



Legal Implications of Tax Avoidance and Tax Evasion Under the Nigerian Tax Regime

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To cite this article:

Effiong Asukwo Esu. Legal Implications of Tax Avoidance and Tax Evasion Under the Nigerian Tax Regime. *International Journal of Business and Economics Research*. Vol. 11, No. 6, 2022, pp. 314-320. doi: 10.11648/j.ijber.20221106.12

Received: August 4, 2022; **Accepted:** August 23, 2022; **Published:** December 15, 2022

Abstract: Modern governments need money to facilitate economic growth and development. Without any doubt taxation is the mainstay of government revenue. The revenue generated by the government from taxation forms a major source of finance to the nation's capital expenditure which is crucial to sustainable economic development. One of the objectives of the Nigerian tax system is to provide the government with stable resource for the provision of public goods and services. A major challenge to the government in generating this revenue has been the increasing rate of tax evasion and tax avoidance by citizens who are the main stakeholders. While some have blamed the situation on the tax authorities for not living up to expectation with regards to tax administration, others attribute it to the unpatriotic attitude of the taxpayers. It is in the light of these perplexing issues that this article examines the legal implications and the incidence of tax avoidance and tax evasion under the Nigerian current tax regime. The result of tax evasion and avoidance is the loss of huge revenue needed for development, and which may also hamper the proper performance of the public sector, thereby threatening its capability to finance public expenditure. It goes further to examine the factors that influence tax evasion and tax avoidance in Nigeria, and recommends that tax authorities should organize educative programs to enlighten tax payers on the different laws guiding the Nigerian tax system, the need for the payment of tax and the effect of non-payment of tax, and the implementation of some of the provisions of the newly enacted Finance Act.

Keywords: Tax, Tax Avoidance, Tax Evasion

1. Introduction

Every organized society, whether a country or a state government, owes certain basic responsibilities to the people it governs. These responsibilities take the form of providing fundamental social amenities such as adequate roads, health, security of people and property, shelter, and safe drinking water, amongst others. These responsibilities are enshrined in Chapter 2 of the Nigerian Constitution. Section 24 (f) of the said Constitution provides thus: "It shall be the duty of every citizen to declare his income honestly to appropriate and lawful agencies and pay his tax promptly." On the other hand, citizens as major stakeholders, owe the government an appropriate contribution in the form of a tax levy. The Court in the case of *Independent Television/Radio v. E. S. B. I. R.* [1] reiterated this Constitutional duty of a citizen to pay tax. It stated that: "Failure of the citizen to pay tax shall strip him of the protection afforded by section 44 [1] of the

Constitution. Against this backdrop, the government levies taxes on its citizens in order to accomplish the aforementioned objectives that it owes to the people. Government and citizens are therefore involved in a symbiotic, reciprocal and mutual relationship in which each party is constantly under pressure to fulfill its part.

Tax itself has been defined as: "a universal contrivance whereby the government imposes upon its citizens a compulsory financial levy or contribution for the benefit of the society as a whole." [2] Taxation as an economic development instrument provides the financial base for providing public goods, rapid economic growth, and encouragement or otherwise of certain socially unfriendly activities. In *Matthew v. Chicory Marketing Board* [3], tax was said to be a compulsory extraction of money by a public authority for public purpose; or raising money for the purpose of administering government budget by means of contribution from individual persons i.e. citizens. Taxation may also be

seen as a compulsory levy imposed on a subject or upon his property by the government having authority over him. It is a monetary charge imposed by the government on persons, entities, transactions, or property with a view to yielding public revenue. The power of the Government to impose taxes is statutory and must be anchored on law. There are sundry legislations in Nigeria of which the major ones are the Personal Income Tax Act, Companies Income Tax Act, and the Federal Inland Revenue Service Act. Tax Avoidance and Tax Evasion are forms of tax non-compliance, the distinction between both terms lies in the legality of tax avoidance and the illegality of tax evasion. Tax Avoidance is the reduction of taxable income or tax owed through legal means. It is instructive to note that one of the effects of evading and avoiding tax by most registered companies and some individuals has been the downward revenue base of the government especially in providing essential services in the society.

2. Definition of Concept

2.1. Tax Avoidance

Simply put, Tax avoidance is the act of arranging taxpayer's affairs in such a manner that he reduces the tax liability without contravening the law [4]. It involves exploiting certain provisions or lack of provisions in the tax law to legally reduce one's tax liability, for example, where options are given in the tax laws, the taxpayer can choose the ones that will minimize his tax liability [5]. Tax avoidance is the systematic use of legal methods to modify an individual's financial situation in order to lower the amount of income tax owed. It is usually accomplished by claiming the permissible deductions and credits [6]. By and large, tax avoidance occurs in a situation where the taxpayer arranges his financial affairs in a manner that would make him pay the least possible amount of tax without infringing the legal rules. In short, it is a term used to denote those various devices which have been adopted with the aim of saving tax and thus sheltering the taxpayers' income from greater liability which would have been otherwise incurred [7]. It is a lawful trick or manipulation towards the circumvention of tax payment [8]. The meaning of tax avoidance is vividly captured in the English case of *Ayrshire Pullman Motor Services and David M. Ritchie v. Commissioner of Inland Revenue* [9], where the Lord President Lord Clyde held thus: "No man in this country is under the smallest obligation moral or otherwise so to arrange his legal relations to his business or to his property as to enable the Inland Revenue to put the largest possible shovel into his stores. The Inland Revenue is not slow and quite rightly to take every advantage, which is open to it under the taxing statutes for the purpose of depleting the taxpayer's pocket and the taxpayer is in like manner entitled to be astute to prevent so far as he honestly can the depletion of his means by the Revenue."

His Lordship reiterated the rationale for the legality of tax avoidance. It underscores the liberty of a taxpayer in taking

advantage of the law in reducing his tax liability while it is the responsibility of the tax authority to prevent unwholesome practice. Thus, a citizen who is clever in the depletion of his income or in taking advantage of the tax laws can legally do so just as the tax authority is allowed to take advantage under the tax laws for the purpose of depleting the taxpayer's income.

On the whole, tax avoidance is not illegal, it is the lawful means of altering a person's taxable income by claiming tax deductions and credit. It has been defined as "a lawful trick towards the circumvention of tax payment." Some examples of tax avoidance include;

- (a) submitting claims for the expenses in earning the income, thereby reducing the income to be taxed.
- (b) increasing the number of one's children so as to enjoy tax deductions,
- (c) seeking professional advice, etc.

2.2. Tax Evasion

This is when a person willfully refuses to pay tax or under pays his tax. Tax evasion has been defined as an illegal conduct in which an individual, entity, or company knowingly fails to pay his true tax burden [10]. Also, tax evasion has been described as the deliberate practice of not declaring all taxable income in order to pay tax at a lower rate [11]. It is a fraudulent intent to disobey or disregard tax regulations with a view to minimize ones tax liability or burden. This is indeed a great disservice to ones nation and the height of unpatriotic conduct.

Some instances of tax evasion are;

- a. False declaration of ones true financial status.
- b. Deductions one is entitled to.
- c. Failure to render tax returns as appropriate.

In *Independent Television/Radio v. E. S. B. I. R* [12], where the taxpayer failed to render tax returns to the relevant tax authority, the Court held that:

"In this instant case, the tax being scuffled over was the tax of the appellant's employees from 2005-2010 which would have long been deducted from the employees' salaries but which the appellant failed to remit to the appropriate authority. This is a despicable way for any tax payer to act and it is seriously detrimental to the development of any nation."

In reaching this conclusion, the court relied on the case of *Phoenix Motors Ltd v. N. p. F. M. B.* [13]. The judgement emphasized the importance of tax, and regardless of how undeserving ones country may be, it is important to pay ones tax. Every citizen is under a constitutional duty to pay tax and it smacks of irresponsibility to renege on this sacred duty, otherwise government will not be able to discharge its responsibility. It is important to stress that Section 40 of the Federal Inland Revenue Service Act makes tax evasion illegal in Nigeria. Furthermore, obstructing or assaulting any authorized tax officer in the exercise of his responsibilities is a criminal offense under Section 41 of the Act. Any of these infractions attracts a fine or three years imprisonment or both.

3. Legal Nature of Tax Avoidance and Tax Evasion in Nigeria

Tax avoidance and tax evasion are used interchangeably to mean the same thing, but strictly speaking, this should not be the case, as we have been able to distinguish between the legality of tax avoidance and illegality of tax evasion. However, this divide is not the case in our laws as most tax laws do not clearly spell out any clear-cut differences between the two.

Under this section, we would explore the relevant provisions encapsulating these two concepts under the various tax laws applicable in Nigeria.

A. The Personal Income Tax Act of 2011:

The Act imposes income tax on individuals, communities and families and on executors of wills and trustees of estates. It also provides for the assessment, collection and administration of personal income tax. By section 68 of the Act, payment of income tax shall have to be made within two months after the service of notice of assessment on the payer, though the relevant tax authority may in its discretion extend the time within which payment may be made [14]. If the tax remains unpaid after the period of two months, the relevant tax authority shall serve a demand note on the taxable person, and if payment is still not made within one month from the date of the service of the demand note, the relevant authority may proceed to enforce the payment in line with the provisions of the Act [15]. Under section 77 of the Act, any tax due from a taxable person shall carry interest on annual basis at bank base lending rate from the date when the tax becomes payable until it is paid. By section 76 (4), a person who without lawful justification or excuse fails to pay the income tax within the period of the demand note shall be guilty of an offence. Action for recovery of income tax may be instituted at, and recovered in, a court of competent jurisdiction by the relevant tax authority in its official name with full costs of action from the person charged therewith as a debt due to the federal government or the relevant tax authority [16]. Magistrate Courts are competent venues of such proceedings provided the amount of tax involved is within the jurisdictional competence of the particular magistrate court [17], otherwise the proper venue might be the High Court. Section 96 of the Act strikes a final blow on any form of tax evasion when it provides that any person who; for the purpose of obtaining a deduction, set off, relief or an overpayment in respect of tax for himself or any other person, who in a return, account or particulars made or furnished with reference to tax, knowingly makes a false statement or false representation; aids, abets, assists, counsels, incites or induces any other person to make or deliver a false return or statement, keep or prepare false accounts or particulars concerning any income on which tax is payable, or unlawfully refuses or neglects to pay tax; is guilty of an offence and liable on conviction to a fine of 50,000 (fifty thousand naira) for individuals and 500,000 (five hundred thousand naira) for corporate bodies or to

imprisonment for not more than six months. Remarkably, however, no prosecution in respect of an offence under the Act may be commenced except at the instance of the relevant tax authority. The institution of proceedings for the imposition of a penalty, fine or term of imprisonment under the Act shall not relieve a person from liability to payment of any tax for which he is or may become liable; and the provisions of the Act relating to prosecution and punishment of tax offences shall not affect any criminal proceeding under any other enactment [18].

B. The Companies Income Tax 2012:

The Act imposes tax on the profits of any company accruing in, derived from, brought into or received in Nigeria in respect of any trade or business for whatever period of time such trade or business may have been carried on; rent or any premium arising from a right granted to any other person for the use or occupation of any property; dividends, interests, royalties; discounts, charges or annuities; any source of annual profits or gains; fees, dues and allowances paid for services rendered and any amount of profits or gains arising from acquisition and disposal of short-term money instruments like federal government securities, treasury bills, treasury or savings certificates, debenture certificates or treasury bills or bonds. Like the Personal Income Tax Act, the Companies Income Tax Act has made provisions to prevent, prosecute and punish tax evasion. By section 47, a company shall be chargeable to tax in its own name; in the name of any principal officer, attorney, factor, agent or representative, or in the name of a receiver or liquidator. Furthermore, the principal officer or manager in Nigeria of every company shall be answerable for doing all such acts, matters and things as are required to be done under the Act for the assessment of the company and payment of tax [19]. Section 55 of the Act mandates every company to file a self-assessment return with the Federal Income Revenue Service at least once a year, and such return shall contain the audited accounts, tax and capital allowances computation for the year of assessment and a true and correct statement in writing containing the amount of profit from each and every source computed; a duly completed self-assessment form as may be prescribed by the Federal Inland Revenue Service [20]; and evidence of payment of the whole or part of the tax due into a bank designated for the collection of the tax [21]. The time for filing such returns is in the case of a company that has been in business for more than eighteen months, not more than six months after the end of its accounting year; and, in the case of a newly incorporated company within eighteen months from the date of its incorporation or not later than six months after the end of its first accounting period. Again, the form of returns shall be signed by a director who must be the chairman or the managing director of the company and the secretary respectively. Any company which fails to comply with the preceding stipulations

shall be liable to pay, as penalty for late filing, the sum of twenty-five thousand naira in the first month in which the failure occurs; and five thousand naira for each subsequent months in which the failure continues. Significantly, section 55 (4) provides that notwithstanding anything to the contrary in any law, an income tax assessment shall be made in the currency note in which the transaction took place.

Furthermore, section 94 of the CITA hints at lifting the veil of incorporation when it comes to false statement and returns that might be made by staff and officers of companies. It stipulates that any person other than a company who, for the purpose of obtaining any deduction, set-off, relief or repayment in respect of tax for any company, or who in any return, account or particulars made or furnished with reference to tax, knowingly makes any false statement or false representation; or aids, abets, assists, counsels, incites or induces any other person to make or deliver any false return or statement, or keep or prepare any false accounts or particulars concerning any profits on which tax is payable, or unlawfully refuses or neglects to pay tax, shall be guilty of an offence and shall be liable on conviction to a fine of one thousand naira or to imprisonment for five years, or both fine and imprisonment. The institution of proceedings for, or the imposition of a penalty, fine or term of imprisonment, under the Act shall not relieve any company from liability for payment of any tax for which it is or may become liable [22]. And any prosecution for tax offences can only be undertaken at the instance or authorization of the Federal Board of Inland Revenue [23]. Furthermore, the provisions of CITA shall not affect any criminal proceeding under any other enactment [24]. And an offence under the Act shall be deemed to occur in the town where the registered office of the company is situated or at such other places as the Federal Board of Inland Revenue may decide [25].

C. The Federal Inland Revenue Service (Establishment) Act, 2007 [26], established the Federal Inland Revenue Service and charged it with powers of assessment, collection of, and accounting for revenues accruable to the government of the Federation. The FIRS Act grants the Federal Board of Inland Revenue enormous powers with which it can forcefully, if need be, recover taxes owed to the government. Section 33 of the Act provides that where an assessment has become final and conclusive and a demand notice has been served upon the taxable person or upon the person in whose name the taxable person is chargeable, then, if payment of the tax is not made within the time limited by the demand notice, the Board may, in the prescribed form for the purpose of enforcing payment of the tax due, distrain the taxpayer by his goods or other chattels, bonds or other securities; or distrain upon any land, premises, or place in respect of which the taxpayer is the owner and recover the amount of tax due by sale of anything so distrained. However, section 34 offers an alternative to the distrain of chattels by authorizing that any amount due by way of tax shall constitute a debt due to the Federal Inland Revenue

Service and may be recovered by a civil action brought by the Service. Furthermore, section 34 empowers the Service to investigate or cause investigation to be conducted to ascertain any violation of any tax law whether or not such violation has been reported to the Service. Interestingly, by section 35 (3) the Service may cause investigation to be conducted into the properties of any taxable person if it appears to the Service that the lifestyle of the person and the extent of the properties are not justified by his source of income. In doing any of the above investigations, the Service may co-opt the assistance and co-operation of any of the law enforcement agencies in the discharge of its duties under the Act [27]. It must be borne in mind, however, that the service requires a court warrant before it can levy a distraint on any property of tax defaulters. This is supported by section 36 (2) and (3) of the FIRS Act that mandates any tax officer levying a distraint to be armed with a warrant issued by a judicial officer and be assisted by law enforcement agencies to so distrain. Any person who obstructs, hinders, molests or assaults any person or authorized tax officer in the performance of any function or the exercise of any power under the Act; or does anything which impedes or is intended to impede the execution of any search, seizure, removal or distraint; or rescues, damages or destroys anything so liable to seizure, removal or distress or does anything intended to prevent the procuring or giving of evidence as to whether or not anything is liable to seizure, removal or distraint; or prevents the arrest of any person by a person duly engaged or acting or rescues any person so arrested, commits an offence and shall be liable to a fine not exceeding two hundred thousand naira or imprisonment for a term not exceeding three years or both fine and imprisonment [28]. Similarly, section 42 punishes false declarations or representations with regard to tax assessment inquiries or investigations while section 43 punishes, any person who counterfeits or falsifies any document which is required by or for the transaction of any business; knowingly accepts, receives or uses any document so counterfeited or falsified; alters any such document after it is officially issued; counterfeits any seal, signature, initial or other mark of or used by any officer or the verification of such a purpose relating to tax; or being an employee of the Service, conspires, connives or participates in the commission of any of the offences mentioned above. By section 49 of the FIRS Act, where an offence under the Act is committed by a body corporate or firm or other association of individuals, every director, manager, secretary or other similar officer of the body corporate; or every partner or officer of the firm; or every person concerned in the management of the affairs of the association; or every person who was purporting to act in any capacity, commits an offence and shall be liable to be proceeded against and punished for the offence in like manner as if he had himself committed the offence, unless he is able to prove that the act or

omission constituting the offence took place without his knowledge, consent or connivance. For purposes of prosecution of offences under the Act, the Service shall have powers to employ its own legal officers who shall have powers to prosecute any of the offences under the Act subject to the powers of the Attorney-General of the Federation [29]. The Service may also compound any offence under the Act by accepting a sum of money not exceeding the maximum fine specified for the offence [30].

Furthermore, Section 27 of the Tax Administration (Self-Assessment) Regulations, 2011, punishes late submission of tax returns while section 28 punishes under-declaration of tax, that is to say, a declaration of tax below what is due. Where a taxpayer, agent or employer fails to pay the tax due on the due date of payment, the relevant tax authority shall impose penalties and interests for late payments on the amount due [31]. By section 33 of the Regulations, where a taxpayer is dissatisfied with any administrative assessment levied on him, he may lodge an appeal with the appropriate tax office of the relevant tax authority responsible for the assessment. If dissatisfied with the outcome, he may appeal directly to the chairman of the relevant tax authority or its equivalent. In the event that the assessment complained of remains unresolved, the taxpayer may appeal directly to the Tax Appeal Tribunal. Any further appeal from the Tax Appeal Tribunal may be lodged at the Federal High Court for resolution, and the time within which to appeal or raise objection is as prescribed by the relevant law.

4. Reason for Tax Avoidance and Tax Evasion in Nigeria

In Nigeria, there are a variety of factors that contribute to tax evasion and avoidance. While some of these factors may be more dominant in established economies, it is more prevalent in developing countries. For most countries, these reasons include the divide between the government and the governed.

For a better understanding, the following are some of the reasons for tax evasion and avoidance in Nigeria:

- 1) The Absence of a "Quid Pro Quo": Taxation is believed to be a discredited and irritating imposition. This is due to the lack of a "quid pro quo," or something of value delivered by the government in exchange for the taxes paid. It is commonly argued, that taxes should not be paid because the government does not provide amenities that are in any way commensurate with the taxes paid. There is no guarantee of a compensatory benefit.
- 2) The lack of trust in Government: The word tax conjures up a lot of images in the mind of a typical taxpayer. Where the salary is not even sufficient for the family upkeep it becomes difficult to contemplate any kind of deduction as tax. The sense of not getting corresponding benefit from government is a great drawback.

Essentially, the tax payer receives nothing of value from the government in exchange for paying taxes. Similarly, there is lack of trust that government can cater for the needs of the ordinary people other than the needs of those in power and their relatives. In this regard, government becomes quite unpopular and the zeal and patriotism that compels the performance of civic obligations is low. Paying tax is therefore viewed as money wasted on government.

- 3) Mismanagement of public funds and tax revenue: The level of corruption and mismanagement of public funds greatly discourage taxpayers from discharging their tax obligations. The public notion that taxes paid will readily be misappropriated by public officials and politicians conduce to tax evasion.
- 4) Lack of patriotism and sense of civic duty: As already stated, payment of tax is a constitutional duty of every Nigerian. The import of this is that the constitution recognizes 'payment of tax' as one of the constitutional duties of citizens and thus, imposes it on them to abide by it. However, most people are unaware of the Constitutional obligation they have to pay tax and this ignorance may also be a major cause of tax evasion in Nigeria.
- 5) Arbitrarily implemented tax laws: Certain taxes such as pay-as-you-earn (PAYE) and other personal income taxes, as well as company income taxes are given hyper attention while others such as property tax and capital gains tax are almost always completely ignored. This lopsided or arbitrary administration of tax may encourage evasion.
- 6) Lack of enforcement: Most sanctions for tax evasion are weak and ambiguous. As such, tax offenders exploit this defect to get off the hook. There are also a number of weaknesses in Nigerian tax laws coupled with the difficulties of securing conviction for tax offences all tend to encourage tax evasion.
- 7) The Legality of Tax Avoidance: Many tax payers do not really know the difference between tax avoidance and tax evasion, and since one is legal, they think both are the same.

Other causes of Tax evasion and Tax avoidance are: corruption in public office, inadequate tax education and awareness, misappropriation of taxes collected, ignorance of the tax authority, failure to deploy technology, lack of adequate enforcement for default, proliferation of taxes, loopholes in the tax laws.

5. Implications of Tax Avoidance and Tax Evasion

5.1. Introduction

Nigeria loses billions of dollars in tax revenue every year as a result of unreformed tax regimes and inadequate tax legislation that have benefited rich individuals and local and multinational firms in tax avoidance and evasion (MNCs).

- [10] Jalia Kangave, 'Improving Tax Administration: A Case Study of the Ugandan Revenue Authority' (2005) 9 (2) *Journal of African Law* p. 12; See also Abiola Sanni, 'Power To Prosecute Tax Offences' (2011) 2 *NIALS Supreme Court Law*.
- [11] CC Obeagu, 'Does Deeming Provisions in Nigerian Tax Legislations Serve any Useful Practical Purpose?' (2005) 6 *Nigerian Journal of Legal Studies* 20-33; See also J. A. A. Agbonika (ed) *Topical Issues on Nigerian Tax Laws and Related Areas* (Abada Press Limited: Ibadan 2015) p. 15.
- [12] *Supra*.
- [13] (1993) 1 *NWLR* (Pt. 272) 718.
- [14] Section 68 (1) (b) *Personal Income Tax Act* (PITA), 2011.
- [15] Sections 76 (1) and (2) of the *Personal Income Tax Act*.
- [16] Section 78 (1) of the *Personal Income Tax Act*.
- [17] Section 78 (2) of the *Personal Income Tax Act*.
- [18] Sections 98, 99 and 100 of the *Personal Income Tax Act*.
- [19] Section 48 of the *CITA*; see also Oyesola Animashaun and O. Y Abdul-Hamid, "Changing Perspectives in the Law and Practice of Taxation in Nigeria" 2017 p. 17; JU ack-Osimiri, 'Stimulation of Investments in International Energy Through Nigerian Tax Exemption Laws' (2003) XXVI (1) *OPEC Review Austria*. p. 13.
- [20] Referred to as the Service under the *CITA*. See sections 1, 8 and First Schedule to the *Federal Inland Revenue Service Act*.
- [21] Section 55 (i) (a) (b) & (c) of *CITA*.
- [22] Section 96 of the *CITA*.
- [23] Section 97 of the *CITA*.
- [24] Section 98 of the *CITA*.
- [25] Section 99 of the *CITA*.
- [26] Otherwise referred to as the *FIRS Act*.
- [27] Section 36, of the *FIRS Act*. The power to invoke the assistance of law enforcement agencies also extends to when it seeks to distrain the properties of a tax defaulter.
- [28] Section 41 of the *FIRS Act*.
- [29] Section 47 of the *FIRS Act*.
- [30] Section 48 of the *FIRS Act*.
- [31] Section 30 of the *Tax Administration (Self-Assessment) Regulations*, 2011.