest that this system is very expensive and may encounter some problems with implementation given the level of literacy among our people. It is however good for the formal sector, where it will be very effective and the cost of establishing the system which could be beneficial in the long run. The Federal Inland Revenue Service (FIRS) in a bid to expand the tax net, has introduced the e-taxing system to all states through the zonal offices. Since the introduction, the FIRS has consistently exceed government revenue targets.[481] The cumulative collection by the Federal Inland Revenue Service for the eight year period between 1996 and 2003 amounted to 2.682 trillion naira. Then on the introduction of e-

[480] The COMET SUN, February 25, 2005, front page.

[481] B Sani, The Journey So Far, Abuja, ESOJAY Digital Ltd, 2012, p. 34maintained that the record of annual revenue collected from January to September 1997 a total of N131 billion, N99.4 billion in 1998, N171 billion in 1999, N455 billion in 2000, N587 billion in 2001, N434 billion in 2002, N698 billion in 2003, N1 trillion in 2004, N1.8 trillion in 2005, N2 trillion in 2006, N1.8 trillion in 2007, N2.9 trillion in 2008, N2.2 trillion in 2009, N2.8 trillion in 2010 and N4.77 trillion in 2011.

payment and other reforms just for the year 2008 alone, the collection figure was 2.972 trillion naira which was over and above the collection for the preceding eight years put together. All payments by taxpayers are made directly into the accounts set up by the office of the Accountant General of the Federation. Once the tax liability is established, the taxpayer proceeds to any of the collecting banks and fills a teller indicating the appropriate tax-type and pays into the relevant account. The bank issues the taxpayer with an electronic ticket as evidence of posting and the payment is reflected on the web portal within 24 hours.[482]

The only observation by this work is that despite the trillions of naira recorded by the Federal Inland Revenue Service, government of the federation could not provide social and other amenities for Nigerians. In fact, the government has failed to live up to expectation despite the tax proceeds. This is a disincentive to tax payers.

4.8 Political Interference

Tax authorities in Nigeria are all parastatals of government. The Federal Inland Revenue Service and State Board of Internal Revenue (SBIR) or the State Internal Revenue Service (SIRS) were not self-accounting. They relied on the budgets of their supervising ministries for logistics and all costs. Consequently, all emergency expenditure required for tax collection must of necessity be channelled to the supervising ministry if it was not initially contained in the budget. The controversy of going cap in hand to beg for money has been cured by the long awaited autonomy which was granted to the Federal Inland Revenue Service and it now maintains a corporate status.[483] Section 1 of the Federal Inland Revenue Service (establishment) Act provides:

[482] I O Okauru (ed) *FIRS Handbook on Reforms in the Tax System (2004 – 2011)* Ibadan, Safari Books Ltd, 2012, p. 49.

[483] Federal Inland Revenue Service (Establishment) Act, 2007, S. 1(1), (2) & (3).

(1) There is established a body to be known as the Federal Inland Revenue Service (in this Act referred to as "the service).

(2) The service –

(a) shall be a body corporate with perpetual succession and a common seal;

(b) may sue or be sued in its corporate name and;

(c) may acquire, hold or dispose of any property, movable or immovable for the purpose of carrying out any of its functions under this Act.

(3) The service shall have such powers and duties as are conferred on this Act or by any other enactment or law on such matters on which the National Assembly has power to make law.

The State Board of Internal Revenue have also acquired the same status.[484] Accordingly, laws[485] enacted in consonance with the provisions of this Act, provided the autonomy in line with the provisions of the Act. The section 87 of the Personal Income Tax (Amendment) Act provides thus:

> There is hereby established for each state, a board to be known as the State Board of Internal Revenue (in this Act referred to as the "State Board") whose operational arm shall be known as the State Internal Revenue Service (in this Act referred to as "the State Service").

It is in compliance with the above provisions that states enacted revenue laws creating the body to manage and superintend the collection of the various taxes in a state. An example,

[484] Personal Income Tax (Amendment) Act, 2011 S. 87.
[485] Anambra State Revenue Administration Law, 2010, S. 3 as an example.

is the enactment of Anambra State Revenue Administration Law 2010. Section 3 of the law provides:

> (1) There is established a Board to be known as the Anambra State Board of Internal Revenue (referred to in this law as "the Board") whose operational arm shall be known as the Anambra State Internal Revenue Service (referred to in this law as "the State Internal Revenue Service").
>
> (2) The Board;
>
> (a) shall be a body corporate with perpetual succession and common seal.
>
> (b) may sue or be sued in its own name; and
>
> (c) may acquire, hold and dispose of any property or interest in property, movable or immovable for the purpose of carrying out its functions under this law.
>
> (3) The Board shall have such power and duties as are conferred on it by this law or by any other law.

In section 88(1) of the Personal Income Tax Act, it provides that the State Board shall be responsible for doing all such things as may be deemed necessary and expedient for the assessment and collection of the tax and shall account for all amounts so collected in a manner to be prescribed by the commissioner. In order to consolidate the autonomy granted to the outfit, the Act[486] provides:

> Provided that an amount of not less than 5 percent of revenue collected as may be approved by a State House of Assembly shall

[486] Personal Income Tax (Amendment) Act the proviso to section 88(1)(b).

be retained by the State Board of Internal Revenue to defray cost of collection and administration.

Section 15(a) of Anambra State Revenue Administration Law, 2010 provides that an amount not less than 2.5% and not more than 10% of all revenue collected by the State Internal Revenue Service in the preceding year as may be appropriated by the State House of Assembly as administrative charge or cost of collection. The provisions above stipulates that the FIRS can now defend their budget at the National Assembly and State Boards can now defend their budgets at the State Houses of Assembly. The percentage of the realized tax revenue for administrative financing allowed to be kept by the Board. This has removed the problem of lack of administrative finance. It would also encourage the tax authorities to realise substantial tax so that they can retain their statutory share for efficient administration.

Despite this autonomy, there is still the supervising authority to these agencies, that is, Minister of Finance and Commissioner for Finance of the States. Their interference follows the reasoning that the legislature being too much pressured by time cannot consider all the details of the legislation, that the legislation may be too technical for effective handling on the floor of the National Assembly. It is sometimes argued that a matter like tax issues may require some measure of flexibility so as to take care of future contingencies and unforeseen supervening developments in the execution of government policy.[487]The problem is where to draw the line and where the principles are undistinguishable from the details. The then Minister of Finance pursuant to the provisions of section 38(a) of the Value Added Tax Act of 1993 in a gazette gave notice of increase in the Value Added Tax rate from 5% to 10% and other new tax related regulations. The provisions of section 38(a) states that the minister may by order published in a gazette amend the rate of tax chargeable. It goes further to state in

[487]M T Abdulrazaq, "An Examination of the Powers of the Minister of Finance to increase the tax rate under the Value Added Tax (Amendment) Act of 2007" in J A Agbonika (ed) *Topical Issues on Nigerian Tax Laws and Related Areas op. cit* p. 1.

section 38(b), amend, vary or modify the list set out in the first schedule to this Act. This provision did not in any way or by any means empower the Minister of Finance to amend the rate of tax from 5% as stated by virtue of the Decree No. 31 of 1996.

Another area of concern about the political interference is on indiscriminate grant of Tax Holidays and incentives. Nigeria is one of the few countries in the world where it is fashionable to evade taxes and one factor that is largely responsible for this is the lack of coordination among relevant ministries, agencies and departments. Osemene commenting on tax waivers and exemptions disclosures by the Minister that about 30 percent of those that received tax waivers from government, especially under the pioneer status scheme now abuse the system, said:

> Instead of encouraging tourism, agriculture and other sectors to boost Foreign Direct Investment (FDI), focus has rather been on granting indiscriminate incentives and tax holidays to foreign investors.[488]

Nigeria economy will not grow where the business operators who are the major contributors are groaning and tax issues are left in the hands of politicians to use as a tool for overburdening the people or use it in pacifying their kit and kins.

4.9 Delegating Tax Administration and Collection to Tax Consultants and Agents

The use of consultants in tax administration gained traction during the military era. Nigeria law provides a statutory role for professional bodies in the tax system. In this regard, the National Tax Policy provided insight in the reason behind their role as:

> Tax consultants and practitioners are also key stakeholders in the tax system, who are expected to use their skill and expertise to

[488] E N Osemene, "Taxation in Nigeria – case studies" in United Nations Conference on Trade and Development (UNCTAD) Tax Incentives and Foreign Direct Investment, A Global Survey", (2000) NO ASIT Advisory Studies at 56 – 57.

> simplify the tax compliance process, properly advice taxpayers on compliance requirements and also provide necessary insight and assistance to tax authorities. It is expected that tax practitioners and consultants shall discharge their duties with integrity and patriotism at all times and shall not be party to wilful or negligent non-compliance with tax laws.

By the provisions, the tax professionals are expected to partner with tax authority and other stakeholders to enhance the effectiveness and efficiency of the tax system and ensure that they open and maintain effective communication lines with tax authorities at all times. In the interpretation of "tax authority" the Taxes and Levies Act[489] means:

> (a) the Federal Board of Inland Revenue (Federal Inland Revenue Service), the State Board of Internal Revenue or the local government revenue committee; or
>
> (b) a ministry, government department or any other government body charged with responsibility for assessing or collecting the particular tax.

However, in a sharp contrast with other tax laws; the Taxes and Levies Act[490] provides:

> Notwithstanding anything contained in the constitution of the Federal Republic of Nigeria 1979 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.

[489] Taxes and Levies (Approved list for collection) Act, S. 4.
[490] Ibid, S. 2(1).

It is worthy to comment that the expression or wordings of this provision of the Act is contrary to the provision of the constitution itself. An act of the National Assembly cannot be used to amend the Constitution.[491] The Constitution provides that if any other law is inconsistent with the provision of the Constitution, the Constitution shall prevail and that other law shall to the extent of the inconsistency be void.[492] The National Assembly should be blamed for not amending this provision of an Act[493] made during the military era at the commencement of democratic rule in 1999. It is to be mentioned that the law expressly prohibits the assessment and collection of tax by any person or body on behalf of government. Again, to cap it up, the Act[494] makes it an offence for any other person except the specified tier of government to collect taxes and levies. It out-laws delegation of the duties of tax collection by government to consultants and agents. The section provides:

> A person who;
>
> (a) collects or levies any tax or levy; or
>
> (b) mounts a road block or causes a road block to be mounted for the purposes of collecting any tax or levy in contravention of section of this Act is guilty of an offence and liable on conviction to a fine of N50,000 or imprisonment for three years or to both such fine and imprisonment.

In line with the above provision, the FIRS Act[495] provides:

> The service may appoint and employ such consultants, including tax consultants or accountants and agents to transact any business or do any act required to be transacted or done in the execution of its functions under this Act provided that such consultants shall not

[491] 1999 Constitution op. cit. S. 1(1) & (3).
[492] Ibid, S. 1(3).
[493] Taxes and Levies (Approved list for collection) Act.
[494] Ibid, S. 3.
[495] Federal Inland Revenue Service (Establishment) Act 2007, S. 12(4).

carry out duties of assessing and collecting tax or routine responsibilities of tax officials.

The above provision is in tandem with the powers granted to the Service by the Act[496] to undertake exchange of personnel or other experts with complementary agencies for purposes of comparative experience and capacity building. It is however, noted that contrary to the above provision the Personal Income Tax Act[497] provides:

> Subject to subsection (4) of this section, the Board may, by notice in the gazette or in writing; authorise any person to
>
> (a) perform or exercise on behalf of the State Board, any function, duty or power conferred on the State Board; and
>
> (b) receive any notice or other document to be given or delivered to or in consequence of this Act and any subsidiary legislation made under it.

The Act[498] in contradistinction to the above provisions said that notwithstanding the provisions of subsection (3) of this section, 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 and 104 of the Act to any person. The import of section 88(3) and (4) of the PITA 2011 is to apparently delegitimize the delegation of the powers of the State Board of Internal Revenue.[499] It is clear from the state of the law presently that no tax authority or tier of government conferred with power, duty and function of assessment and collection of taxes can delegate this power and function to any other person or body. The only slight exception is the provisions that allowed the tax authority[500] to by a directive in writing addressed to an employer or be published in the state gazette. The Board shall specify the emolument of an

[496] Ibid, S. 8(1)(j).
[497] Personal Income Tax (Amendment) Act, 2011 S. 88, 1(3).
[498] Ibid S. 88(4).
[499] M N Umenweke, Tax Law and its Implications for Foreign Investments in Nigeria, op. cit p. 73.
[500] Personal Income Tax op. cit. S. 81(5).

employee or class of employees to which it refers and the amount or amounts of income tax to be deducted, whether by reference to tax tables issued by the relevant tax authority or otherwise. This provision did not offend the provisions of the law prohibiting the use of consultants and agents. It is to be noted that despite the provisions of the law, once taxes are assessed and they are not paid on time, they become overdue, thereby occasioning huge revenue loss to government. Most State Boards resort to the use of tax consultants for tax collections which is generally frowned at by the law. The proponents of the practice argue that the use of consultants results to higher yields in tax revenue for the government. It must however be pointed out that this argument cannot be right as the use of consultants in carrying out assessment and collection is illegal.

The function of assessment, collection and accounting for revenues which form the core of tax administration are assigned by law to the tax authorities. They include, Federal Inland Revenue Service at the Federal level; State Boards of Internal Revenue Service at the State level and Local Government Revenue Committees at the local government level. It is beyond doubt that issue of tax administration is a legal duty, the power of taxation is an index of sovereignty and the government as the custodian of the sovereign status must not cede it to another party. In *IBL v MILAD, Osun State*,[501] the court determining the validity of the state governor's delegation of the functions of the State Board of Internal Revenue, considered the provision of section 85A and 85B of PITA; 1993[502] and said:

> The words used in the subsection are, there is hereby established for each State Board to be known as the State Board of Internal Revenue.[503] It is clear from the word used that the process of establishing the Board has already been completed by means of the

[501] (2000) 1 NRLR 86, 107.
[502] Now Personal Income Tax (Amendment) Act, S. 87(1) and 88(1)(3).
[503] Personal Income Tax Act 1993, S. 87 (now Personal Income Tax (Amendment) Act, S. 87(1).

> Decree and there is no other role to be played by the Military Administration or any other person, for that matter, in this respect. It is therefore, understandable that the word "shall" was not used in this subsection because there was no need for it. The Military Administration therefore has no discretion whatsoever as to whether to establish the Board or not, as was submitted by the learned counsel for the defendants because the board has already been established…

The court further analysing the statutory provisions said that it is clear from the provisions of the Edict No. 2 of 1997 that the Agency established under section 3 has been made under section 5(e) and (f) to take over and perform the functions of the State Board of Internal Revenue as provided for under sections 85A and 85B of Decree No. 4 of 1993. Mr. Sanni insisted that the Military Administrator could delegate these functions to any other body. He did not refer to the provisions of the Decree which support his submissions. The functions enumerated in section 85B(1) of the Decree have been exclusively vested in the Board. One is reinforced in this view by the provisions of section 85B(2) which state that the Board shall be autonomous in the day-to-day running of the technical, professional and administrative affairs of the State Service.[504] It is therefore difficult to see how the military administrator could validly purport to delegate the functions which are not vested in him. As the saying goes *"Nemod at quod non habet".* Nobody can give out what he does not have.[505]

The import of the decision is that it is illegal for Governors and local Government Chairman to set up another body other than the tax authority to perform the functions of the State Board. In *Government of Akwa-Ibom State v. Udofia*[506] the plaintiff took out an

[504] Personal Income Tax Act 1993, S. 88(2) (now Personal Income Tax (Amendment) Act 2011, S. 88(2).
[505] See also *Multi-purpose Ventures Ltd v. Ag. Rivers State* (1997) 1 NRLR p. 122.
[506] (2012) All FWLR (pt. 627) 794 @ 801 – 806 .

originating summons seeking determination relying on the provisions of sections 1(1) and 2(1) of the Taxes and Levies (Approved List for Collection) Act, Laws of the Federation of Nigeria, 2004. The Government of Akwa-Ibom State is entitled to engage the services of consultants to collect the revenue accruing to her. The defendant, Government of Akwa-Ibom in a preliminary objection challenged the *locus standi* of the plaintiff to maintain the action. The preliminary objection was however dismissed. Aggrieved by the decision, the defendant appealed to the Court of Appeal. The Court of Appeal considered the following statutes:

Section 2(1) of the Taxes and Levies Act[507] which provides;

> Notwithstanding anything contained in the constitution of the Federal Republic of Nigeria, 1979, as amended or in any other enactment or law, no person, other than the appropriate tax authority, shall access 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.

Again, item 9D of part II to the CFRN 1999 as amended provides[508] thus:

> 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.

The court held further: thus;

> …the deponent has missed the essence of the complaint in bringing the suit is not about the obligor paying commission to the

[507] Taxes and Levies (Approved list for collection) Act, Cap. T2, Vol. 14 Laws of the Federation of Nigeria 2004, S. 2(1).

[508] 1999 Constitution op. cit. Second Schedule, part II, item 9D.

> consultants but rather that there is no justification for deducting a huge amount of revenue which accrues to the Sate as commission to the consultants for work not done. Since the Board of Internal Revenue has admitted the arrangement of paying the consultants for the work it has engaged the consultants; it is incumbent on the board to make a full disclosure of the amount involved and not to be dodgy about it since it is an item of public expenditure.

This case restated the law and also encouraged the citizens of this country to rise to the challenges of the time when the policy of a government is illegal. The joint tax board should rise up to the challenges and make the states to jettison the use of tax consultants. Governments should rather invest in human capacity building, technology and other platforms that are necessary to modernize tax administration and enhance the overall capacity of the States' Boards of deliver on their mandates.

4.10 Conflicts in Tax Collections

The scope of Taxes and Levies collectible by each level of government is another serious challenges of tax administration and collection in Nigeria. In addition to the above mentioned issues is the prevalence of the authorities at the state and local government levels imposing taxes and levies in contravention of the law. It is important to point out that a few taxpayers have successfully challenged some of the illegal taxes and these activities of the authorities in the court.[509] A review of the cases however shows that most of the challenges have been against State and Local government even though the Federal government is not free from

[509] *Attorney-General of Lagos State v. Eko Hotels Ltd &Anor* (2009) 1 TLRN 198; *Lagos State Board of Internal Revenue v. Nigerian Bottling Co. Ltd &Anor* (2009) 1 TLRN 294; *Mobil Producing Nigeria Unlimited v. Tai Local Government Council & 2 Ors* (2004) 10 CLRN 100; *Eti-Osa Local Government v. Mr. Rufus Jegede* (2007) 2 NWLR (pt 1043) 537 and *Mama Cass Restaurant Ltd &Ors v Federal Board of Internal Revenue &Anor* (2010) 2 TLRN 98.

blame in this regard.[510] Notwithstanding that some of such taxes imposed have been declared to be null and void. The practice is to leave the particular taxpayer who had gone to court and continue to enforce the tax against others. The people who contravene the law, argue that a revenue law cannot be arrested or put in abeyance at the instance of one or a few aggrieved taxpayers to the detriment of the public treasury.

4.10.1 The Federal, State and Local Government Tax Authorities Power Struggle

4.10.1.1 Federal Government and State Government

There has been a latent war between the Federal Government and the state governments on which of the tiers of government has the power to impose consumption tax. Consumption taxes come in different names. It may be called sales taxes or value added taxes.[511] By virtue of section 4(2) of the 1999 constitution, the National Assembly has exclusive legislative powers to make laws with respect to any matter contained in the Exclusive Legislative list. The Houses of Assembly of the state have no jurisdictions to make laws on any matters contained in the Exclusive List.[512] The scope of the legislative powers of the Houses of Assembly of States in Nigeria is provided in section 4(7) of the Constitution. It does appear that section 4(7) by necessary implication, vests residual legislative powers in the Houses of Assembly of the States.[513] This means that the National Assembly cannot make laws on residual matters,[514] since its legislative competence is limited to those matters on which it is expressly empowered to make laws by the Constitution.[515] Item 59 of the Exclusive

[510]National Inland Waterways Authority v. SPDC (2005) 8 CLRN 150.

[511]M N Umenweke "The Power to Impose and Collect Consumption Tax in Nigeria – *Attorney-General of Lagos State vEko Hotels Ltd &Anor* (2008) All FWLR (pt. 398) 235 Revisited, *Tax Law Journal of Nigeria,* 2012, Vol. 1 p. 120.

[512] 1999 Constitution op. cit. S. 4(3).

[513]*Attorney-General of Ogun State v Aberuagba* (1985) 1 NWLR (pt. 3) 395 @ 405. By residual legislative powers… is meant what was left after the matters in the exclusive and concurrent legislative lists 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 – per Bello JSC (as he then was).

[514]*Attorney-General of Ogun State v. Aberuagba* (supra).

[515]*Doherty v. Balewa* (1961) 1 ALL NLR 604 @ 608; Okeke L.O. The VAT Decree and the Nigeria Constitution *MPJFILI* vol. 5 No. 2001 p. 289.

Legislative List imposes on the National Assembly powers to legislate on taxation of income, profits and capital gains. It does not expressly include taxation of consumption. With respect to the concurrent legislative list, the only taxation matter therein is listed as item D (on collection of taxes). The scope of the legislative list, power of the National Assembly, in this respect, is provided in paragraphs 7 and 8, item D of the concurrent legislative list. The said paragraphs 7 and 8 of item D and the entire Concurrent legislative list are silent on taxation of consumption.

There is no express provision in the Constitution (including the legislative lists) empowering the National Assembly to make laws imposing Value Added Tax. The National Assembly relied on the incidental powers to the provisions in item 62(a) of the Exclusive Legislative List, under which the National Assembly has exclusive powers to make the laws on Trade and Commerce. It is in particular on trade and commerce between Nigeria and other countries, including import of commodities into and export of commodities from Nigeria. The omnibus provision in item 68 of the list provides that National Assembly has exclusive powers to make laws on any matter incidental or supplementary to any matter mentioned elsewhere in the list. The issue presently is whether Value Added Tax is an incidental or supplementary matter to the subject of item 62. In other words, does the National Assembly have implied powers under item 62 of the Exclusive Legislative List to impose Value Added Tax? The constitutionality of the Sales Tax Law[516] of States was the subject of landmark cases. In *Attorney General, Ogun State v. Aberuagba*[517] the Supreme Court was invited to decide the validity or otherwise of the Sales Tax Law of Ogun State which provided in section 3(1) that a tax to be known as sales tax, shall be charged in accordance with the

[516] The Sales tax was a tax on consumption as contained in *Ag. Ogun State v. Aberuagba* (supra) part 431 per Irikefe, JSC (as he then was). VAT is a replacement of the Sales Tax. The validity of the Sales Tax Decree was indisputable because it was enacted by erstwhile Federal Military Government in the exercise of its omnibus powers to make laws on any matter whatsoever. Section 2(1) constitution (suspension and modification) Decree 1984.

[517] Supra. The court was influenced by case laws from other jurisdiction; *Nippert v. City of Richmond* 32 US 416.

provisions of the law on all taxable products brought into the state and on supply of goods and services in any inn not exempted from the requirement of registration under the law at the rate specified opposite each class of goods or service in the first schedule to the law.

While invalidating the provision, the Supreme Court held:

> Now, section 3(1) of the law imposes sales tax on products brought into Ogun State since the sales tax is only chargeable on the products brought into Ogun State from another state or from outside Nigeria, it follows that the tax is a discriminatory tax directed against inter-state or international trade and commerce which are within the exclusive regulatory power of the federation under item (a).
>
> Accordingly, I hold that, in so far as the law purports to impose sales tax on taxable products brought into the state, it offends the provision of inter-state or international trade and commerce and contravenes section 4(3) of the constitution. I declare the law unconstitutional to that extent.

The *Aberuagba* case was applied in *Nigeria Soft Drinks Company Ltd v. Attorney General of Lagos State,*[518] where the Court of Appeal considered the constitutionality of the Sales Tax Law of Lagos State. Sections 1 and 2 of the law provided:

1. As from the commencement of this law a tax to be called hereinafter in this law as "sales tax" shall be charged in the state subject to and in accordance with the provisions of this law on all chargeable commodities listed in the first column of the schedule.

[518] (1987) 2 NWLR (pt. 57) 444.

2. Every purchaser or consumer of any of the chargeable commodities listed in the schedule shall be liable to pay sales tax at the time of the purchase or at the consumption.

In declaring the provisions constitutional and distinguishing them from those of Ogun State, the court held;

> The Sales Tax law of Ogun State was invalid under section 3(1) and 3(4)(ii) because according to Bello JSC, the Sales Tax under the said two sub-sections is unconstitutional, null and void because the law imposed the tax on taxable products brought into the state which is a matter of inter-state trade and commence which is within the exclusive legislative power of the federation. It has been contended by the appellant that purchases made in Lagos State by persons who are residents of another states, for retail or disposition to consumers in another state is also interference within the provisions of trade and commerce per state. The arguments to my mind, misunderstand the nature of what the sales tax is about…

The next issue is that the National Assembly has legislated and enacted Value Added Tax Act[519] which the Taxes and Levies Act mandates it the power to collect the tax solely. This issue was laid to rest in a considered decision of the Court of Appeal in *Attorney-General of Lagos State v. Eko Hotels Ltd*[520] wherein the respondent (Eko Hotels Ltd) as plaintiff in the Federal High Court by originating summons sought for a determination whether it was supposed to remit money collected on tax on its sales to its customers to the Federal Board of Inland Revenue Service or the Lagos State Government. The action was in

[519] In line with the provisions of Taxes and Levies (Approved List for Collection) Act, Cap T2 Laws of the Federation of Nigeria, 2004.

[520] (2008) All FWLR (pt. 398) 235.

view of the provisions of the Value Added Tax Decree No. 12 of 1993, Sales Tax Law Cap 175 and Sales Tax (Schedule Amendment) order, 2000 among other reliefs the two laws on the same item existing at the same time. The court insisted that the plaintiff (Eko Hotels Ltd) should pay taxes to the 1st and 2nd respondents. The researcher is of the new that where Value Added Tax is paid to Federal Inland Revenue Service and Sales Tax to Lagos State Government respectively, that would amount to double taxation.

The court voided the Sales Tax Law of Lagos State for being inconsistent with the Value Added Tax and the Taxes and Levies (Approved list for collection) Act.

b. State and Local Government

State governments and local governments are still immersed in the tussle of who should collect which tax or the other. This has continued despite that the taxes collectable by each tier of government as stated in the Taxes and Levis (Approved list for collection) Act has not changed. In *Multi-Purpose Ventures Ltd & 57 Ors v. Attorney-General of Rivers State & 3 Ors*[521] the plaintiffs, companies operating in Rivers State, applied to court for declaratory reliefs among others that;

> The Government of Rivers State has no right, power or authority to impose taxation on income or properties of the plaintiffs or any other company operating in Rivers State… that the Property Tax Edict No. 1 of 1995 purportedly promulgated by the government of Rivers State is unconstitutional and of no effect whatsoever…

On the objection of the defendant challenging the jurisdiction of court to entertain the suit and same was struck off on the grounds that section 5 of the Constitution (Suspension

[521] (1997) 9 NWLR (pt. 522) 642.

and Modification) Decree No 107 of 1993 contains an ouster clause. On appeal to the court of Appeal, the Court unanimously allowed the appeal. The court held:

> A challenge of the competence must not be considered on the face value only of the word challenged but from broader and more general perspective of validity. A High Court has jurisdiction to entertain the validity of an Edict on the ground of conflict or inconsistency with the provisions of a Decree or the unsuspended parts of the 1979 Constitution thereby a challenge of competence may actually extend to such an exercise, therefore, it cannot be said that a High Court lacks jurisdiction.

The matter was immediately sent back to the Federal High Court for retrial and an order of expeditious and accelerated hearing made by the court. This decision is commended as it set a pace for other decisions of an attempt by the military to emasculate the judiciary. Another case that deserves commendation is the *Guardian Newspapers Ltd v. A.G. Federation*[522] wherein the Court of Appeal among others said;

> …Military Government is not above the law, it has been established. Until such law is abolished or repealed, it must abide by it. That is part of the Rule of Law. It must therefore, conduct its affairs according to the laid down law. That will bring certainty and order…

In *Knight, Frank &Rutley v. A.G. Kano State*[523] the matter was whether the State Government had concurrent competence with local government councils on property assessments designed eventually to lead to rate collections. The Kano State Government signed a contract with two firms of accountants. The agreement was retrospective to cover

[522] (1995) 5 NWLR (pt. 398) 703 @ 735.
[523] (1998) 7 NWLR (pt. 556) 1 – 37.

from 1980 and required these accountants to provide consultancy and training services for the evaluation of specified tenements in and around Kano metropolis. Before the arbitrator appointed in accordance with the contract arbitration clause could act, the Kano State Government went to State High Court to nullify the appointment and set aside on grounds of invalidity of the consultancy agreement. The trial judge, Saka Yusuf held that by virtue of section 7(5) and the fourth schedule to the 1979 Constitution[524] and the provisions of the 1977 Local Government Edict of Kano State[525] that it was only the local government authorities that could execute the sort of contract that state government had in this case entered into. On appeal to Court of Appeal, the Court unanimously affirmed the decision of the trial court. On further appeal to the Supreme Court, while upholding the views of the two lower courts; the Supreme Court held that the functions assigned by the 1979 Constitution to the Local Government Councils in the fourth schedule were functions only the local government could perform.

The court further held:

> …since rating and assessment of private houses or tenements for the purpose of levying of rates was one of the said local government council functions both in the Constitution and under Kano State Legislation, the present agreement by which the State Government contracted the services of the two accounting firms to execute that responsibility was an exercise ultra vires of their powers.

[524] Section 7(5) of the 1979 Constitution contains the same provision as section 7(5) of the 1999 Constitution.
[525] Edict No 5 of 1977.

Achara[526] has criticised this decision. This research will differ on his opinion on the ground that the House of Assembly by the provision of the Constitution is expected to make a law prescribing how the local government should assess and collect the rate. The state government went beyond their powers by appointing a different body to take over the functions of local government. In *Bamidele v. Commissioner for Local Government and Community Development (Lagos State) and Anor*[527] the state government imposition of market stallage fees was held to be an usurpation of allegedly exclusive local government functions. In *Shell Petroleum v. Burutu Local Government Council*[528] the Court of Appeal held having regard to item D9 of the concurrent legislative list that the local government council's rating power was (not for imposition of tax) but merely for collection of rates.

In *Thompson & Grace Investment Ltd. V. Government of Akwa-Ibom State & 2 Ors*[529] the issue before the court was whether a local government area can impose business premises levy at a rate higher than N10,000 contrary to the Taxes and Levies (Approved List for Collection) Act[530] and referred to imposition of N50,000.00 stipulated by the Registration of Business Premises Law, Cap 107 Laws of Akwa-Ibom State 2000. The trial judge, Hon. Justice Ekerete A. Ebienyie held:

> The imposition of N50,000 by the 1st and 2nd respondents to be paid by the applicant is definitely ultra vires their powers. See the case of *Eti-osa Local Government v. Jegede*[531] *and Joy Land v. Wemabado Estate Ltd.*[532] The powers of the state government to make laws in tax matters is subject to the enabling law which gives

[526] Achara RACE, "Can Nigerian Local Government Councils autonomously impose rate?" *Journal of African Law,* Vol. 47 No. 2, 2003 p. 224. He has criticized this decision on the grounds that the issue of power to impose levy or charge rates was not canvassed by the parties.
[527] (1994) 2 NWLR (pt 328) 568.
[528] (2000) NRLR 1.
[529] Suit No. HEK/MISC. 95/2009.
[530] Cap T2. Laws of the Federation of Nigeria, 2004.
[531] (2007) 10 NWLR (pt. 1043) 557.
[532] (2008) 6 – 7 SC (pt. 1) 174.

it the power to collect taxes. Any attempt to act outside the ambit of part II of the Taxes and Levies (Approved List for collection) Act will be futile.

It is expected that the members of the Bench with the greatest respect should proactively espouse the law and declare the state of the law at any given time. It is surprising that the trial judge refused as was expected to nullify the provisions of Registration of Business Premises Law of Akwa-Ibom State that provided that local government has jurisdiction to collect rate on Business Premises and item 3 of the fourth schedule to the law for being contrary to part II and item 7 to the schedule of the Taxes and Levies (Approved list for collection) Act. In *Idowu v. Attorney-General & Commissioner for Justice Lagos State &2 Ors,*[533] the trial court rightly held that the provisions of the Land Use Charge Law[534] is not inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria.[535] However, in *Attorney-General Cross River State &Anor v. Mathew Ojua,*[536] the respondent is a property owner in Cross River State of Nigeria. He was served with four notices of assessment for payment of Urban Development Tax, Tenement Rate, Sanitation Levy and Refuse Collection charges. The respondent immediately filed an originating summons at the High Court of Cross River State, wherein he sought for a nullification of the Urban Development Tax Law[537] being the law upon which he was assessed for violating the provisions of the Constitution of the Federal Republic of Nigeria, 1999 as amended. The trial court declared the Urban Development Tax Law unconstitutional, null and void and of no effect. Aggrieved by the decision, the Appellant appealed to the Court of Appeal. The Court of Appeal held;

[533] (2011) 5 TLRN 86.
[534] Cap L. 61 L. (2001) Lagos State.
[535] 1999 Constitution op. cit. Section 7 and the Fourth Schedule, item 1(j).
[536]FHC/PH/CS/220/2008.
[537]Cap U3 Laws of Cross River State, 2004.

> A close look at the Urban Development Law shows that it is the function assigned to the local government council in paragraph 1(1) of the fourth schedule to the constitution that is being usurped by the state government which deals with the assessment of privately owned houses or tenements for the purpose of levying the rates and collection of same by the Commissioner of Finance in order to carry out the functions entrusted to Urban Development Authority.

In *Fast Forward Sports v. Port Harcourt Local Council*[538] wherein plaintiff was served demand notices in respect of (1) sewage levy – N50,000(2) sign posts/billboards/advertisement - N50,000 (3) Local government support levy – N100,000 (4) operational permit – N100,000 (5) Stickers - N50,000 and (6) Agricultural Development Levy for 2008 – N35,000. The plaintiff also received a Demand Notice from the Rivers State Board of Internal Revenue for 2008 Economic Development Levy of N350,000. The court considered sections 1 and 2 of the law[539] which provides that every company doing business in the state shall pay an annual development levy. The purposes for which the levy will be put to use are spelt out in section 6 of the law. Section 6 states that the levy will be spent by the State government for the construction and development of infrastructures for industries, rural, industrial and agricultural development and other things related thereto. The imposition of another Agricultural Development levy outside the one collected by Rivers State Government under the Economic Development Levy Act which includes a levy for agricultural development would amount to double taxation.

These challenges have continued unabated in almost all the States in Nigeria. It is also to be added that lawyers and tax practitioners seems to be too docile as nothing is being done

[538](2011) 5 TLRN 01.
[539] Economic Development Levy Law of Rivers State, 1999.

to curb this menace; the result is that the three tiers of government continues to lose income as with the fight that the taxpayers must be compelled to enhance compliance.

4.11 Tax Appeal Tribunal/Court's Jurisdiction

A person aggrieved by an assessment or demand notice made upon him by the service may appeal to the Tribunal within 30 days from the date of service of the notice.[540]The present state of the law is that an application for extension of time could be made and courts will readily grant same[541] Tax Appeal Tribunal exercises jurisdiction, power and authority conferred on it by the Federal Inland Revenue Service (Establishment) Act.[542] It shall have power to settle disputes arising from the following taxes:

(a) Companies Income Tax;

(b) Petroleum Profit Tax;

(c) Personal Income Tax;

(d) Value Added Tax;

(e) Capital Gains Tax; and,

(f) Any other law contained in or specified in the first schedule to the Act or other laws made from time to time by the National Assembly.

Prior to April 7, 2011, an aggrieved taxpayer who desires to challenge an assessment must first of all forward a notice of objection to the FIRS within 30 days of being served the assessment.[543] The notice of objection referred to above must contain the following;

i. amount of assessable profits for that year;

ii. amount of total profits for that year;

iii. amount of tax payable for the year;

[540]*Oando Supply and Trading Ltd. V. Federal Inland Revenue Service* (2011) 4 TLRN 133.
[541]*Supra*.
[542] Federal Inland Revenue Service (Establishment) Act, 2007, 5th Schedule, paragraph 11(1).
[543] Companies Income Tax Act, Cap C21 Laws of the Federation of Nigeria, 2004, S. 72.

iv. ground upon which the objection is based;

v. the prayer of the applicant.

Where the taxpayer fails to serve the objection on the FIRS within the time prescribed by law, the assessment will become final and conclusive.[544]

In *FBIR v. The Nigerian General Insurance Co. Ltd,*[545] a company failed to forward its objection to the board within the time prescribed by law. The company's contention while seeking to set aside the assessment was that the notice of assessment ought to have been sent to the company's tax consultant. The Court held that the assessment has become final and conclusive. Where a valid objection is received by the tax authority, the authority may, accept the objection and accept the taxpayer's prayers; revise the assessment to what is considered appropriate or refuse further amendment and issue a Notice of Refusal to Amend to the taxpayer (NORA).

In *Oando Supply and Trading Ltd v. Federal Inland Revenue Service,*[546] the appellant was served with notices of additional assessment for 2006, 2007 and 2008 years of assessment imposing liability on it. The appellant forwarded the notice of objection to FIRS in accordance with the provisions of CITA.[547] The FIRS did not however, respond to the objection after several months. The appellant's application was based on the provisions of Order 3 Rule 1 of the Tax Appeal Tribunal Rules[548] which provides;

> a person aggrieved by an assessment or demand notice made upon him by the service under the provisions of the tax laws referred to in paragraph II, may appeal against such decision or assessment or

[544] Federal Inland Revenue Service (Amendment) Act, op. cit. paragraph 13(3).
[545] (1969) ANLR 533.
[546](2011) 4 TLRN 13.
[547] Companies Income Tax Act op. cit. S. 54 and 69.
[548] Tax Appeal Tribunal (Procedure) Rules, 2010, Federal Inland Revenue (Establishment) Act, 2007, section 59(1) and Fifth Schedule, paragraph 13(1).

> demand notice within the period stipulated under the schedule to the tribunal.

The Tax Appeal Tribunal held that Notice of Refusal to Amend is no longer a condition precedent to the filing of an appeal to TAT thus;

> The question here is whether the appellant, a taxpayer can appeal to the tribunal against a tax assessment served on it by the respondent, the tax collector, while its objection to the assessment is yet to be resolved by the respondent. The Federal Inland Revenue Service (Establishment) Act 2007 governs appeals to this tribunal. It is settled that in the interpretation of statutes effect must be given to their ordinary meaning where the text is clear. Thus in *A.G Ondo State v. AG Ekiti State*[549] Justice Kutigi SC at page 756 stated as follows:
>
> > It is certainly a cardinal principle of interpretation that wherein the ordinary meaning of the provisions are clear and unambiguous, effect must be given to them without resorting to any aid internal or external and relied on other cases.[550]

Much as the proactive and resilience standing of the Tax Appeal Tribunal is appreciated, it is pertinent at this point to pause and pose a question whether the provisions of section 59[551]FIRS (E) Act can stand *vis-a-vis* the provisions of section 251 of the 1999 Constitution of the Federal Republic of Nigeria as amended. Section 251(1) of the said Constitution provides, *inter alia* that:

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[549] (2001) 17 NWLR (pt. 743) 706.

[550] *St. Mellon R.D.C. v. Newport Corporation* (1951) 2 All NRL 839, *London Transport Executive v. Betts* (1959) AC 231, *Attorney-General of Bendel State v. Attorney-General of the Federation &Ors* (1981) 10 SC 1, *SPDC (Nig) Ltd v. FBIR* (1996) 8 NWLR (pt. 466) 256 and *Lawal v. G.B. Olivant* (1972) 3 SC 124.

[551] Federal Inland Revenue (Establishment) Act, op. cit. S. 59(1) & (2), First and Fifth Schedule.

> …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 to 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 said 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;

The exclusive jurisdiction of the Federal High Court is to the exclusion of "any other court". It is opined that because the Tribunal is not a court that is why it is deemed[552] to be one and its proceedings are deemed to be judicial. The opinion above when juxtaposed with the provisions of the Constitution[553] cannot stand the test of time. Section 1(1) of the 1999 Constitution of the Federal Republic of Nigeria declares its supremacy over any other enactment and authority when it provided that this constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria. In section 1(3), it provides that; if any other law is inconsistent with the provision of this constitution, this constitution shall prevail and that other law shall to the extent of the inconsistency be void.

In *CNOOC Exploration and Production Nigeria Ltd &Anor v. Federal Inland Revenue Service &Anor*[554] the validity of the provisions of Federal Inland Revenue (Establishment) Act 2007 and authority of the Tax Appeal Tribunal was questioned. The Tribunal held;

[552] J A Agbonika, Problems of Personal Income Tax in Nigeria, op. cit. p. 231.
[553] 1999 Constitution op. cit. S. 1.
[554] (2013) 9 TLRN 28.

> The Tax Appeal Tribunal is an administrative Tribunal not a court. Civil litigation is the template for administrative hearings and so the use of terms like adjudicate, judicial and so on cannot convert a tribunal into a court of law. Administrative and even domestic tribunals adjudicate on disputes. And when a person or panel is required to decide judicially, it often means no more than to decide fairly.…they invoke Shell v. Federal Commissioner of Taxation (1931) AC 275, where the judicial committee of the Privy Council held that the following characteristics do not make a panel a court; giving final decisions; hearing witnesses on oath; deciding between parties appearing before it and availability of appeal to a court. The Privy Council wrote: an administrate tribunal may act judicially but still remain an administrate tribunal as distinguished from a court, strictly so called.[555]

On the word "deemed" used in paragraph 20(3) of the 5th schedule to the FIRS (E) Act, the Tribunal review law words[556] and quoted thus:

> In legal drafting (which includes legislative drafting), deemed is commonly used to create a legal or statutory fiction.[557] It is used to extend the meaning of a word or concept to include a subject not otherwise within its normal or ordinary meaning.[558] As one judge described it; generally speaking, when you talk of a thing being deemed to be something, you do not mean that it is that which is

[555] Supra @ 36.
[556] Duckworth M and Spyrou A, (ed) "30 Essays on Legal Words and Phrases in Law words, the centre for plain legal language, Faculty of Law, University of Sydney Australia, 1995, p. 13.
[557] *Muller v. Dalgety& Co. Ltd* (1909) 9 CLR 693.
[558] *St. Aubyn v. Attorney-General* (1952) AC 15 @ 53.

> deemed to be. It is rather an admission that it is not what it is deemed to be.

In *Federal Inland Revenue Service v. Nigerian National Petroleum Corporation*[559] the validity of Tax Appeal Tribunal vis-à-vis the original jurisdiction of the Federal High Court on revenue matters, Federal High Court held:

> The mechanism provided for resolution of tax disputes is to appeal to the Tax Appeal Tribunal and the appeal the Tribunal comes to the Federal High Court in the exercise of its appellate jurisdiction but that does not preclude a party from invoking the original jurisdiction of the Federal High Court on tax matters further to the provisions of the constitution.

It is surprising that rather than nullifying the provisions of the FIRS Act that offends the Constitution, the Federal High Court circumvented the provisions of the Constitution to justify the existence of Tax Appeal Tribunal when the court held in *Olean & Oil Limited v. FBIR*[560]that the applicant is therefore supposed to explore the avenue of going through the Body of Appeal Commissioners first before coming to the Federal High Court, especially with respect to Tax Act Matters"

The trial judge justified this position relying on the decision of Supreme Court in *Eguamwense v. Amaghizeuwen*[561] the Court stated 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 the law before going to court. The decision in *Federal Inland Revenue Service v. Nigerian National Petroleum Corporation*[562] and *Ocean & Oil*

[559]FHC/A13J/CS/764/II in (2012) 6 TLRN 87.
[560] (2011) 4 TLRN 135.
[561] (1993) 9 NWLR (pt. 315) 1 @ 25.
[562]*Supra*.

Limited v. FBIR[563] can be best described as judicial summersault as they are both based on misconception of the law. It is also judicial recklessness on the part of the judicial officers, with the greatest respect, as they bluntly refused, neglected and failed to be guided by an earlier decision of Court of Appeal on the issue in *Cadbury v. FBIR.*[564] The Court of Appeal in the case refused to be persuaded that section 6(6)(b) of the Constitution of the Federal Republic of Nigeria, 1999 preserves the jurisdiction of the Value Added Tax Tribunal as a fact finding Tribunal and held:

> Learned Respondents Counsel interpretation of the judicial powers of the Court under section 6(6)(b) of the 1999 Constitution is misconceived. This is because a court or tribunal cannot invest itself with jurisdiction based on misconception of the law. See the case of *Babalola v. Obaoku-Oke.* I therefore hold that section 6(6)(b) of the constitution has not preserved the jurisdiction of the VAT Tribunal as fact finding tribunal.

The court while declaring section 20(1) of the VAT Act invalid in view of its inconsistency with section 251 of the 1999 Constitution by virtue of section 1 subsection 3 of the 1999 Constitution, further said:

> I disagree with the Respondent's Counsel submission that VAT Tribunal is a fact finding tribunal subject to control by the Federal High Court relying on the provisions of the Federal High Court Tax Appeal Rules.[565]

The decision is commendable with regards to Federal Tax Laws as the Constitution provides the Federal High Court Original jurisdiction. Again, the section 59(1) & (2) of the

[563] *Supra*.
[564] (2010) 2 TLRN 16 @ 34.
[565] Federal High Court Tax Appeal Rules Cap. T12 Laws of the Federal Republic of Nigeria 2004.

Federal Inland Revenue (Establishment) Act, 2007 was enacted in violation of section 251(1) (a & b) of the 1999 Constitution of the Federal Republic of Nigeria.

There are other problems militating against maximum compliance and causing revenue leakages to the government which are calling for attention. They include; inadequate funding of the tax authority, lack of identification of enterprises in formal and informal sector, lack of data on taxpayers and other tax indices, lack of motivation of tax officers, money laundering, power to arrest by tax authorities, tracking of tax defaulters, prosecution of wealthy tax defaulters, lack of enforcement provisions in certain tax laws for example; Education Tax Act and transfer pricing issues in Nigeria.

4.12 Reform of the Tax System

Taxation remains a veritable tool for national development. It is not only that tax is a major source of revenue for governments to provide goods and services needed by the people, its policies can stimulate economic growth and job creation through its impact on investment and capital formation in the economy. In this respect, reforms in the tax system will ensure effectiveness, equity and efficiency are necessary conditions for healthy public finance.[566] Reformation of the tax system and development of a tax policy would serve as a guide to tax administration and address structural, institutional and other inherent problems in the tax system. This will enhance effectiveness, efficiency and transparency.

Reform of the Nigeria tax system is imperative in order to rekindle the confidence of the taxpayer in the system. It will also rekindle the authorities and government to square up in the provision of social amenities to the people. This is important as the principle has it that tax being a compulsory contribution to the state for it to perform its social responsibilities, it

[566] National Tax Policy, 2010.

is only persons who benefit from the provision of such social amenities that should make the contribution.

In the reform, it is important that there is a tax refund mechanism in the tax system. It is expected that tax authorities would give priority to refund requests and that the verification process shall be rigorous, fair and objective.

4.13 Constitutional/Legal Framework for Effective Tax System

Fiscal federalism is expected to play a major role in Nigeria tax administration. In this regard, the concept of fiscal federalism would be the common thread holding the tax system together.[567] Nigeria tax policy would therefore uphold for smooth running, the application of fiscal federalism in the generation and expenditure of revenue by government at all levels in accordance with the tenets of the Nigerian Constitution. The new tax regime will include the basic understanding that the revenue functions and agencies are best centralized, which should run concurrently and which are better placed under the sphere of decentralized levels of government.[568] It is expected that the tax policy and other tax legislations, would resolve the issue of who collects what, how it is collected, who controls what is collected, how is what is collected shared. It is also to be determined who is responsible for spending what is collected and who is ultimately responsible and accountable to the taxpayers for the revenue collected and its expenditure.[569] It is expected that when it is corrected, the various levels of government should also adopt and apply the doctrine of separation of powers in relation to taxation. It is believed that adherence to this principle would bring to an end to disputes on the limits and powers of the tiers of government in our federation fiscal matters. This will

[567] I A Ayua, *Nigerian Tax Law,*(Ibadan: Spectrum Publishing, 1999) p. 24. 1999 Constitution op. cit. S. 2(1 & 2).

[568] A Sanni "Multiplicity of taxes as a bane of tax compliance and yield, Tax Law Journal of Nigeria 2012, Vol. 1 p. 87. Again, a review of the Taxes and Levies (Approved List for Collection) Act No. 21 Cap T2 Laws of the Federation of Nigeria 2004 which gives a false impression that there are 39 taxes in Nigeria. The statute is not a taxing state as it does not have power to impose tax rather power to collect.

[569] 1999 Constitution op cit. S. 162. In *Attorney-General, Federation v. Attorney-General Abia State* (2002) FWLR (pt. 102) 1 at 113, the court declared the Government of the Federation as trustee.

also bring clarity and certainty to tax administration and the entire tax system.[570] It is paramount that the concept of federalism should be well defined in the Nigerian Constitution, the present structure as stipulated by the Constitution of the Federal Republic of Nigeria reflects the three tier system of government at the Federal, State and Local Government levels.[571]

It does appear that under the Constitution, each tier of government has been granted powers and responsibility in respect of the imposition and collection of taxes.[572] It is submitted that section 2(2) of the 1999 Constitution of the Federal Republic of Nigeria creates a special federation for Nigeria but distributes the taxing powers in line with the provisions in section 4(1) and (6) and 7(1) of the same Constitution. A major component of the Federation of Nigeria, the Federal Capital Territory was not assigned or any role designated to it to participate in the revenue generation in Nigeria.[573]Local government councils which are not one of the component of the Federation of Nigeria as prescribed in section 2(2) of the 1999 Constitution was assigned about 20 items upon which to raise income and revenue.[574] In the year 2002, the Supreme Court in *Attorney-General, Abia State & 2 Ors v. Attorney-General of the Federation*[575] nullified the practice of first line charges in section 1(d) of Cap 16[576] (as amended) for being inconsistent with the Constitution. Section 1(d)(iv) of Cap 16 (as amended) provides for one percent of the revenue accruing to the

[570] J A M Agbonika and J A Agbonika, "Fiscal Federalism and the challenges of administration of Personal Income Tax in Nigeria" in T*opical issues on Nigeria tax laws and related arrears,*(Ibadan: Ababa Press, 2015) p. 407.

[571] But see the provisions of section 2(2) of the 1999 Constitution of the Federal Republic of Nigeria which stipulates that the federation of Nigeria consists of States and Federal Capital Territory only. See also the decision in *Attorney-General Abia State v. Attorney-General of the Federation* (2002) FWLR (pt. 102) 1 at 108.

[572] 1999 Constitution, op cit. S. 4(1) & (6) and S. 7(1).

[573] But the functions were alluded under section 299 of the Constitution of the Federal Republic of Nigeria, 1999 as amended.

[574] *Ibid*, S. 7(5) and Fourth Schedule to the Constitution.

[575] (2002) FWLR (pt. 102) 1 at 109.

[576] Allocation of Revenue (Federation Account, etc) (Amendment) Decree 1992, No. 106 of 1992 (previously the allocation of revenue (Federation Account, etc) Act Cap 16 laws of the federation of Nigeria 1990.

federation account derived from minerals, will be distributed to the Federal Capital Territory. This provision is inconsistent with the Constitution. Section 162(3) of the Constitution reads:

> Any amount standing to the credit of the federation account shall be distributed among the federal and state governments and the local government councils in each state on such terms and in such manner as may be prescribed by the National Assembly.

By the provisions of the Constitution above, the Federal Capital Territory is neither a state[577] nor a local government. It is further to be noted that the Area Councils in the Federal Capital Territory are not also local governments going by the provisions of the Constitution. This lacuna in the constitution continues to hamper the practice of the special type of federalism in Nigeria. The National Assembly throughout the three alterations[578] of the 1999 Constitution did not amend the provisions of the 1999 Constitution to accommodate the Federal Capital Territory. It is rather more disturbing that the 1999 Constitution in section 299 made a serious summersault when it provided:

> The provisions of this Constitution shall apply to the Federal Capital Territory, Abuja as if it were of the states of the federation and accordingly;
>
> (a) All the legislative powers, the executive powers and the judicial powers vested in the House of Assembly, the Governor of a state and in the courts of a state shall, respectively, vest in the National Assembly, the President of the federation and in the courts which by virtue of the foregoing provisions are courts established for the Federal Capital Territory, Abuja.

[577] 1999 Constitution op. cit. S. 299.

[578] 1999 Constitution of the Federal Republic of Nigeria (first, second and third alteration) Act, No. 1, 2 & 3, 2010.

The National Assembly should wake-up and fill this gap and lacuna. The Federal Capital Territory, Abuja could at best be a Ministry/Department of the Federal Government following the state of law in Nigeria, moreso as it is headed by a minister of the Federal Government. It will also save the country from this mess created in the Constitution. The Federal Capital Territory authorities cannot impose nor collect tax.[579] Despite the glorification of the status of the Federal Capital Territory as that of a state, there is no executive governor incharge of the executive arms, head of the authority is a minister of government appointed by the President. The territory does not also have a House of Assembly. The reason is simple, the Federal Capital Territory do not have legislative powers to make a legislation in tax matters. Another controversy in the Constitution is the word "imposition" of taxes used by scholars and authors in qualifying the provisions in the Constitution for law making.[580] It is to be stated that the allusion that each tier of government is given power to legislate on taxation matters is misdirected.[581] Even, going by the omnibus provision in the section, the resolution of the issue is that the state can impose tax on residual matters. The state as a tier of government can only make legislation[582] on the concurrent legislative list to the exclusion of the items contained in the exclusive legislative list and after the federal has legislated on the concurrent legislative list.

In a federal country like Nigeria the importance of having a coherent tax system need not be stressed. It is indeed desirable that the taxing powers of the different and independent layers of government should be consistent with each other for if they clash this could be disastrous from the standpoint of their effects on incentives which, if adverse, are bound to cause distortion in the national economy.[583] The Constitution of the Federal Republic of

[579] Ibid, S. 4(1) & (6) and S. 7(1).
[580] Ibid. S. 4(3) & (7).
[581] Ibid. S. 4(7)(a) and (b).
[582] Ibid – This was described by the Supreme Court in *Attorney-General Ogun State v. Aberuagba* (supra) as residual list.
[583] I A Ayua, Nigerian Tax Law, (Ibadan: Spectrum Books, 1996) p. 9.

Nigeria 1999 as amended provides for taxing powers that are not clearly consistent or put simply the powers of imposition of known taxes in Nigeria is left to the Federal Government.[584] There is an omnibus provision contained in subsection (3) of the section 4 of the 1999 Constitution. Sub section (3) reads:

> The power of the National Assembly to make laws for the peace, order and good government of the federation with respect to any matter included in the exclusive legislative list shall, save as otherwise provided in the constitution be to the exclusion of the Houses of Assembly of states.

Furthermore, the Constitution goes ahead to provide that[585] in addition and without prejudice to the powers conferred by subsection (2) of this section, the National Assembly shall have power to make laws with respect to the following matters, that is to say; any other 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. The legislative power of the Federal government is total, one will assume that nothing is left for the other tiers of government. The ambiguous nature of the provision due to the drafting problems in the Constitution has put the Nigeria's federalism in a quagmire. The federal government can by the above provision delve into law making in any area of their choice. A journey into the lists[586] in the CFRN 1999 as amended will help to x-ray this problem. In part II of the second schedule to the 1999 Constitution, the items[587] relating to taxation reveals that the imposition of taxes in Nigeria can be solely done by the Federal Government. In fact, in practical terms, it is the federal government that is left with the imposition of taxes that cuts across the length and breadth of Nigeria. The inadequacies in the Constitution points to

[584] 1999 Constitution, S. 4(2)(3).
[585] *Ibid*, S. 4(4)(a).
[586] *Ibid*, second schedule parts I and II.
[587] *Ibid*, second schedule part II paragraphs I(a) and 2 of item A, 7, 8, 9 and 10 of item B and 17 (b) of item H.

this specific mention of taxation on income, capital gains and stamp duty. The CFRN1999 as amended provides:[588]

> In the exercise of its powers to impose any tax or duty on:
>
> (a) Capital gains, incomes or profits of persons other than companies; and
>
> (b) Documents or transaction by way of stamp duties; the National Assembly may, subject to such conditions as it may be prescribed, 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.

The provision above signifies that the Constitution on one hand granted powers of imposition of tax on the state and in another withdrew the same power. In this situation, the Constitution centralized the entire process of imposition of tax. It is a wrong practice as stated[589] that the colonial government at the centre sought to have a harmonized tax system. This should not be allowed to continue despite the allusion that Nigeria is running a federalism. The Income Tax Ordinance No. 3 1940 during colonial era unified the incomes of all non-natives in Nigeria, as well as residents of the colony of Lagos (natives and non-natives) within one and same legal regime.[590] It is evident that in the legislative competence in tax matters, functions assigned to the states are residual powers.[591] Section 4 of the 1999 Constitution which gives the federal government powers to make tax laws through the

[588] Ibid, item D paragraph 7(a and b).

[589] The section 66 of Income Tax Ordinance No. 3 1940 which repealed altogether Non-Natives Tax (protectorate) Ordinance NO. 21 1931, together with all the amendments thereto (1933, 1936 and Nos 1, 2 and 3 of 1939), Colony Taxation Ordinance No. 4 1937 together with all the amendments thereto (Nos. 1 and 2 of 1938, and No 1 and 2 of 1939), Companies Income Tax Ordinance NO. 14 1939 and Income Tax (supplementary) Ordinance, 1939.

[590] I O Okaura (ed),*A Comprehensive Tax History of Nigeria,*(Ibadan, Safari Books Ltd, 2012) p. 164.

[591] That is the remnants after the Federal Government has exhausted the areas of operation as described in *Attorney-General of Ogun State v. Aberuagba* (supra).

National Assembly. It also gives state governments the same powers to enact laws through their State Assembly in the interest of peace and good government. There is also an inbuilt check on the state with the caveat that where there is conflict, the law enacted by the federal government prevails.[592] It is therefore the constitutional responsibility of the National Assembly to make tax laws or amend existing laws as provided in the second schedule to the Constitution and as may be required under section 4 of the Constitution. By virtue of paragraph 7 of item D, part II of the 2nd schedule, the National Assembly may delegate the administration of tax (collection and the penalties for non-payment etc.) to the states. This means different criteria will be used in the assessment rates, allowances and several other indices in the administration of tax in various states. The consequence is lack of unanimity in the rates of taxes, reliefs, allowances and assessment of tax. Again, this opens the door for the possibility of internal double taxation to continue to exist. In recognition of this fact, paragraph 8 of item D[593] provides that:

> Where an Act of the National Assembly provides for the collection of tax or duty on capital gains, income or profit or administration of any law by authority of a state in accordance with paragraph 7 thereof, it shall regulate the liability of persons to such tax or duty in such manner as to ensure that such tax or duty is not levied on the same person by more than one state.

It is submitted that despite this provision above, the possibility of duplicity of taxes and the use of divergent criteria for assessment, for instance, still exist. In short, the Constitution places the responsibility for legislating on the collection of taxes, fees and charges to be collected by the local government councils on the state governments. In addition to the powers vested in the States Houses of Assembly in section 4(7) as to make

[592] 1999 Constitution, op. cit. S. 4(5).
[593] *Ibid*, second schedule.

laws for the peace, order and good government of the states. The paragraph 9 of the second schedule empowers a State House of Assembly to make a tax law and in doing so, require a local government council in the state to collect the tax so prescribed. Furthermore, paragraph 10 provides that in delegating tax collection powers to a local government under paragraph 9, the law passed by the House of Assembly. This is to regulate the liability to the tax in a manner that would ensure the tax is not levied on the same taxpayer by more than one Local Government Council. The combined import of section 4(7) and paragraph 9 and 10 of part II of the second schedule is that States possess residual[594] tax jurisdiction and in exercise whereof, the states may delegate the responsibility to collect to the local governments.

It is also important to note the import of the provisions of section 4(5) which was tailored towards the doctrine of "covering the field" which restricts or made the power of the state to legislate on residual matters the subject of the federal power to legislate. This scenario is best captured in the control and regulation of the Value Added Tax. Value Added Tax is neither on the exclusive nor concurrent legislative list, making it a "residual" matter which ordinarily should fall within the purview of state legislative competence. The item 62(a) in the exclusive legislative list, the National Assembly has exclusive powers to make law on trade and commerce and in particular trade and commerce between Nigeria and other countries, including import of commodities into and export of commodities from Nigeria and trade and commerce between the States.[595] Although the argument in favour of Value Added Tax has been that by item 68 of the list, the National Assembly has exclusive powers to make laws on "any matter incidental or supplementary to any matter mentioned elsewhere

[594] *Attorney-General, Ogun State v. Aberuagba*(*supra*).

[595] In *Attorney-General, Ogun State v. Aberuagba* (supra), the decision of the court of appeal is with the greatest respect wrong in law with the combined reading of item 62(a) of the exclusive list and section 3(i) of the Sales Tax Law of Ogun State 1982.

in this list.[596]The goods and services intra-states in Nigeria cannot form part and parcel of any matter incidental or supplementary to any matter mentioned elsewhere in this list. Any federal law that purports to regulate consumption and services intra or within a state cannot be incidental to the provisions of item 62(a) of the second schedule to the 1999 Constitution. Suffice it to say that the prevailing position is that the Federal Government ultimately has overriding authority on taxation matters with some latitude to State governments to introduce taxes, fees and charges (collectible by the local governments) in those areas that do not conflict with the position of the Federal government.

4.14 Other Legislative Intervention – Taxes and Levies (Approved List for Collection) Act

The 1999 Constitution of the Federal Republic of Nigeria defines the legislative competence of each tier of the government. The Taxes and Levies (Approved List for Collection) Act[597] defines the jurisdiction of the three tiers of government in terms of actual collection of the various tax types. In recognition of the fundamentals of federalism, the Taxes and Levies (Approved List for Collection) Act with the amendment order,[598] contains as much as 9, 25 and 21 taxes and levies for Federal, State and Local Governments respectively. The Act gives a false impression that there are 55 taxes in Nigeria. A careful consideration of its provisions will reveal that it is not a taxing statute since it deals with the "power to collect" and not "power to impose" taxes. This position is reinforced by the language of the statute

[596]M N Umenweke, the Power to impose and collect consumption tax in Nigeria – *Attorney-General of Lagos State v. Eko Hotels Ltd & anor* (2008) AL FWLR (pt. 398) 235 revisited in Ukpebor O. (ed) *Tax Law Journal of Nigeria*, 2012, p. 120.

[597] Taxes and Levies (Approved List for Collection) Act No 21 Cap T2 Laws of the Federation of Nigeria, 2004, see also Schedule to the Taxes and Levies (Approved List for Collection) Act (Amendment) Order, 2015 made by Dr. (Mrs.) Ngozi Okonjo-Iweala as the coordinating minister for the Economy and Minister of Finance relying on section 1(2) of the Taxes and Levies (Approved List for Collection) Act, Cap T2 LFN 2004 increased the jurisdiction of the three tiers of government to collect taxes and levies. This amendment raises a serious constitutional issue of whether the minister can by fiat of the executive amend the provisions of the constitution.

[598]*Ibid*.

which employed words and phrases such as "collecting",[599] "collects",[600] "shall assess or collect".[601] In view of the above, it is submitted that the Taxes and Levies (Approved List for Collection) Act has never been and is presently not relevant for the purpose of determining the extent of taxing powers of government under the 1999 Constitution of the Federal Republic of Nigeria as amended. An attempt to either trace the power of a government or lack of it to impose a particular tax or levy to the Act is a serious misdirection. The point seems not to be appreciated by the courts in a number of cases[602] where certain state laws and local government bye-laws have been declared null and void on the ground that they contravene the provisions of the Act.

Again, the drafters of the Act seem to be at loss on the basic distinction between a tax and other related terms such as fees and charges. There is inclusion of several user charges and licensing fees contained in the schedule to the Act. It is counter-productive to the intendments of taxation and administration for such an Act to describe payments made in exchange for direct benefit as taxes in view of the general aversion for taxes. It would appear that the listing of 21 items in Taxes and Levies Act is one of the factors that prompts the local government councils into inordinate derive for revenue through those items. For instance, while parking fee should ordinarily be collected on "pay as you go" basis, the fact that it features on the Act has given it a semblance of a tax which the local governments leverage upon as the basis for serving assessment notices on corporate bodies as parking

[599] *Ibid*, section 1(1), 2(2), 3(b).
[600] *Ibid*, S. 3(a).
[601] *Ibid*, S. 2(1).
[602] *Attorney-General of Lagos State v. Eko Hotels &Anor* (2009) I TLRN 198, *Lagos State Board of Internal Revenue v. Nigerian Bottling Co. Ltd &Anor* (2009) 1 TLRN 294, *Mobil Producing Nigeria Unlimited (M.P.N.U) v. Tai Local Government Council & 2 Ors* (2004) 10 CLRN 100; *Eti-Osa Local Government v. Mr. Rufus Jegede* (2007) 10 NWLR (pt.) *Mama Cass Restaurant Ltd &Ors v. Federal Board Inland Revenue &Anor* (2010) 2 TLRN 99.

fees. It is without equivocation that the 2003 study group recommended for the amendment of the fourth schedule to the Constitution should be amended. The Report[603] states;

> The fourth schedule of the 1999 Constitution which has given powers to local government to control and regulate many items should be urgently amended to expressly limit the taxing powers to local government to tenement rate on private houses, capitation rate, and clear cut user charges for services directly beneficial to the payers. This is because the words "control and regulate" as used in the fourth schedule has been misinterpreted by local governments as granting them taxing powers for virtually every type of businesses as shown in Appendix IV with over 20 types of local government taxes. Unless this major constitutional amendment is made to restrict local government's taxing powers, the lawlessness and confusion will continue and cripple the national economy.

It is submitted that the study group recommendation misses the point. The ground of disagreement is that the control and regulatory power is inherent to any government otherwise there would be no means of controlling activities within a territory. The problem is not with the fourth schedule but the needless reference to user charges and fees in the schedule to the Act. The fourth schedule to the Constitution has a clearly laudable objective which is to prescribe irreducible minimum functions which every State government must confer on their local governments in their respective Local Government laws.

4.15 Diversification of the Economy through Tax Revenue

[603] Nigerian Tax Reform in 2003 and Beyond, Report of Prof Dotun Philip's Study Group on Nigeria Tax System, July 2003, p. 231.

Oil has continued to be the major source of revenue or mainstay of the Nigeria economy, contributing more than 80% of the country's foreign exchange.[604] Hitherto, agriculture and solid mineral had played a vital role in Nigeria's economy. Coal later in the 50s made Nigeria a major exporter of coal and Enugu was referred to as the Coal City.[605] The military in over 20 years of its rule in Nigeria failed to diversify the economy from over-dependence on oil revenue. The global price of crude oil which was as high as $115 per barrel in June 2014 started falling by the last quarter of 2014. Since that time the price has kept fluctuating between $35 and $49 per barrel.[606] Taxation also has its own share of this downfall since the bulk of tax revenue is hinged on Petroleum Profit Tax paid by multinationals in the oil and gas sector.[607] The implication of the decline in crude oil price and its impact on Nigeria necessitates developing strategies and road maps towards achieving the diversification of the economy through tax revenue especially non-oil tax revenue. South Africa and other countries in Africa generates far more revenue from taxes alone than what Nigeria generates from all sources including oil revenue.[608] As Nigeria continues to seek ways to diversify the economy and attract Foreign Direct Investment (FDI), there is the need for government at all levels to recognise the importance of a dynamic tax system. This will not only be geared towards raising revenue, but addresses the sophistication of today's business environment with its attendant complexities.

Nigeria has been said to have the potentials to generate N310 billion from non-oil exports.[609] There is no way, government can grow the non-oil sector without the role of the tax authorities. As earlier mentioned efforts are geared towards a paradigm shift from oil

[604] O K Chinda, "The Petroleum Industry in Nigeria and the Niger Delta Environment, A Blessing or Curse". Available at http://www.obloakporembassy.com pdf assessed on 9 February 2016.
[605] F Udoh, "Nigeria: Diversifying the Economy through Non-oil Sector Exports".
[606] B Pulmer "why oil prices keep falling and throwing the world into turmoil. Available at http://www.vox.com/2014/12/16/7401705/oil-pricesfalling accessed on 9 February 2016.
[607] A A Onaolapo *et al,* "The Analysis of the Effect of Petroleum Profit Tax on Nigerian Economy" in Asian Journal of Humanities and Social Sciences (AJHSS) 2013, vol. 1 page I.
[608] T Oyedele, Tax is the New Black Gold "The Guardian Newspaper, Monday December 14 2014 at p. 58.
[609] F Udoh "Nigeria: Diversifying the Economy through Non-Oil Sector Exports" op. cit.

revenue to non-oil revenue. Non-oil revenue is largely dominated by taxation. The role of taxation in the development of the economy cannot be over-emphasized. Indeed, taxation, rather than natural resources, such as oil, ought to be the centre instrument of state economic policy in Nigeria as it is truly modern democratic states, hence the need for diversification of the economy through taxation.[610] The 2003 study group on tax reform recommended that there is need for shift from over-dependence on oil revenue to non-oil revenue by repositioning and empowering the respective tax authorities to enhance an efficient and effective tax administration.[611]The Nigerian tax system places a huge burden on taxpayers as a result of overreliance on direct taxes such as Companies Income Tax, Petroleum Profit Tax, Education Tax, Stamp Duties, Personal Income Tax and others. An instance is where a single company is mandated to pay Companies Income Tax (CIT), Education Tax and NITDA levy as the case may be.[612]

In other jurisdictions direct taxes, that is, Value Added Tax (VAT), a consumption tax play a prominent role. VAT is the third highest source of income of the United Kingdom Central Government.[613] Her Majesty's Revenue and Customs (HMRC)'s revenue collection stands at £476 billion as at April 2014, with £101 billion or 21 percent of total tax being from VAT. This is not the situation in Nigeria where VAT is charged at 5%. It is one of the lowest in the world. In United Kingdom Value Added Tax rate is a standard 20%.[614] Value Added Tax is charged at 15% in South Africa.[615] In Ghana Value Added Tax rate is 17%.[616] In Kenya Value Added Tax rate is 16%[617] a comparison of the Value Added Tax rates in some

[610] *Ibid.*
[611] S Stelnmo, Taxation and Democracy, (New Heaven and London: Yale University Press, 1993) at p. 1.
[612] Price Waterhouse Coopers "Nigeria at 50: Top 50 Tax Issues" available at http://www.pwc.com/en.NG/ng/pdf/nigeria-top-50taxissues accessed 12 February 2016.
[613] N Lee, Revenue Law – Principles and Practice(28th ed), Sussex, Bloomsbury Professional Ltd, 2010, p. 15.
[614] VAT Rates, available at http://www.gov.uk/vat-rates accessed on 10 February 2016.
[615] Taxes and VAT Refunds. Available at http://www.southafrica-newyork-net/consulate/vat%20refund.html.
[616] Available at http://en.wikipedia.org/wiki/listofcountriesbytaxrates accessed 10 February 2016.
[617] *Ibid.*

ECOWAS countries shows that Nigeria's current Value Added Tax rate of 5% is comparatively low.[618] The rates is graphically represented in a chart below:[619]

Country	Benin	Cote D'ivore	Ghana	Mali	Niger	Nigeria	Senegal	Togo
VAT rate (%)	18	18	15	18	19	5	18	18

The current structure of Nigerian's tax system places heavy reliance on direct taxes from the oil sector, which overtime has created a lopsided over-dependence on oil taxes. In other sectors, indirect and direct taxes play equally prominent role, however when viewed from the overall perspective, indirect taxes are more efficiently realised and provide a higher rate of returns. In order to correct the imbalance, there should be a shift from direct to indirect taxation within the non-oil sector in order to stimulate economic growth. A reduction in the rates of direct taxes, will lead to lower tax revenue from such sectors. Conversely, greater reliance on indirect tax may occasion an upward review of such taxes. This may be necessary to sustain government's revenue base and make up for any potential shortfall from any reduction in direct taxes. It should be noted that any increase in VAT rates in Nigeria would be in line with the country's regional and economic commitments and should be done in line with the statutory and constitutional provisions,[620] in open manner and must not over burden taxpayers in the country. There was a dedicated VAT tribunal established in 1993 pursuant to the second schedule of the Value Added Tax Act. However, with the passage of the Federal

[618] Taken from "Study on harmonization of the Value Added Tax and Excise Duty Legislation of ECOWAS Member States" Volume 1: Provisional Report Bureau National of Etudes Techniques et de Development, June 2006.

[619] *Ibid.*

[620] M T Abdulrazaq, An Examination of the Powers of the Minister of Finance to Increase the Tax Rate under the Value Added Tax (Amendment) Act of 2007 in Agbonika J. (ed) Topical Issues in Nigeria Tax Laws and Related Areas (Ibadan: Ababa Press Ltd, 2015) p. 89.

Inland Revenue (Establishment) Act in 2007[621] the VAT tribunal was abolished and fused with the Body of Appeal Commissioners to form the Tax Appeal Tribunal (TAT). The VAT tribunal was opined[622] to be more dedicated and efficient than the TAT and there is need to reintroduce a VAT tribunal.

Appeals from decisions of the VAT tribunal are laid to the Court of Appeal while appeals on decisions of the TAT go to the Federal High Court.[623] The important issue now is not whether it is VAT tribunal or TAT that is more efficient but the legal implication of their existence, wherein the Court of Appeal, Ibadan Division in *Stabilini v. FBIR*[624] had in 2009 declared the Tribunal Act void. The Court said;

> On the totality of the deductions arrived at, it goes without much saying that section 20 of the VAT tribunal Act is very inconsistent with the constitution and hence same cannot therefore stand and is hereby declared null and void.

In *Cadbury v. FBIR*,[625] the court of Appeal restated that section 20(1) of the VAT Act is invalid in view of its inconsistency with section 251 of the 1999 Constitution by virtue of section 1 subsection 3 of the 1999 Constitution. It therefore becomes a judicial rascality 'with the greatest respect,' for the Federal High Court Lagos Division in 2014 in *Nigeria National Petroleum Corporation v. Tax Appeal Tribunal & 3 Ors*[626] to maintain that Tax Appeal Tribunal is an inferior administrative panel from which appeals go to the Federal High Court and that it has a constitutional authority to hear and determine tax appeals. The provisions of the VAT Act are not adequate for efficient VAT returns and collections in the proposed

[621] Federal Inland Revenue Service (Establishment) Act 2007, S. 59(i).
[622] C Okoyeuzu, Value Added Tax Remittance: Observations from Developing Country in A.U. Aladesame "Diversification of Nigeria's Economy through Tax Revenue, op cit. p. 91.
[623] TSKJ II Construces Internacionals Sociodade Ida v. Federal Inland Revenue Service (2014) 13 TLRN 1.
[624] (2009) 1 TLRN 1 at 7.
[625] (2010) 2 TLRN 16 at 21.
[626] (2014) 4 CLRN 170.

diversification. Again, tax authorities need to meticulously get in a legislation that will enable them to get the real targeted revenue.

4.16 Interrelationship between Stakeholders

It is recognised that in order to have a workable and sustainable tax system, frequent interaction and engagement between the various stakeholders. The Ministry of Finance is the body charged with the responsibility of performing the oversight function over the activities of revenue authorities in Nigeria. It is also the sole organization responsible for tax policy matters, including drafting any proposed amendments to laws or legislation on taxation. All tax/revenue authorities such as Federal Inland Revenue Service (FIRS) and Nigeria Customer Services (NCS) shall account to the Federal Ministry of Finance in respect of all taxes collected by them. Other governmental organizations and bodies are responsible for advising government on tax policy direction which include the Joint Tax Board, National Planning Commission (NPC) and Nigerian National Petroleum Corporation (NNPC). The Joint Tax Board has a coordinating role on economic policy formulation of which National Tax Policy is a component. Its' major role is to harmonize all tax policies and applications within the country so as to promote uniformity and avoid double taxation between States and the Federation.[627]

At the state level, tax and revenue authorities are also required to report to the State Government through the state's Ministry of Finance. The relationship between the Federal tax organ and the respective states Internal Revenue Boards on tax related matters is moderated through the Joint Tax Board (JTB).[628] The Federal Inland Revenue Service (Establishment) Act, 2007 mandates tax authorities to establish formal inter-agency cooperation with various law enforcement agencies such as the Nigeria Police, Economic and

[627] Personal Income Tax (Amendment) Act 2011, S. 86(9).
[628] *Ibid.*

Financial Crimes Commission and Independent Corrupt Practices Commission.[629] This is necessary in order to assist tax authorities to acquire skill, training and competences on investigation and enforcement activities in relation to the provisions of the enabling legislations with respect to problems of tax defaulters and recalcitrant taxpayers. Tax authorities can also conclude information sharing agreements with EFCC, ICPC, CAC, DSS and others in order that proper assessment can be made on taxpayers. There should be a properly structured information-sharing arrangement established between the tax and revenue authorities on one hand and government bodies such as the Central Bank of Nigeria, Tax Consultants, Nigeria Customs Service, Banks, Nigerian National Petroleum Corporation (NNPC), Department of Petroleum Resources (DPR), National Drug Law Enforcement Agency (NDLEA), National Agency for Food and Drug Administration and Control (NAFDAC) and the Ministry of Finance on the other hand.

Federal Inland Revenue Service should work with the banks and Corporate Affairs Commission (CAC) in gathering database of companies and individuals who carry out transactions with the CAC and banks in order to bring them within the tax net. The Joint Tax Board should be alive with its responsibilities and shall through the Joint State Revenue Committee advice and compel the State Boards on the compliance principles. Tax compliance is not a one way traffic flow. Both the tax authority and taxpayers are obligated to comply with the provisions of the law. There is non-compliance when taxes are imposed arbitrarily, administered without following set of rules or standards and people are subject to penal sanctions without due process. An instance is a matter pending at Anambra State High Court between *Basil Onwuzulume v. Brecco Nigeria Limited*[630] wherein the applicant who was issued warrant to distrain on the BOJ – TAX AUDIT Demand Notice for outstanding tax

[629] FIRS (Establishment) Act, 2007, S. 8(1)(d) & (i).

[630] *Basil Onwuzulume v. Brecco Nigeria Limited* in Suit No. A/Misc. 69/2015 pending at High Court No. 2, Anambra State High Court, Awka.

liabilities for (2011 – 2013) to the tune of N190,562,351.00 (One Hundred and Ninety Million, Five Hundred and Sixty Thousand, Three Hundred and Fifty-One Naira) applied to court for an order to destrain the properties of the respondent in order to recover the said amount. The computation is as follows:

Revenue Window	**Code**	**Amount (₦)**
PAYE/Business Premises	2930006/400102	115,311,987.00
WHT	3930006/400109	30,000,000.00
Development Levy	3930006/400112	162,500.00
Penalty	3930006/400107	14,544,472.00
Interest	3930006/400107	30,543,392.00
Total		**190,562,351.00**

The above computation by the Anambra State Internal Revenue Service is contained in the demand notice addressed to the Managing Director of Brecco Nigeria Limited dated 9th September, 2014. It is to be noted that the provision of the Personal Income Tax Act[631] provides:

> Income tax chargeable on an employees by an assessment whether or not the assessment has been made, shall, if the relevant tax authority so directs, be recoverable from any emolument paid, or from any payment made on account of the emolument, by the employer to the employee.

It will be recalled that a direction in subsection (1) of the section shall be in writing addressed to an employer or be published in the state gazette. Further, it states that the tax authority shall specify the emolument of an employee or class of employees to which it refers and the amount or amounts of income tax to be deducted. It is noteworthy that the Anambra State Internal Revenue Service did not observe this condition precedent, the entire assessment

[631] Personal Income Tax (Amendment) Act, S. 81(i).

runs contrary to the tax laws. An absolute compliance would mean that the taxpayer, tax authority and their advisers would do the right thing at the right time. Finally, the different levels of government and the Joint Tax Board as well as tax authorities are expected to provide guidance and information to the tax paying public. This will elicit higher compliance and cooperation from the tax paying public. The FIRS and other tax authorities should strive to uphold the principles of fiscal federalism and this will translate to economic growth and development of the entire nation.

4.17 Funding of Tax Authorities

The government is expected to provide fund which is a key requirement for the efficient discharge of the duties of the authorities. It is true that when tax authorities are well funded, they are able to act in an independent and unencumbered manner. The main objective of taxation is to mobilize funds from private hands to public treasury by imposing compulsory payment towards the financing of the public sector. In order to get at this objective to be achieved, government must put in place a good and functional tax system. Tax yield is the revenue that accrues to government after taking account of the cost of administration. At this point, it would seem that a firm structure for tax administration had been established at both the state and local government levels throughout the country. This is however a farce.[632] In reality, the revenue committees and State Joint Revenue Committees have not been constituted in some of the states up till today. Where they have been, they are far from being efficient. At the state level, although all the states have since constituted their Board of

[632] A Sanni, Multiplicity of Taxes as a bane of tax compliance and yield op. cit. p. 89.

Internal Revenue, most of them are still plagued with myriads of problems including poor funding, lack of infrastructure, poor remuneration and lack motivated staff.

In order to ensure that the tax and revenue authorities in the country are well funded, government at all levels shall ensure that a proportion of revenue collected by any revenue authority shall be provided to cater for its administration.[633]The proviso to PITA provided that an amount not less than 5 percent of revenue collected as may be approved by the State House of Assembly should be retained by the Board. In the States the provision is not the same, section 15 of Anambra State Revenue Administration Law, 2010 provides for an amount not less than 2.5 percent and not more than 10 percent of all revenue collected by the State Internal Revenue Service in the preceding year. It is submitted that nothing short of 10% of total revenue collection by tax/revenue authorities shall be appropriated each year by the National Assembly to FIRS in order to cater for refund requests from taxpayers. Section 15(a) of FIRS (Establishment) Act, 2007 provides:

> The service shall establish and maintain a fund which shall consist of and to which shall be credited:
>
> > a percentage as determined by the National Assembly of all non-oil and gas revenue collected by the service which may be appropriated by the National Assembly for the capital and recurrent expenditures of the service:

It is not in doubt that funding is very essential for the day-to-day running of the affairs of the tax authorities and in carrying out their statutory functions. Where the tax authorities diligently carry out their functions, it will ensure taxpayer confidence in the tax administration and create a workable and sustainable tax system to the benefits of the stakeholders.

[633]Anambra State Revenue Administration Law, 2010. Personal Income Tax (Amendment) Act, S. 88(i)(b), the Proviso.

4.18 Identifying Taxpayers

It is crucial to effective tax administration that every individual and business taxpayer has unique tax identification number. Measures and controls must be in place to ensure that only one tax number is assigned to each taxpayer. The registration of businesses might be done by auditing registered taxpayers in order to detect their unregistered suppliers or customers or by actually sending tax officials to conduct a tax survey in a particular geographic area to ensure that all persons and businesses are properly registered. The tax identification numbering is mandatory while doing any transaction with the Federal Inland Revenue Service.[634] All taxpayers dealing with FIRS must obtain TIN from the FIRS integrated tax office and TIN is a 14 digit sequential unique number assigned to all corporate and individual taxpayers as part of registration process for ease of identification.[635]

The Federal Inland Revenue Service (Establishment) Act[636] enjoins the FIRS to issue identification number to every company, enterprise and individual in collaboration with the State Boards of Internal Revenue and Local Government Revenue Committee. This collaboration required of the tax authorities is the challenge hampering this innovation. The role of the State Board of Internal Revenue and the various local government tax revenue bodies cannot be over-emphasized in their duty to collaborate with the Federal Inland Revenue Service to provide an adequate and workable system of taxpayers identification number (TIN). The Joint Tax Board should intervene and always rekindle the collaboration between the tax authorities.

4.19 Tracking Tax Defaulters

[634] Guage, a quarterly publication of the Federal Inland Revenue Service, April – June, 2009. P. 11.
[635] *Ibid.*
[636] Federal Inland Revenue Service (Establishment) Act, 2007, S. 8(1)(a), Personal Income Tax (amendment) Act, 2011, S. 85(3)(e).

The objective of the Tax Identification Number (TIN) to be assigned to every taxpayer is to make it easy to track taxpayers and defaulters. This is as the practice in several jurisdictions where tax identification number is used on driving licenses, passports and other personal documentation.[637] The method should be adopted in Nigeria in all forms of documentation to have the bearers' tax identification number.

The Joint Tax Board should facilitate and institutionalize tax identification number to be used nationwide which will be contained in every documentation of a taxpayer. Where this is done, it will have the attendant effect of increasing compliance and the cost of tax administration will be low. It is suggested that the Joint Tax Board and tax authorities should collaborate with banks which will play a major role of ensuring compliance by furnishing tax authorities with names and addresses of their new customers both corporate and individuals. Finally, TIN will provide easy and complete access to taxpayer information nationwide, which can be achieved by the efficient use of information communication technology. It will ultimately reduce the cost of administration and supervision and enhance higher compliance. It cannot be over-emphasized that the relevant tax authorities and the Joint Tax Board should ensure the successful administration/operation of the TIN programme.

4.20 Curbing Corruption and Sharp Practices

Today the commerce is becoming almost intangible for instance through e-commerce and through the help of information technology. The challenge of corruption, fraud and tax evasion is a potential problem and seem to take place in practically every country in the world but these phenomena hit developing countries hardest.[638] The societal problem of corruption has taken its toll in the tax administration which results in negative impact on

[637] A Agbonika, Problems of Personal Income Tax in Nigeria, (Ibadan: Ababa Press Ltd, 2012) p. 332.
[638] R Kitgaard, A framework for a country program against corruption, occasional working paper No. 4 of Transparency International in A. Agbonika, ibid. p. 334.

revenue generation. Revenue officials especially at the state and local government level behave like touts as they openly extort money from members of the public under the pretence of collecting taxes and levies for which receipts are not issued to taxpayers and this result in huge revenue loss to government.[639] Taxpayers often induce revenue collectors so as to pay less than the due taxes. Total compliance with the relevant provisions of the tax laws were meant to safeguard against the leakages. The FIRS Act[640] imposes a general obligation on agents to deduct and remit taxes in accordance with specific provisions of the various tax laws. It is an offence to deduct and fail to remit to the service within 30 days, such an offender is to be charged to account for the tax withheld or not remitted in addition to penalty of 10 percent per annum and interest at the prevailing Central Bank of Nigeria rate or to a jail term of 3 years.[641] Section 13(1) of the VAT Act imposes an obligation on Ministries, Departments and Agencies of Government to withhold VAT at source on all payments and remit to the FIRS.[642]

The provisions of these tax laws are not usually complied with, thus, tax administrators should ensure that the full sanctions and penalties ranging from imprisonment to payment of penalties and interest as well as distraint under the relevant tax laws are employed to fight loss of tax revenue due to government and also to serve as a means of deterrence to tax defaulters.[643] The government has the responsibility to provide the required funding and platform for the automation of tax administration processes, as this would aid effective and efficient administration of taxes in Nigeria. Automated processes would minimize or eliminate leakages observed in the system, which may be due to error or

[639] Nigerian Tax Reform in 2003 and Beyond, op. cit, p. 296.
[640] FIRS Act, S. 40.
[641] *Ibid.*
[642] Section 81 and 82 of CITA imposes same obligation in withholding WHT at source on ministries, departments and agencies; section 81 of PITAA imposes the obligation on employees to deduct income tax of employees under the PAYE scheme.
[643] FIRS Act, section 24 allows the Accountant General of the Federation to deduct from budgetary allocation taxes due from MDAs, see also section 55(4)(a) & 9b) of CITA.

misconduct on the part of tax officials or taxpayers, safeguard the integrity of the system and lead to greater professionalism on the part of tax officials and greater confidence on the part of taxpayers. In addition, automated systems would lead to greater specialisation and reduce the costs and time required in tax administration process thereby leading to higher compliance by taxpayers due to the ease with which processes can be commenced and completed. Other institutions have automated system of revenue collection including the two teaching hospitals in Anambra State, Nnamdi Azikiwe Teaching Hospital, Nnewi and Chukwuemeka Odumegwu Ojukwu Teaching Hospital, Amaku-Awka is advanced in the use of automated system and it makes easy for payments.

It is expected that all processes starting from registration of taxpayers, filing of returns, audits and investigations, payment of taxes and including correspondence with taxpayers would be automated. The necessary amendments shall be made on the tax laws to ensure that the use of the systems are in line with the law. Tax officials shall be trained in the use and maintenance of automated systems and the general public and taxpayers encouraged to embrace the use of these systems so that Nigeria can have a tax system that is in line with global best practices.

In this regard, revenue authorities must have the proper quantity and quality of personnel needed for the onerous task of tax collection. There should be proper recruitment and selection processes with emphasis on both skills and ethics. Tax officials who are in charge of administration and enforcement of taxes are many years ago[644] identified to be largely untrained and unqualified and had remained so till date. It is therefore said that untrained tax officials populate the SIRS and unqualified staff are many.[645] The need to fully develop tax officials to cope with the present e-commerce, e-banking will help for re-

[644] U Akpo in a paper titled "Ensuring an Effective Personal Income Tax Administration, Approaches and Challenges" delivered at the FIRS Management Meeting of January, 2006. P. 5.

[645] *Ibid.*

equipping human capacity building and utilization. This will involve training and re-training of tax officials of FIRS and SBIR. Taxation as a profession is highly specialised and requires the services of experts in the field of taxation.[646] It was found and same is prevalent that at the local government level, most levies and taxes are not collected by government revenue collectors but contracted to touts, tax consultants without any form of professional training.[647]

The government at all levels should map out strategy as recommended by the Joint Tax Board in 1994[648] for the establishment of an Academy for Tax Administration in Nigeria. The government is expected to adopt the following strategy:

a. Establishing and funding of tax academies for training of tax authorities and continuous capacity building;
b. Adequate exposure of tax authorities to international training (including secondment, attachment and mentoring programmes on all aspects of taxation, closely linked to the autonomy and funding of tax authorities; and,
c. Providing framework to fully acquaint tax officials with global best practices in tax and revenue generation and administration.

The fund needed for this all important capacity building and training of tax personnel is supposed to be factored into the budget of the relevant authority for each year to ensure sustainability.

4.21 Tracking Offshore Payment

Tracking offshore payments to taxes is still of challenge as it is shown that the tax authorities do not have the machineries in place to effectively monitor foreign taxes. In this era of technologically advanced systems in which companies not resident, nor with a fixed base in

[646] Nigerian Tax Reform & Beyond op. cit p. 298.
[647] *Ibid*. p. 299.
[648] Companies Income Tax, 2007 No. 56.

Nigeria goes into arrangements to evade tax, it is difficult to say that tax authorities in Nigeria are ready for the serious challenge. The tax authorities under the extant law can assess the liability of a non-Nigeria company which derives earnings in Nigeria. Section 13(2) of the Act[649] provides:

> The profits of a company other than a Nigeria company from any trade or business shall be deemed to be derived from Nigeria:
>
> a. …..
>
> b. If it does not have such a fixed base in Nigeria but habitually operates a trade or business through a person in Nigeria authorized to conduct on its behalf or on behalf of some other companies controlled by it or which have a controlling interest in it; or habitually maintains a stock of goods or merchandise in Nigeria from which deliveries are regularly made by a person on behalf of the company to the extent that the profit is attributable to the business or trade or activities carried on through that person;
>
> c. …
>
> d. Where the trade or business or activities is between the company and another person controlled by it or which has a controlling interest in it and conditions are made or imposed between the company and such person in their commercial or financial relations which in the opinion of the board is deemed to be artificial or fictitious, so much of the profit adjusted by the board to reflect arm's length transaction.

[649] *Ibid*.

Federal Inland Revenue Service (FIRS) has maintained certain FIRS dedicated domiciliary account with JP Morgan Chase Bank in the United States, in London and in Germany. All tax payments in US dollars are paid into the one in the USA while taxes in Pound Sterling are paid in the one in London and all Euro-dominated taxes would be paid into that in Frankfurt, Germany.[650] It is commendable that FIRS has opened channels of receiving taxes that are due and paid for but the major challenge is tracking the defaulters. The situation which the difficulty of tracking revenue from artificial and fictitious arrangement by companies offshore arose in *Offshore Int'l v. FBIR*[651] wherein the Offshore International S.A. (the plaintiffs) are a body corporate which was incorporated in Panama and is having its principal office at Houston in Texas USA. By various agreements in writing, entered into contract to carry out certain oil well drilling and completion operations in Nigeria for different oil companies in Nigeria namely: Shell BP, Mobil Oil and Japan Petroleum Company. Under the said agreements substantial payments were made to the plaintiffs, from time to time.

The Federal Board of Inland Revenue (as then) believed that the plaintiffs are chargeable to tax in respect of various payments in connection with the contract. During trial it was in evidence that the Board[652] informed the court that through the profit and loss balance sheet or statement of account which I.D.C. submitted for tax purposes, a total sum of N1,060,379 was paid to the plaintiffs for hiring of equipment *e.g.* RIGS *etc*. and such rentals were allowed for and exempted from taxation by revenue as legitimate expenditure incurred by I.D.C. The court relied on the provisions of section 25 of CITA 1961, Companies Decree 1968 and Income Tax (Miscellaneous Provisions) Decree 1974, section 17 of CITA and reviewed the cases of *DIAB NASIR v. FBIR,*[653] *Smith, Stone and Knight v. Birmingham*

[650] J A Agbonika, *Problems of Personal Income Tax in Nigeria, op. cit* p. 349.
[651] (2011) 4 TLRN 58.
[652] Federal Board of Inland Revenue (FBIR) now Federal Inland Revenue Service (FIRS).
[653] (1964) 1 ALL NLR 408.

Corporation,[654] *F.G. (Films) Ltd,*[655]*Federal Commissioner of Taxation vs. Clarke.*[656] The court held:

> There is no provision in the Companies Income Tax Act that grants exemption or immunity from payment of tax on a company because it is not incorporated in or resident within Nigeria or because it has no office or place of business in Nigeria. The Companies Income Tax does not provide that a different or rather preferential treatment be given to a company on the ground of foreign nationality or residence outside Nigeria as compared with a company incorporated in Nigeria.

The proactive judge in *Offshore Int'l* case has set a pace for the tax authorities to follow in dictating and tracking defaulters that hide under cloak of residing or carrying out business in a foreign country to evade tax. It is now established that consideration for liability to pay tax should be based not only the person that earned the money but the question is who is beneficially entitled to the profit and such person is the person who "derives" the income. Again, a Vessel or Aircraft of a company that carries on the business of transport by sea or air calls at any Nigerian seaport or airport, its profit or loss is deemed to be derived from Nigeria. It is also now more challenging that many companies left Nigeria on security grounds yet through their subsidiaries they do business in Nigeria. It is also a fact that the provisions in our tax laws presently cannot adequately address the volume of transactions transpiring on the internet and Nigeria is inadvertently missing out on potential revenue source derivable from appropriate taxing of internet transactions.

[654] (1939) 4 all er 116.
[655] (1953), WLR 483.
[656] 40 Commonwealth L.R. 246 at 260.

4.22 Developing a Transfer Pricing Regime

Transfer pricing is a term that encompasses the setting, analysis, documentation and adjustment of charges made between related parties for goods, service or use of property including intangible property.[657] It relates to the system of setting prices for the transfer of goods, services and intangibles between parties under the same entity or between related entities which operate in a more than one tax jurisdiction. Transfer pricing is also a legitimate practice for associated companies to adopt in the pricing of interrelated sales within a group as means of optimising economic performance. It is described while commenting on the understanding of the meaning as;

> Transfer pricing is often misunderstood and misrepresented as speciality of international tax frequently and described pejoratively in the popular press. Transfer pricing is nothing more than the essential function of determining pricing arrangements among related entities within a corporate group. A vertically integrated business needs to have as series of transfer prices in place to determine the profitability of each segment of its business, to effectively manage its decision making and to appropriately reward its managers.[658]

Transfer pricing is a major concern of multinational enterprises (MNEs) which operate in more than one country and by extension, more than one tax jurisdiction. Tax legislations and regulations differ from one tax jurisdiction to another and there is the need for multinational business entities to comply with these requirements. Compliance may lead to an increase in the tax burdens of the enterprises through double or multiple taxation.

[657] I O Okauru (ed) Federal Inland Revenue Service and Taxation Reforms in Democratic Nigeria, (Ibadan: Safari Books Ltd, 2012) P. 333.

[658] D Lam, What every business Lawyer should know about transfer pricing cited in A J Urguidi, An Introduction to transfer pricing, New School Economic Review, vol. 3(i) 2008 p. 72.

Multiple taxation leads to increased costs for companies which conduct businesses in Nigeria and also creates hurdles in the way of the transfer of goods and services across borders generally. A recent report by Global Financial Integrity, a Washington-based think tank comprising former IMF economists, entitled "Illicit Financial Flows from Africa" looked at capital outflows from Africa. The report found that between 1970 and 2008 illicit financial outflows from African countries were on a conservative estimate, $854 million. These outflows were mainly from West and Central Africa – the biggest outflows were from Nigeria and were substantially attributable to transfer pricing and mispricing by multinational companies.[659]

The astronomical growth in the amount of cross-boarder transactions on the African continent in the last decade, an increasing number of African countries looking to tax as a sustainable source of revenue for development must introduce specific transfer pricing laws to combat transfer mispricing. Nigeria has through the Federal Inland Revenue Service (FIRS) within the confines of the powers conferred by section 61 of the Federal Inland Revenue Service (Establishment) Act 2007 opted for the arm's length principle.[660] Prior to the regulations in 2012, in confronting the phenomenon of transfer pricing, the FIRS was limited to the general anti-avoidance rules found in sections 13(2)(d) and 22 of the Companies Income Tax Act (CITA), section 15(2) of the Petroleum Profits Tax Act (PPTA) and section 17(3) of Personal Income Tax Act (PITA). These rules which capture something of the arm's length principle, proved unsatisfactory because they failed to provide for certainty of treatment of transfer pricing transactions owing to their wide and subjective

[659] D A Obadina, The New Transfer Pricing Regime in Nigeria: Choice of an Imperfect System in topical Issues on Nigerian Tax Laws and Related Area, A. Agbonika (ed) Ababa Press Ltd, Ibadan, 2015 p. 50.

[660] The arm's length is designed to replicate the workings of the market by requiring members of a multi-national group to negotiate as though they were unrelated parties dealing in the market place. In this way, it seeks to ensure that the transfer price agreed and ultimately, the allocation of profits by the multinational as between the jurisdictions where its members are located reflects the outcome that could be expected if the parties were unrelated. Formulary appointment by contrast seeks to establish a fair division of a multinational's global profit without regard to how prices are determined in the market place. Under this approach a portion of the multinational's profit is allocated.

terms. The regulations substitute a more structured and transparent regime based explicitly on the arm's length principle as elaborated by the organization for Economic Corporation and Development (OECD) transfer pricing guidelines for multinational enterprises and tax administrations (the OECD guidelines) 2010 and the United Nations Practical Manual on transfer pricing 2013.

It is to be noted that when multinational companies and their subsidiaries who are related parties deal with each other, there will be less emphasis on ensuring the prices of the goods and services exchanged reflect market circumstances (although there may be genuine difficulty in determining a market price). This creates the potential for the profits attributable to a transaction to be distorted by setting the selling price too high or too low in relation to costs and other market considerations.[661] For the person whose profits are distorted, the quantum of tax liability will be less than it would otherwise have been. In this way, where the transaction is between a multinational company and associated company in another jurisdiction, transfer pricing may be used to extract profits from the jurisdiction in which they are generated, to the detriment of the local tax base. Transfer pricing represents a significant risk and cause of concern for tax authorities and ultimately for governments. Abdulrazaq[662] identifies the following tax motivations for transfer pricing abuse:

1. Through under-invoicing, multinational enterprises can avoid paying customs duties;
2. By shifting tax deductible costs to a high tax country and taxable revenue to a low tax country, the multinational enterprise can minimize the total tax paid to the two countries; and,
3. If the foreign subsidiary cannot directly remit profits to its parent company because of the host country foreign exchange restrictions, profits are shifted out of the host

[661] This leads to transfer mispricing.

[662] M T Abdulazaq, Reporting and Compliance Requirements under the Nigerian Income Tax (transfer pricing) Regulations 2012, Tax notes, Lagos, 2013 p. 18.

country by over-invoicing intra firm exports to and under-invoicing exports, from the foreign affiliates.

Most developing countries have sought to deal with transfer pricing transactions by transporting into domestic law the principles set out in Article 9 of the OECD and UN model tax conventions. These require pricing transactions between "associated enterprises" to be tested and taxed on the basis of the "arm's length" principle. Paragraph 9(1) of the model tax conventions contain an authoritative statement of the principle thus:

> Where conditions are made or imposed between two (Associated) enterprises in their commercial and financial relations which differ from those which would be made between independent enterprises, then any profit which would, but for those conditions, have accrued to one of those enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and be taxed accordingly.

There are three significant aspects of this statement as highlighted by Obadina[663]

1. It requires associated enterprises to be treated as though they were independent and unrelated enterprises.
2. It requires a comparison between the conditions made or imposed between associated independent enterprises in order to determine whether to rewrite the accounts for the purpose of calculating the tax liabilities of the associated enterprises.
3. It requires a determination of the profits which would have accrued at arm's length in order to determine the quantum of any adjusted profits.

The underlying assumption of the arm's length principle from the above, is that price related terms agreed between related parties in the exchange or transfer of goods and services

[663] D A Obadina *op. cit*.

should achieve the same result that would be agreed between unrelated parties dealing under a comparable transaction undertaken in comparable circumstances. This is a turn based on a requirement that transactions between affiliated companies should be made purely on a commercial basis in circumstances where both will seek to maximise their advantage but without allowing their special relationship to influence the terms agreed. In 2012, Regulations[664] which require the FIRS to test transfer price transactions by reference to "arm's length principle" and enable it to adjust non-compliant transactions are to be applied in a manner consistent with Article 9 of the UN and OECD model tax Conventions,[665] the OECD's guidelines[666] and by implication, the UN manual on transfer pricing.[667] The objectives of the Regulations are:

i. To ensure that Nigeria is able to tax business "appropriately" based on their economic activities in the country.[668]
ii. To equip Nigerian tax authorities with the tools to fight tax avoidance through mispricing of transactions between associated persons.[669]
iii. To reduce the risk of double taxation and to provide taxable persons with certainty of transfer pricing treatment.

While commending the milestone achieved in tracking the multinational companies from transfer pricing games, the new transfer pricing regime has some bottlenecks in implementation as criticized by Abulrazaq.[670]

i. The Advance Pricing Agreement Mechanism (APA) still pose challenges as whereas FIRS may by notice cancel an APA, if there has been a breach of a "fundamental term" or an underlying critical assumption, change in tax law and misrepresentation

[664] Nigerian Income Tax (transfer pricing) Regulations 2012.
[665] *Ibid*. Reg 11(a).
[666] *Ibid*. Reg 11(b).
[667] *Ibid*. Reg 12(i).
[668] *Ibid*. Reg 2().
[669] *Ibid*. Reg 2(b).
[670] M T Abulrazaq, Reporting and Compliance Requirements under the Nigerian Income Tax. op. cit.

and mistake. It is still not clear what is to be permitted in APA to avoid issues with the other tax jurisdiction.

ii. In the transfer pricing documentation and disclosure, the Regulations failed to specify the type of information that should be provided.

iii. It did not state the time and circumstances in which it might be appropriate for a taxpayer to apply a transfer pricing methodology other than one of the specified methodology in the regulation.

iv. It failed to address "how far back" the FIRS may go in reopening and adjusting transfer pricing transactions. Above all the regulations fail to get to grips with the underlying tension between the arm's length principle and the economic realities that attend transfer pricing by multinationals; the tension around the fact that the goods and services transferred in multinational enterprises are often unique and the result of group synergies and economies of scale, with the result that it will often be difficult and in many cases impossible to find "comparable" to work the arm's length test.

4.23 Tax Amnesty

Tax amnesty has the potentials of improving tax yield, widening tax net and making tax defaulters to turn a new leaf which will consequently improve economic activities, increase investment and generate employment and consequently transform Nigeria into an economic giant. Tax amnesty is a limited-time opportunity for a specified group of taxpayers to pay a defined amount, in exchange for forgiveness of a tax liability relating to a previous tax period or periods without fear of criminal prosecutions, it typically expires when some authority begins a tax investigation of past due tax.[671] It is given consideration in the context of an anti-

[671]F O Obaro, How about tax amnesty? Nigerian Tribune I April 2014 p. 27; I. Nwachukwu, Tax Amnesty as a legal solution to tax evasion, Business Day online 12 October 2011 p. 1.

evasion drive in Nigeria where evasion has hitherto been widespread.[672] The government wishes to tackle evasion and gives evaders an opportunity in the transition from a lower to a higher tax morality, to square accounts with the tax authorities by disclosing items previously omitted and settling their true liability. The terms may be:

1. The evader is granted freedom from prosecution but must pay the tax and full monetary penalties; or
2. There is also an abatement or exemption from monetary penalties; or
3. The tax is computed at a compounded rate on hitherto concealed capital when disclosure is made at the rate intended to cover both tax and penalty.

It is difficult to justify an amnesty in terms of equity and the main justification is that it would give impetus to an anti-evasion drive, producing a useful flow of additional revenue at low administrative cost.[673] Tax amnesty assist the tax authorities in producing a higher tax morality among the general public at a faster rate than could otherwise be expected. The process of tax amnesty vary from one jurisdiction to another, just as every amnesty programme shares a few basics. One has to do with defining who is eligible to apply for the amnesty and avoiding the possibility of lines against property or bank accounts or garnishment of wages as a means of settling the outstanding tax liability. In some nations the total tax debt must exceed a minimum amount before amnesty is a possible.[674] A taxpayer owing less than that amount may be able to work out a payment schedule with the tax agency. In this, the taxpayer might incur additional late fees and other penalties until the debt is paid in full.

Another common element in tax amnesty is the identification of a specific amount that must be paid in order to avoid attempts to collect the overdue taxes. Typically, the

[672] J A Agbonika, *Problems of Personal Income Tax in Nigeria,* op. cit. p. 423.
[673] *Ibid.*
[674] O Abifarin *et al*, "Tax Amnesty is some Commonwealth Countries and America: a lesson for Nigeria" in topical issues on Nigeria taxation and other related matters, op. cit p. 101.

agency will base this figure on a parentage of the total debt owed, sometimes making allowances for the overall income level of the taxpayer. Depending on the circumstances, the figure included in an approved amnesty settlement may be as much as 70 percent less than the original amount of taxes owed.[675] The establishment of settlement date is another feature where the taxpayer fails to remit the reduced tax amount to the agency by the settlement date fixed, the offer of amnesty is withdrawn and the full amount of the tax debt is reinstated. It is not unusual for additional late fees and penalties to be applied to the balance on the taxpayer's account. It is opined that where this happens, the agency may begin proceedings to attach property or garnish wages as a means of collecting the total amount of taxes due.[676] Tax amnesty can provide a great deal of emotional and financial relief for taxpayers who have undergone some type of financial reversal that prevented them from paying taxes in a timely manner.

4.24 Dispute Resolution Mechanism

Tax disputes resolution mechanism has been another thorning issue in tax matters in Nigeria. It is naturally expected that there would be disputes between taxpayers 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[677] recognizes the right of every Nigerian to submit disputes to the courts[678] for adjudication whether he is a taxpayer or not. Other than the general disputes, there are specialized processes relating to the resolution of tax or fiscal disputes between taxpayers and tax revenue authorities. In this regard the tax appeal process which is an integral and important part of the tax administration process, is

[675] O Abifrain. Tax amnesty as catalyst for Economic Development of Nigeria, Confluence Journal of Jurisprudence and International Law, vol. 7 (2014) p. 12.
[676] *Ibid*.
[677] 1999 Constitution of the Federal Republic of Nigeria as amended, s. 6(6)(b), 251(1)(b) and 272(1).
[678] *Ibid*, s. 6(1)(3). PITA, S. 78, CITA, s. 48 and FIRS Act, s. 59(2).

provided for under the relevant tax legislation.[679] The appeal process is available to every taxpayer, who is aggrieved or dissatisfied with a decision or ruling made by the tax authority, relating to the tax status of such taxpayer, the interpretation/application of tax laws and such other matters affecting the rights and status of the taxpayer. It is noteworthy, to know that the jurisdiction of the Tax Appeal Tribunal has been subjected to a lot of criticism[680] and the courts has adjudicated on this issue of jurisdiction of the Tax Appeal Tribunal in *Stabilini Visinoni Ltd v. FBIR*[681] and *Cadbury (Nig) Plc v. FIBR.*[682] The constitutionality of the jurisdiction of Tax Appeal Tribunal has been so much questioned and discussed and in all the arguments with the highlights:

a. The tribunal is not a court but an administrative tribunal
b. A fact finding tribunal

The only problem with this classification is that as a fact finding tribunal, the tribunal can only make recommendation to another body, however, the Tax Appeal Tribunal (TAT) is not a fact finding tribunal.[683] The reason is that the judicial powers of court under section 6(6)(d) of the 1999 Constitution has not preserved the jurisdiction of the Tribunal as such. The Court of Appeal in *Cadbury v. FBIR*[684] cited with approval the principle in *Stabilini Visinoni Ltd v. FBIR*[685] and said:

> Learned Respondent's counsel interpretation of the judicial powers of the court under section 6(6)(d) of the 1999 Constitution is

[679] Federal Inland Revenue Service (Establishment) Act, s. 59 and the 5th Schedule, Companies Income Tax (Amendment) Act 2007, s. 18. Personal Income Tax (Amendment) Act 2011, s. 60, Petroleum Profit Tax Act, s. 41(1); Value Added Tax Act, s. 20(1-5).

[680] M N Umenweke& K KEzeibe, Nigerian National Petroleum Corporation (NNPC) v. Tax Appeal Tribunal & 3 Ors – The Constitutionality of the jurisdiction of the Tax Appeal Tribunal Revisited, International Journal of Business & Law Research 3(2): 73 – 81, April – June 2015 page 72. See also seahipaj.org/journals-ci/june-2015/UBLR/full/UBLR-j-7-2015.pdf assessed on 20/8/2016.

[681] (2009) 2 CLRN 269.

[682] (2010) 1 CLRN 215.

[683] *Supra* at 34.

[684] (2010) 2 TLRN 16 at 34.

[685] (2009) 1 TLRN 1 at 6.

> misconceived. This is because a court or tribunal cannot invest itself with jurisdiction based on misconception of the law. See the case of *Babalola v. Obaokaoke* (2005) 8 NWLR (part 927) 386 at 403. I therefore hold that section 6(6)(d) of the Constitution has not preserved the jurisdiction of the VAT tribunal as a fact finding tribunal.

A fact finding tribunal can only recommend possible solutions and not venture into giving judgment as TAT has done. On this ground the existence of TAT is in violation of the provisions of the Constitution particularly sections 1 subsections (1) & (3) and 251(1)(a) & (b) of the 1999 Constitution of the Federal Republic of Nigeria as amended.

Now that Tax Appeal Tribunal is not a court nor a fact finding administrative body, the question is; is TAT an arbitral body? The answer to the question is capital no. TAT is not one of the bodies recognized by the Arbitration and Conciliation Act,[686] hence it cannot be alluded that it was created by that statute; however, it is created by a statute.[687] Again, the provisions of section 59 of the Federal Inland Revenue Service (Establishment) Act and other tax statutes created the jurisdiction of TAT, but an arbitrator or an arbitral tribunal derives its jurisdiction from the agreement of the parties. It is important to note here that the FIRS (E) Act, PPTA and other tax statutes have provided a mechanism for settlement which does not include arbitration. As a standard part of arbitration law, the inarbitrability defence reinforces the fundamentally contractual character of the arbitral process. It provides that non-contractual issues, regardless of their implications for the transaction, cannot be submitted to arbitration, because they impinge upon or involve, directly matters of public law.[688] It is agreed among arbitration scholars that the core of the arbitrability argument is that the public

[686] Cap C1, LFN. 2004.
[687] Federal Inland Revenue Service (Establishment) Act s. 59.
[688] T E Charbonneau and A W Shedrack, Tax liability and inarbitrability in International Commercial Arbitration, Florida State University. Journal of Transnational Law & Policy, 1992, p. 27.

which never signed the arbitration agreement is hurt directly when a law of fundamental importance to democratic capitalism is improperly enforced.[689]

Tax disputes relating to federal tax in Nigeria presently by the provisions of section 251 of the 1999 Constitution of the Federal Republic of Nigeria as amended can only be resolved through the mechanism of court adjudication. It is because, there is no such other mechanism other than court adjudication,[690] matters of tax disputes resolution became also a challenge to the administration and collection of tax in Nigeria. Presently, Nigerian law, in particular the PPTA did not provide for arbitration as a method of settling tax disputes and the parties involved cannot by their agreement contract out of the statute and create a private court to determine what amounts essentially to statutory claims. In other jurisdiction like United States of America, there is alternative system of curbing tax evasion tagged Foreign Account Tax Compliance Act (FATCA). It is therefore submitted that with due consideration that arbitration tribunal has no national or state powers yet it has jurisdiction to decide on sovereign prerogatives of nations, hence there is need for further amend the Constitution of the Federal Republic of Nigeria 1999 as amended. There is need for an amendment of section 251(1) of the Constitution by removing paragraphs (a) and (b) on the exclusive jurisdiction of the Federal High Court and by inserting part III under the fifth schedule or adding it as a tribunal under the sixth schedule to the Constitution.

[689] W W Park, Private Adjudication and the public interest: The Expanding scope of International Arbitration, 12 Brooklyn Journal of International Arbitration, 1986 p. 630; F E Onyia, Arbitrability of tax disputes under Nigerian Law: A Tale of Three Cases, published in the Index of Tax Law Reports of Nigeria 2009 – 2013 p. 1.

[690] *Federal Inland Revenue Service v. Nigerian National Petroleum Corporation & 3 Ors* (2012) 6 TLRN 1, Esso, Shell v FIRS (2012) 8 TLR 45.

CHAPTER FIVE

ANALYSIS OF TAXATION IN UNITED KINGDOM, UNITED STATES OF AMERICA AND NIGERIA

Income taxation is one of the principal methods by which nation – states raise revenue to fund ever-increasing government expenditure. Among the countries of the world, different tax regime exist but these different tax systems share many common principles and indeed, a common language of income taxation. It is important to note that most systems generally compute taxation income by allowing for reductions or deductions for the cost of making profits including allowances for capital recovery and exemptions.[691] There are broad similarities that may be obscured by many differences in various income tax laws. The disparities in the political, social, economic and moral objectives of societies involved.[692] The United States and United Kingdom share the same general system of law, that is, the common law system of jurisprudence. Nigeria by extension is a product of British colonialism and shares the same attributes. Alan Watson a leading authority on comparative law suggested that comparisons are difficult and may not be particularly worthwhile except when the legal systems are closely related.[693]

5.1 The United Kingdom

Taxation in the United Kingdom may involve payments to a minimum of three different levels of government; the central government (Her Majesty's Revenue and Customs), devolved national governments and local government.[694] Central government revenues come primarily from income tax, corporation tax and fuel duty. Local government revenues come

[691] Tax exemption refers to a monetary exemption which reduces taxable income. Tax exempt status can provide complete relief from taxes, reduced rates or tax on only a portion of items.

[692] W B Barker, *A Comparative Approach to Income Tax Law* in the United Kingdom and the United States, (1996) 46 Cath. U.L Rev 7.

[693] *Ibid* p. 8.

[694] http://wikipedia.org/uk/taxation-in-the-united-kingdom accessed 17th August 2017.

primarily from grants from central government funds, business rates in England and Wales, council tax and increasingly from fees and charges such as those from on-street parking.[695]

Income tax was aroused in Britain by William Pitt the younger, in his budget of December 1798 and introduced in 1799 to pay for weapons and equipment in preparation for the Napoleonic wars. Pitt's new graduated (progressive) income tax began at a levy of 2 old pence in the pound (1/120) on incomes over £60 (equivalent of £5,696 as at 2015) and increased up to a maximum of 2 shillings (10 percent) on incomes of over £200. Pitt hoped that the new income tax would raise £10 million but receipts for 1799 totalled just over £6 million.[696]

Income tax was levied under five schedules. Income not falling within those schedules was not taxed. The schedules were;

i. Schedule A (tax on income from United Kingdom land)
ii. Schedule B (tax on commercial occupation of land)
iii. Schedule C (tax on income from public securities)
iv. Schedule D (tax on trading income, income from professions and vocations, interest, overseas income and casual income).
v. Schedule E (tax on employment income)
vi. Later schedule F (tax on United Kingdom dividend income) was added.

Pitt's income tax was levied from 1799 to 1802, when it was abolished by Henry Addington during the Peace of Amiens. Addington had taken over as Prime Minister in 1801. The income tax was reintroduced by Addington in 1803 when hostilities recommenced but it was again abolished in 1816, one year after the Battle of Waterloo.[697]

[695] *Ibid.*
[696] UK Consumer Price Index inflation figures are based on data from Gregory Clark (2016). The Annual RPI and Average Earnings for Britain, 1209 to present (new series; measuringworth.com).
[697] *Ibid.*

Britain's income tax has changed over the years. Originally it taxed a person's income regardless of who was beneficially entitled to that income but now a person owes tax only on income to which he or she is beneficially entitled.[698]Most companies were taken out of the income tax net in 1965 when corporation tax was introduced. The changes were consolidated by the income and Corporation Taxes Act 1970. The schedules under which tax is levied have changed. Schedule B was abolished in 1988, Schedule C in 1996 and Schedule E in 2003. The remaining schedules were superseded by the Income Tax (Trading and other income) Act 2005, which also repealed schedule F. The Corporation Tax Act 2009 and Corporation Tax Act 2010 repealed and superseded the scheduler system for corporation tax purposes. The highest rate of income tax peaked in the Second World War at 99.25 percent.[699] It was slightly reduced after the war and was around 97.5 percent (nineteen shillings and six pence in the pound) through the 1950's and 60's.[700]

Subsequent governments reduced the basic rate further to the present level of 20 percent in 2007. Since 1976 (when it stood at 35 percent), the basic rate has been reduced by 15 percent but this reduction has been largely offset by increases in National Insurance Contributions and Value Added Tax. In 2010 a new top rate of 50 percent was introduced on income over £150,000. A predictable result of this was for people to disguise their income and revenue to the Exchequer to go down.[701]

5.1.1 Overview of Tax Practice in United Kingdom

Income tax forms the single largest source of revenues collected by the government. The second largest source of government revenue is National Insurance Contributions. The third

[698] http://wikipedia.org/UK/taxation op cit.
[699] *Ibid.*
[700] *Ibid.*
[701] *Ibid.* See also W Robert, Two-thirds of millionaires disappeared from official statistics to avoid 50 percent tax rate; The Daily Telegraph, London, 12 December 2012.

largest source of government revenues is value added tax (VAT) and now the fourth largest is corporation tax.[702]

5.1.1.1 Residence and Domicile

Untied Kingdom source income is generally subjected to United Kingdom taxation no matter the citizenship nor the place of residence of the individual nor the place of registration of the company.[703] On individuals, the United Kingdom income tax liability of one who is neither resident nor ordinarily resident in the United Kingdom is limited to any tax deducted at source on United Kingdom income, together with tax on income from a trade or profession carried on through a permanent establishment in the United Kingdom and tax on rental income from United Kingdom real estate.

Individuals who are both resident and domiciled in the United Kingdom are additionally liable to taxation on their world wide income and gains. Individuals, resident but not domiciled in the United Kingdom (a non-dom), foreign income and gains have historically been taxed on the remittance basis, that is, only income and gains remitted to the United Kingdom are taxed (for such people the United Kingdom is sometimes called a tax heaven.[704] The long term policy for the non-dom wishing to retain the remittance basis is required to pay an annual tax of £30,000.[705]

United Kingdom domiciled individuals who are not resident for three consecutive tax years, are not liable for United Kingdom taxation on their world wide income and those who are not resident for five consecutive years, are not liable for United Kingdom taxation on

[702] S Dowell, *History of Taxation and Taxes in England*. Pdf. Accessed 17/2/2017.
[703] *Ibid.*
[704] http://wikipedia.uk/taxation op cit.
[705] *Ibid.*

their world capital gains.[706] Anyone physically present in the United Kingdom for 183 or more days in a tax year is classed as resident for that year.

Domicile here is a term with a technical meaning.[707]An individual is domiciled in the United Kingdom if he was born in the United Kingdom or if the United Kingdom is his permanent home and is not a United Kingdom domicile if he was born outside of the United Kingdom and does not intend to remain permanently. A company is resident in the United Kingdom if it is United Kingdom incorporated or if its central management and control are in the United Kingdom (although in the former case a company could be resident in another jurisdiction in certain circumstances where a tax treaty applies). Double taxation of income and gains may be avoided by an applicable double tax treaty – the United Kingdom has one of the largest networks of treaties of any country.[708]

5.1.1.2 Personal Taxes

Income tax is the single largest source of government revenue in the United Kingdom making up about 30 percent. The taxpayers with the highest incomes and 90% of all income tax revenue is paid by the top 50% of taxpayers with the highest incomes.[709]

Each person has an income tax personal allowance and income up to this amount in each tax year is free of tax. The 2017/2018 tax year the tax-free allowance for under 65s with income less than £100,000 is £11,500.[710]

Income tax rates:

[706] *Ibid.*

[707] The practice of residence and domicile interpretations were fully discussed under chapter 4 (four) on the heading factors establishing residence.

[708] See UK/Nigeria Double Taxation Agreement signed on 9th June 1987 on income tax corporation tax, capital gains tax and petroleum revenue tax, particularly paragraph 2(a & b) on fiscal residence of Article 4.

[709] *Ibid*. See also UK/USA Double Taxation Convention, Protocol 2002.

[710] "Rates and Allowances – Income Tax" HM Revenue & Customs, accessed 16th August, 2017.

Rate	Dividend Income	Savings Income	Other Income (income employment)	Tax bracket (of income above tax free allowance)
Basic rate	7.5%	20%	20%	£0-£33,500[711]
Higher rate	32.5%	40%	40%	£33,501 – £150,000
Additional rate	38.1%	45%	45%	Over £150,001

The table reflects the removal of the 10% starting rate from April 2008, which also saw the 22% income tax rate drop to 20%. In 2013, income threshold for high taxation rate on income was decreased to 32,011.[712] The taxpayer's income is assessed for tax according to a prescribed order with income from employment using up the personal allowance and being taxed first, followed by savings income (from interest or otherwise unearned) and then dividends. Foreign income of United Kingdom residents is taxed as United Kingdom income.[713] Rental income on a property investment business is taxed as other savings income, after allowing deductions including mortgage interest. The mortgage does not need to be secured against the property receiving the rent, subject to a maxim of the purchase prices of the property investment.

5.1.1.3 Tax Exemptions

The UK tax resident individuals are entitled to personal allowance of tax free income (that is £11,500) for a tax year ending on the 5th April of the year. The UK does not have itemized deduction or similar. The main tax reliefs are limited to contributions to pension schemes or gifts to UK registered charities. The costs of transporting an employee and close family to the

[711] Current tax rates, http://www.hmrc.gov.uk/rates.html.
[712] *Ibid*. See also Horstman, Taxation in the Zenith: Taxes and classes in the United Kingdom, 1816 – 1842, Journal of European Economic History, 2003, 111-137.
[713] But to prevent double taxation the United Kingdom has agreements with many countries to allow offset against United Kingdom tax what is deemed paid abroad.

UK at the beginning and end of UK assignments are not taxable up to a maximum of GBP 8,000.

The categories of income that are exempt from income tax include the following:[714]

a. Gaming winnings

Winnings from betting (including pool betting; or lotteries or games with prizes) are not chargeable gains and rights to winnings obtained by participating in any pool betting or lottery or game with prizes are not chargeable assets.

b. Long service awards are fully tax-exempt if made in the following circumstances;

- The award is not in cash,
- The award is made to an employee to mark long service with an employer
- The award marks at least 20 years service and other exceptions.

c. Individual savings accounts for UK residents. The annual Individual Savings Account allowance is GBP 20,000. There are different individual savings accounts to facilitate investment of the funds in different asset classes, for instance, stocks and shares ISA.

d. Certain pensions:

Some pensions and allowances paid to war widows and dependents are exempt from tax.

e. Certain social security and state benefits

These include;[715]

- Child tax credit
- Housing benefit
- Maternity allowance (but statutory maternity pay is taxable)
- Employment and support allowance (for the first 28 weeks of entitlement)

[714] KPMG UK – Income Tax. http://home.kpmg.com/xx/en/home/insight2011/2012/unitedkingdom-incometax.html accessed 23rd May 2017.

[715] See https//www.gov.uk/incometax/tax-free and taxable state benefits accessed 23rd May 2017

- Attendance allowance

f. Non UK source investment and foreign capital gains are potentially exempt.

g. Certain expenses such as travelling, housing and subsistence may be deductible when associated with a short term assignment for 24 months

Unlike some other jurisdictions, deductions from income are limited, for instance, annual subscription to professional bodies or learned societies and other deductions on employment are allowed.[716] Generally, no deduction is allowed for alimony and child support payments and neither is the recipient taxable on the amount received.

5.1.1.4 Tax Reimbursement Methods

The most common form of tax reimbursement is current year gross up. This enables the tax payable by the employer and the income to which it relates to be dealt with together in the same year's calculation.

5.2 The United States of America

The United States of America is a Federal Republic with separate Federal, State and Local Government tax. Taxes are imposed in the United States at each of these levels. The taxes include taxes on income, payroll, property, sales, capital gains, dividends, imports, estates and gifts as well various fees.

The congress has power under the Constitution[717] of the United States to lay and collect taxes, duties, imports and excise to pay the debts and provide for the common defence and general welfare. The court has flip-flopped on the issue of whether congress has the constitutional power to tax in order to accomplish regulatory goals that would otherwise be

[716] *Ibid* www.worldwide-tax.com accessed 23/5/17

[717] Article 1, Section 8 of the United States of America.

outside of the scope of its enumerated powers.[718] In *Bailey v Drexel Furniture*,[719] the court invalidated a 10% tax on the annual profits of employers who knowingly employ child labour.

Thirty-six states ratified the sixteenth amendment to the United States Constitution; thereby making income taxation a reality[720]. The sixteenth amendment ended the debate as to whether the federal government had the power to impose an income tax on its citizens. The true starting place for modern income taxation in America is the 1913 law that implemented the sixteenth Amendment.[721]

The 1913 Act continued the tradition of a comprehensive tax base, including both domestic and foreign income. A progressive system characterised by graduated rates[722] but excluded gifts and inheritances which the congress considered should be in a separate tax structure. It also introduced deductible expenditure. In United States Law, however, taxes include all income from whatever source derived. American legislation has been designed as a unified code updated and synthesized continuously. The Internal Revenue Code's major provisions, that is, the general rules for income and deduction, consist of broad pronouncements gave courts and governmental administrative bodies great latitude to interpret or supply content in order to deal with evolving economic conditions. The court in exercising their powers assumed that congress meant to exercise the full measure of its taxing powers, under the Sixteenth Amendment in *Helvering v Clifford*.[723] In *Commissioner v*

[718]The Sixteenth Amendment provides, "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without appointment among the several states and without regard to any census or enumeration. US Constitution Amendment XVI.
[719] www.californialawreview.org/wp-content/ accessed 20/12/16.
[720] J F Witte, The Politics and Development of the Federal Income Tax (1985) 75.
[721]See Act of Oct, 3 1913 ch. 16, 38 Stat. 114 (codified as amended I.R.C. S. 1-9722 (1994).
[722]*Ibid.* S. 2, 38 Stat. at 166 – 81.
[723] 309 US 331, 334, 337 – 38 (1940).

Glenshaw Glass Co.[724] the United States Supreme Court defined income as undeniable accessions to wealth, clearly realized and over which the taxpayers have complete dominion.

In the United States, tax law specifically addresses the issue of deductions by limiting deductions for wagering losses to the amount of wagering gains.[725]Under United States Law, the tax issue typically begins and ends with the question of income. The income tax is determined by applying a tax rate which may increase as income increases. Individuals and corporation are directly taxable and estates and trusts may be taxable on undistributed income. In the United States, the term 'payroll tax' usually refers to 'FICA taxes' that is paid into social security and medicare while income tax refers to taxes that is paid into state and federal general funds.

Partnerships are not taxed but their partners are taxed on their shares of partnership income. Residents and citizens are taxed on world wide income while non residents are taxed only on income within jurisdiction. Several types of credits reduce tax in the United States of America. Taxable income is total income less allowable deductions (exemption) and certain personal expenses, including home mortgage interest, state taxes, contributions to clarify and other deductions.

Individuals are allowed several deductions as personal exemptions and for 2017, the amount is $4,050.[726] In addition is a standard deduction of $6,350 for single individual, $12,700 for a married couple and $9,350 for a head of household. The standard deduction is higher for individuals over age 65 or who are blind. Itemized deductions are available but subject to conditions and limitations. They are:

- Medical expense in excess of 10% of adjusted gross income.[727]
- State, local and foreign taxes

[724] 38 US 426, 429-30 (1955).
[725]I.R.C. s. 165(d)(1994).
[726] Income tax in the United States. https://en.wikipedia.org/wiki/income-tax-in-the-united-states.
[727]IRS Pub. 502, IRS Note Limit is 7.5% for those over age 65.

- Home mortgage interest
- Contributions to charities
- Losses on non business property due to casualty and deductions for expenses incurred in the production of income in excess of 2% of adjusted gross income.

United States tax law exempts organizations. Charitable organizations and cooperatives on application are exempt by Internal Revenue Service.[728] An organization which participates in lobbying, political campaigning or certain other activities may lose its exempt status.

5.3 Evaluation of Tax Systems in United Kingdom, United States of America and Nigeria

In United Kingdom social security schemes are obtainable. A resident or citizen of United Kingdom is automatically issued with a national insurance number when you reach the age of 16.[729] It is also the case that where the person did not receive a number when he takes up work he is expected to apply for it. The United Kingdom social security schemes include;

i. The National Insurance Scheme (NIS) which provides cash benefits for sickness unemployment, death of a partner, retirement and others. People are entitled to these benefits by paying National Insurance Contributions;
ii. The National Health Service (NHS) which provides medical, dental and optical treatment and which is normally available free of charge only to people who live Great Britain and Northern Ireland.
iii. The child benefit and child tax credit schemes which provide cash benefits for people bringing up children.
iv. Non-contributory benefits for certain categories of disabled persons or carers.

[728]Internal Revenue Service (IRS) Code Section 501.
[729]Wikipedia. Social security in the United Kingdom.

v. Other statutory payments made by employers to employees entitled to maternity, paternity and adoption leave.

The welfare state of the United Kingdom comprises the above expenditures by the government of the United Kingdom intended to improve health, education, employment and social security.

In the United States, social security is commonly used term for the Old Age, survivors and disability insurance. The social security is funded primarily through payroll taxes called Federal Insurance Contributions Act tax (FICA) or Self Employed Contributions Act Tax (SECA). With few exceptions all legal residents working in the United States now have an individual social security number.

The major social security programs under the social security administration are:

- Federal Old Age (Retirement), Survivors and Disability Insurance (OASDI)
- Temporary assistance for Needy Families
- Health Insurance for Aged and Disabled Medicare
- Grants to States for Medical Assistance programs for low income citizens
- States Children's Health Insurance Program for low income citizen.
- Supplemental security income.

Ironically, in Nigeria where tax is aggressively pursued, against residents and citizen like the United Kingdom and United States of America, little or nothing is known, said or done about social security. There is no policy to secure the individual against want, poverty, destitution, disease and idleness which may be thrust upon him by the varied hazards and vicissitudes of social life.[730]Notably loss or suspension of income or means of sustenance resulting from sickness, maternity, accident injury, invalidity, old age, death of bread winner

[730] B O Nwabueze, Social Security in Nigeria, Nigerian Institute of Advanced Legal Studies, 1989 Lecture Series in www.orgNIALS – Nigeria.

or unemployment is the social order in Nigeria. The Constitution[731] solemnly proclaims the security and welfare of the people shall be the primary purpose of government. A near programme to social security schemes found in United Kingdom and United States of America is the Nigeria Social Insurance Trust Fund (NSITF) established in 1993. The programme is only concerned with injuries from work place accidents, any injury in the course of work outsider work place and diseases emanating from working conditions.

The general principle of taxation is that tax being a compulsory contribution to the state for it to perform its social responsibility. The jurisprudence therefore is that it is only persons who benefit from the provision of such social amenities that should make the contribution. There is persistent problem of infrastructure like unstable electricity, good roads, pipe borne water, health and medicare, housing, unemployment and others in Nigeria. The research therefore is of the view that the government of Nigeria have no justification to continue to collect tax from the residents and citizens as social security obtainable in other jurisdictions is alien to the Nigerian tax regime.

In Nigeria despite the huge tax rates, government does not utilize the tax yield in provision of infrastructure and welfare of the taxpayers. Taxpayers after paying their liability to tax end up providing social and infrastructural facilities for themselves. A taxpayer in Nigeria must build his own house, provide security for his compound or in the neighbourhood and contribute for neighbourhood watch. Despite the sponsorship for provision of water by the United Nations as one of the sustainable development programme initiative, the individual taxpayer is made to provide borehole water for his use. In the area of electricity, the taxpayers are left at the mercy of the providers. Furthermore, government in

[731] Constitution of Federal Republic of Nigeria 1999 as amended, section 14(2)(b).

Nigeria after collecting tax enacted laws[732] both at the federal and states that encourages taxpayers to partner with government on the provision of roads.

The British doctrines prevent taxation, if the income in question is not sufficiently related to the particular source. In *Graham v Greene,*[733] the taxpayer had considerable winnings from betting on horses. Indeed betting was practically his only means of livelihood. The question presented was whether the taxpayer's wining were taxable under schedule D as either profits and gains of a trade, vocation or other income. The court recognizing that the winnings were income, the court nevertheless concluded that they were not gains or profits from a taxable source. Even though carried on regularly, the taxpayer's betting activity was not a trade or vocation, the court reasoned because a bet was an irrational agreement. Under the United States law taxable income results from gambling simply because it represents the flow of an economic benefit. Windfalls in the nature of found cash or goods are also not taxed under the British tax system because there is no taxable source. In United States Law, which dictates that found goods or treasure trove are indeed taxable income because they represent inflows of economic benefits, even when the taxpayer may not have absolute ownership.[734]

In Nigeria, it is seen as income that are not regular and undetermined but the provisions of the tax laws,[735] the definition of the income chargeable includes any gain which was not defined by the Act. From the Nigerian tax laws, classification whether a windfall related to profit or services rendered are irrelevant in determining whether the payments are included in the definition of taxable income. In Nigeria all receipts on an economic benefit is taxable income irrespective of its relation to a particular source.

[732] Infrastructure Concession Regulatory Commission Act 2009, Lagos State Public Partnership Law 2011.
[733] (1925) 2KB 37.
[734] *Cesarini v United States,* 296F Supp. 3
[735] Personal Income Tax Act, Section B

Another area of interest is tax exemption. Tax exemption which is a monetary exemption reduces taxable income. An instance of exemption is exemption of charitable organizations. The United Kingdom generally exempts public charities from business rates, corporation tax, income tax and others. The organizations are required to be registered with the charity commission to be eligible to benefit. In the United States of America by the provisions of Internal Revenue Code.[736] Provides that about 28 types of organizations can apply for tax exempt. The United States System does not distinguish between various kinds of tax exempt entities (such as educational versus charitable) for purposes of granting exemption but does make such distinctions with respect to allowing a tax deduction for contributions. In Nigeria, the organizations are not regarded as charities except where the objects of the organization indicate so.

Tax Amnesty is another area in the administration of tax that is yet to be tapped in Nigeria. In tax amnesty, government tackles evasion and gives evaders an opportunity to negotiate with the tax authorities with the view to settling their tax liability. Some of the commonwealth countries that had experienced tax amnesty include:

i. United Kingdom

Tax amnesty has not been generally applied in the United Kingdom, because they have had a long experience of income tax administration and have combated evasion and managed to keep it within strictly limited bounds even though the board of Inland Revenue have stated:

> …they reserve to themselves complete discretion in all cases as to the course which they will pursue but it is their practice to be influenced by the fact that the taxpayer has made full confession and has given full facilities for investigation into his affairs.[737]

[736] Internal Revenue Code, Section 501(c)(3).

[737] Harved report of a question and answer in the House of Commons on October 5, 2007 cited in O Obifarin, Tax, *ibid* p. 103.

In *I.R.C. v. National Federation of Self-Employed and Small Business Ltd*[738] wherein evasion by print workers who were employed casually through the use of fictitious names, had become a common practice. In order to end this, there was an agreement between the employers, the unions concerned and the Inland Revenue. Part of the agreement was an undertaking that if an employee registered with the relevant tax office before April 6, 1979 and cooperated fully and promptly in settling his tax affairs, investigation of list on casual earnings in the past would not be carried out for years before 1977 – 1978. The National Federation was aggrieved by the amnesty and sought a declaration that the Inland Revenue had acted unlawfully. The court held that the amnesty was not illegal and although the board is under a duty to collect these taxes, it is not guilty of abuse of power in entering into special arrangements absolving payers from liability to tax. In Britain, this is seen as worthwhile in providing an economic administrative short-cut to the collection of hitherto evaded revenue enabling evaders to graduate painlessly to full tax compliance.

ii. Pakistan

The Pakistan amnesty was conducted in rather exceptional circumstances. The country had recently come under martial law and there was a new spirit abroad in the land.[739] The amnesty was in respect of taxes for the period 1947 – 1958, commencing from the date of partition from India, when there had been a certain amount of upheaval and dislocation. The intention was to give taxpayers a chance to put up their affairs in order and tax was charged on the omitted profits at special flat rates which were favourable to the taxpayers. The operation was so successful that the amount paid in areas amounted to approximately two-thirds of the annual yield of tax.[740]

iii. Tax Amnesty in Cyprus

[738] (1981) 2 ALL ER 93.
[739] A Obifarin, tax amnesty a catalyst for economic development of Nigeria op. cit. p. 13.
[740] *Ibid* p. 13.

The Cyprus parliament has passed a law allowing a partial write-off of interest and penalties on overdue tax, provided that liabilities are settled by 31st March 2012. The law applies to liabilities of individuals and companies in respect of income tax, immovable property tax, stamp duty and capital gains tax for periods up to 31st December 2008. It provides for the waiver of interest or penalties in excess of 5% of the principal amount owed, as long as the balance is paid by 31st March 2012.

According to the tax authorities; outstanding tax arrears for 2008 and prior years amount to some 355 million.[741] The government believes that the waiver of fines and penalties will encourage taxpayers to settle their debts, resulting in the collection of these long-overdue amounts. The law was passed despite warnings from the office of the Attorney-General that it is inconsistent with articles 24 and 28 of the Constitution which provides that all persons are equal before the law and that every person is bound to contribute according to their means towards public burdens. A similar law passed in 2007 was found to be unlawful by the Supreme Court of Cyprus on the grounds that it discriminated against taxpayers who comply with their obligations in favour of those who do not.[742]

iv. Tax Amnesty in India

The Finance Minister, P. Chidambaram announced an amnesty scheme for service defaulters in an effort to entice a larger number of assesses to tax fold and simultaneously boast tax collections for the exchequer. The amnesty scheme will be called Voluntary Compliance Encouragement Scheme and allow defaulters to file truthful declaration of service tax dues since October 1, 2007 and makes the payment in one or two instalments before the prescribed dates. In such a case, interest, penalty and other consequences will be waived.[743] In his words, Chidambaram said:

[741] http://www.legal1500.com/c/nigeria/developments/16604 accessed 15/2/2015.
[742] *Ibid*.
[743] O Abifarin, tax amnesty a catalyst for economic development of Nigeria. op. cit.

> Many have simply stopped filing returns. We cannot go after each of them. I have to motivate them to file returns and pay the taxes due. Hence I propose to introduce a one-time scheme called "Voluntary Compliance Encouragement Scheme."[744]

The scheme promises one time amnesty by way of waiver of interest and penalty, immunity from prosecution to stop filers, non-filers and non-registrants or service providers who have not disclosed true liability in the returns filed by them during the period from October 2007 to December 2012. Service tax collections during the year 2012 – 2013 stood at Rs 1,32,697 Crore and for the next fiscal year 2013 – 2014 government collected Rs 1,80, 141 Crore.

v. Tax Amnesty in Ghana

Under President John Evans Atta Mills administration, a Tax Amnesty Act was made in 2012 known as Internal Revenue Act 2000 (592).[745] The goals of the Act was the promotion of full disclosure of previously undisclosed gains, profits or other income. It encouraged the people of Ghana to register their companies with Ghana Revenue Authority (GRA) and thus widen the tax collection base and seal all loopholes in the tax collection chain.

vi. Tax Amnesty in Kenya

The Finance Act 2004 amended the VAT Act by inserting a new section 14A which provided for tax amnesty where;

(a) The tax was paid

(b) All returns or amended returns in respect of the tax were submitted on or before 31st December, 2004 provided that the taxpayer was not under audit or investigation for the period amnesty was applied for.

[744] www.dailymail.co.uk/indiahome/india, accessed 15/5/2015.

[745] O Abifarin et al. tax amnesty in some Commonwealth countries and America: A lesson for Nigeria op. cit. p. 108.

The Minister of Finance announced a tax amnesty on 10th June 2004 when presenting 2004/2005 Budget.[746] The amnesty covers penalties or fines under the customs and excise Act (Cap 472); additional tax, penalties or fines under the Value Added Tax Act (cap. 470).

vii. Tax Amnesty in South Africa

Tax amnesty in South Africa was an opportunity granted by SARS in 20009 to help many taxpayers to clean out their Companies and Trusts by transferring properties out of these entities into their own hands. Another popular use of the amnesty provisions is where a property is held by a company, the shares of which are held by a trust; in this instance, it is possible to move the property from the company to the trust and then on to qualifying individual acquirers.[747] This amnesty legislation have been broaden in order to achieve its set out goals.

The economic and socio-political environment in Nigeria necessitates the consideration of other civil and friendly mechanism and approaches to tax collection and enforcement in foreign jurisdiction like America where the Foreign Account Tax Compliance Act of America (FATCA) which serves the same purpose exists and in Ghana, Kenya and South Africa. Nigeria both the Federal, State and Local governments should critically examine the relevance of the tax amnesty and make enabling laws to implement it. Tax amnesty in Nigeria will boost the economy, by bringing more taxpayers to the tax net, it can also broaden the tax base and ensure future voluntary tax compliance. When this is adopted in Nigeria it will reduce acrimony and litigations in the Nigerian tax system and tax administration.

On tax evasion, in many jurisdiction, the act must be done with fraud, wilful default or neglect and knowingly. This is common in United Kingdom,[748] United States,[749]

[746] J AAduba, The Effects of Tax Amnesty on Revenue Growth in Kenya. http://business.unobi.ac.ke/node/874.
[747] http://www.nortonrosefulbright.com.news/66622/tax-amnesty-now-wider.
[748] Taxes Management Act 1970 part X.
[749] Internal Revenue Code 1954.

Australia,[750]New Zealand,[751] Canada,[752] and India[753] the law recognises the distinction between tax evasion and tax avoidance but there is no statutory definition. It is however accepted within the commonwealth law jurisdictions that to come within the ambit of tax evasion, an activity must include element of fraud or unlawful conduct, accompanied by intent on the tax payers' part deliberately to deceive the revenue authority. For instance, in the Australian Income Tax Assessment Tax, 1936, the terms "avoidance" of tax and "evasion" both appear in paragraph (a) of S. 170(2) which provides:

> Where a taxpayer has not made to the commissioner a full and true disclosure of all the material facts necessary for his assessment and there has been avoidance of tax. The commissioner may:
>
> (a) where he is of the opinion that the avoidance of tax has been due to fraud or evasion at any time
>
> (b) amend the assessment.

The terms avoidance and evasion of the tax were considered by FULLAGAR j in *Westgarth's case*[754] when he said:

> The word avoidance is, I think to be contrasted with the word evasion. It involves, I think no notion escaping by any device on artifice but conveys simply the notion of actually escaping through not being called upon to pay.

In *Simms v. Register of Probates*[755] Lord Hobhouse pointed out that:

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[750] Income Tax Assessment Act 1936, s. 170(1).
[751] Income Tax Act 1976.
[752] Income Tax Act S. 239(1).
[753] Income Tax Act 1961, chapter 21.
[754] *Federal Commissioner of Taxation v. Westgarth* (1985) 18 Commonwealth Law Report (C.L.R.) 396 at 414. See other definition as offered in *Denver Chemical Manufacturing Co. v. Commissioner of Taxation* (1949) C.L.R. 296 at 313 quoted with approval by Fullagar J in *Australasian Jam Co. Pty Ltd v. Federal Commissioner of Taxation* (1953) 88 Commonwealth Law Report 23 at 37-38 and quoted by Wallschutzky I.G. (1985), Towards A Definition of The Term "Tax Avoidance." Australian Tax Review (A.T.R.) March p. 48.
[755] (1990) A.C. 334.

> It does not appear to their lordships that an examination of the decisions in which the word evade has been the subject of comment leads to any tangible result. Everybody agrees that the word is capable of being used in two senses; one which suggests underhand dealing and another which means nothing more than the intentional avoidance of something disagreeable.

It has been observed that the basic ingredient in tax evasion is *mens rea* and absence of any credible explanation for fraud, wilful default or neglect. This was correctly stated by Williams J. in *Barripp v. Commissioner of Taxation*[756] that it is sufficient for the purpose of the appeal to say that where a taxpayer makes a profit which he knows to be taxable income and wilfully omits this profit from his income tax return, he would be guilty of evasion in the absence of some satisfactory explanation for the omission.

The case adopts the suggestion that the basic ingredient in tax evasion is *mens rea*[757]**.** The President of the Chartered Institute of Taxation as at 2005, in Nigeria, Mr. Foluso Fasto said this of the impact of tax evasion on Nigeria's Revenue yield:

> The issue of tax evasion has really done a lot of damage on the income of the country and the effect in financial terms runs into billions of naira in this country annually. Unfortunately, we don't have an official figure because of the poor statistical situation in the country. But my estimate is that on an annual basis, there is no way this can be less than N50 billion.[758]

[756] (1941) Australian Income Tax Report (A.I.T.R) 2.

[757] J I Obi, Tax Evasion and its Solution. Paper presented at the seminar on taxation held by the West African sub-regional Committee of the Association of African Tax Administrators, 22nd – 24th February 1983, at Lagos, Nigeria cited in M N Abdulrazaq, Nigerian Tax Offences and Penalties op. cit. p. 18.

[758] The Guardian, Monday, October 24, 2005, p. 57.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1 Conclusion

Tax is a monetary charge on persons, entities, transactions or properties to yield revenue imposed by Nigerian government. Under the current structure of government in Nigeria, taxes should be imposed and collected at different levels of government, the Federal, State and Local government, otherwise regarded as taxing powers. The Nigerian tax system appear as if taxes at the Federal, State and Local government level are usually efficiently collected and utilized. The research examined and highlighted the structural, institutional and other inherent problems in the existing tax system that when tackled, will enhance effectiveness, efficiency and transparency in the system. The challenges identified in Nigerian tax system include:

i. Increased demand to grow internally generated revenue which has led to the exercise of the powers of each level to the detriment of the tax payer who suffers multiple taxation and bears a higher burden than anticipated.

ii. The lack of clarity on taxation powers of each level of government and encroachment by another.

iii. Non-review of tax legislations which had allowed obsolete laws that do not reflect Nigeria's current realities.

iv. The lack of a specific policy direction for tax matters in Nigeria and absence of laid down procedural guidelines for the operation of the various tax authorities.

v. The non-refund of excess taxes to the taxpayers. These and other problems plaguing Nigeria tax system have not been adequately addressed. One of the reasons for this was government's heavy reliance on oil revenue as a result no attention had been given to other revenue sources. There is now a renewed commitment and desire by

the federal government to diversify the economy by growing the non-oil tax revenue in order to develop a stable and sustainable revenue source to finance projects.

6.2 Recommendations

The need to develop strategies to ensure fiscal optimization, improved equity and fairness to create competitive advantage in the tax system has necessitated the move towards finding a solution to the challenges in Nigeria tax system. This can only be achieved when the problems plaguing the tax system is addressed properly.

The Nigerian tax system is however increasingly becoming a nuisance and burden on the citizens as a result of policy instability, inconsistent laws, administrative inefficiency, low revenue-yield, inequitable characteristics and inconsistency with federalism. The unfortunate situation is demanding for immediate reform and rationalization of fundamentals of the following; the Constitution of the Federal Republic of Nigeria 1999, as amended gives impression that there are three levels of government in Nigeria and taxing powers are divided between them. The third level of government and an important level in tax matters though not a component of Nigerian federation under section 2(2) of the Constitution of the Federal Republic of Nigeria 1999 as amended was assigned functions but the Federal Capital Territory a component of the Nigeria federation was not assigned taxing powers. The said provisions are contained in sections 4(1) and (6) and (7) (1) of the same Constitution. In Nigeria, there are two legislative lists which specifies the area of operation of each level of government. Going through the provision of section 4 of the Constitution of the Federal Republic of Nigeria 1999, reveals that most of the powers in taxation rests with the federal government giving room for over concentration of the tax powers on the federal government. Federal government in turn imposes taxes and delegates the other levels to collect. Tax legislations and other statutes are very complex and taxpayers' peculiarities were not

considered in drafting the legislations. The following recommendations are pro-offered for achieving the promotion of a tax culture in Nigeria:

1. **Constitution**

The Constitution of the Federal Republic of Nigeria 1999 as amended requires a further amendment to the following sections:

a. Section 4 should be amended to accommodate Federal Capital Territory a component unit of Nigeria federation as a taxing authority.

b. Section 4 should be amended to limit the extent of powers exercisable by the federal government on tax matters. The adoption of the United States of America model in Article 1, section 8 of the Constitution of the United States granted the Federal government to tax on income, duties, that is Excise duties on imports and tariff. In Nigeria, the federal government should not have any business with imposition of Education tax, Value Added Tax, Capital Gains Tax, Stamp Duties and Petroleum Tax.

c. Section 162 and 163 of the Constitution of the Federal Republic of Nigeria 1999 as amended should be further amended to be in line with fiscal federation following the amendment of Section 4 of the Constitution.

d. Section 162(6) should be amended and State Joint Local Government Account abolished.

e. The legislative lists (Exclusive and Concurrent Lists) and the provisions in the second schedule in part II and items D should be amended. The amendment will allow the states power to impose tax on the taxes which are now state taxes.

f. The amendment of section 4 of the Constitution will make Value Added Tax to become State tax. This is also adopting the position in United States of America where Service tax like Value Added Tax is a State tax.

g. Section 251 of the Constitution of the Federal Republic of Nigeria 1999 as amended should be amended to accommodate the jurisdiction of Tax Appeal Tribunal in resolving disputes in tax matters.

h. Taxes and Levies (Approved List for Collection) Act should be further amended to remove several user fees, charges and licensing fees included in the Act. The user fees and charges are to be collected on "pay as you go" basis.

i. The provisions of part III of the Taxes and Levies (Approved List for Collection) Act should be revisited and leaving on the items that are taxes. This will allow the local government to control and regulate the user-fees and charges as non-tax levies given to them under the fourth schedule to the Constitution.

j. The National Tax Policy should uphold the concept of federalism as practiced under the Nigerian Constitution, that is, it will reflect a three tier division of taxing powers between the Federal, State and Local Governments. Further, the policy should encourage and energize the move towards diversifying or shift from direct to indirect tax system.

k. Sections 2, 25 and 68 of the Federal Inland Revenue Service (Establishment) Act should be amended to accommodate the jurisdiction of the State Board of Internal Revenue.

2. Tax Legislations/Statutes

a. The amendment should reflect the trend and reality on ground placing reliance on indirect tax.

b. The reduction in the rate of direct taxes, in order to give it a human face.

c. There is need to review upwards of the rates of indirect tax.

3. Alternatively, revisit of the proposal of the 2003 Study Group that two broad-based taxes should be imposed is imperative. The two broad taxes are income (covering both individuals and corporate entities) and expenditure tax (covering all expenditures) as an alternative to shifting from direct to indirect tax system. When this option is taken:

i. The liability for the income tax will be determined by residence of the taxpayers while that of expenditure tax will be determined by location of spending.

ii. Each state will have the authority to collect the two broad-based taxes and the federal tax authority to take care of Federal Capital Territory (FCT).

iii. The local government which hitherto was not allowed the requisite tax powers under the current regime will continue to charge fees and user charges on "pay as you go" basis and have power to impose tax on the items concerning taxes.

iv. Broad-based tax will enhance simplicity in taxes and will be difficult to evade and reduce administrative costs.

v. The Joint Tax Board and Federal Inland Revenue Service should be alive to the responsibility to save Nigerians from extortions as observed in the judgment in *Standard Chartered Bank of Nigeria Ltd v Kasmal International Services &Ors.*

4. Developing and formulating laws and regulations for:

i. Tracking offshore payments – the various tax authorities in Nigeria should be ready to be equipped with the use of advance technology to meet up with the activities of companies that go into arrangements to evade tax. The artificial and fictitious arrangement must be tracked.

ii. Tracking the volume of transactions transpiring on the internet needs to be harnessed for effective use by the government.

iii. Checking transfer pricing and mispricing by multinationals and their subsidiaries. This could be done by domesticating the principles in Article 9 of the OECD and UN model tax convention. The principle states that:

> Where conditions are made or imposed between two (associated) enterprises in their commercial and financial relations which differ from those which would be made between independent enterprises, then any profit which would but for those conditions have accrued to one of those enterprises, but by reason of those conditions have not so accrued, may be included in the profits of that enterprise and be taxed accordingly.

iv. Granting of tax amnesty. Tax amnesty has the potentials of improving tax yield, widening tax net and making defaulters turn a new leaf. This will also help to reduce acrimony and litigations in the Nigeria tax system and tax administration.

v. Tax dispute resolution. The Tax Appeal Tribunal should be retained. However, there should be room for alternative resolution mechanism/arbitration of tax matters and related issues. This should be done by amending section 251(i) by removing paragraphs (a) and (b) and inserting part III in the fifth schedule to the Constitution, hence creating a tribunal/arbitral process as resolution mechanism.

5. Tax Administration/Authority

a. Every state should set up an independent and well funded tax authority.

b. Providing the necessary infrastructure needed for the daunting task of tax collection.

c. Remuneration and motivated staff should be in place.

d. Introduction of automated process to minimize leakages in the process.

e. Trained and qualified officials with requisite skills should be recruited.

6. **Establishment and funding of an academy for tax administration in Nigeria. The academy should be for:**

a. Training and retraining of tax officials and for continuous capacity building.

b. Exposure of the tax authorities to international training (including secondment, attachment and mentoring programmes).

c. Providing framework to fully acquaint the tax officials with global best practices in tax and revenue administration.

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