

Legal Solutions to The Dilemmas in Enforcing Income Tax Regimes in Nigeria©

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Abstract: Taxation for any society, including Nigeria, is an indispensable means of economic development. Developing countries can attain economic development through marshalling internal resources by enforcing tax policy constructively. Nevertheless, there is hardly a voluntary yield to each call for tax payment either by the individual or a corporate organization. Piqued by the dilemma of involuntariness in income tax extraction or payments, this research embarked on the doctrinal investigation of the Law (statutory and others) to understanding the amplitudes of easing such dilemmas. This paper contends that Nigerian income tax systems are principally meant to fund government projects and expenditures rather than instruments for socio-economic improvements. This realization breeds not only distrust as between the taxpayers and the tax collectors, but discourages the voluntariness in disclosures of taxable incomes and distortions in real collections and related statistical records. There are number of other reasons discovered by the research as impediments to efficacious income tax regimes in Nigeria. Some of these are lack of adequate logistics, undue political interference, slow judicial process, bribery and corruption, unskilled, poorly motivated staff, and sheer ignorance. The Paper provided suggested changes in legal and non-legal approaches, especially with respect to socio-political and fiscal policies over which the tax-payers' monies were to be applied. The paper concludes that trust in tax authority would increase if there is internal and external institutional integrity, thereby minimizing tax payment defiance in the country.

I. INTRODUCTION

It may sound elementary, yet it is necessary to say that taxation in any society, including Nigeria, is indispensable for economic development.¹ According to Wilford and Wilford, third world countries can attain economic development through marshalling internal resources by enforcing tax policy constructively.² As was aptly opined in

earlier work³, there is hardly any government today that does not rely on taxation for development⁴. From another clime⁵, the U.S. Supreme Court held taxation to be one of:

...great powerful machinery upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as it is the air he breathes to the natural man. It does not only have the power to destroy, but also the power to keep alive⁶.

In the views of Jean Baptiste Colbert, taxation does no more than to "pluck the maximum amount of feathers from the goose with the least amount of hissing"⁷. Since the advent of modern democracies, there has been a global realization that taxation is indeed a manifested instrument that, if used sensibly, could help each society attain its economic and social goals. In all ramifications, taxation can be used to uplift the welfare and living standard of the citizenry, put smiles on the faces of the governed without losing its traditional grip of revenue generation, and has a potent effect in restructuring an ailing economy such as Nigerian.

Yet, there is hardly a voluntary yield to each call for tax payment either by the individual or a corporate organization. Even Government departments, for whose operational survival requires the remission of taxes by all concerns, hardly remit the monthly deducted taxes from their respective employees to the central treasury of government. It is not unexpected that the legal and /or social responsibilities for complying with taxation have not always been ordinarily discharged in Nigeria⁸. As a matter of fact, taxpayers often exhibit different attitudes, and if not complete apathy, to tax payment⁹. The reasons for the pervasive weak tax compliance are not farfetched. It is believed that Nigerian income tax systems are only meant to fund government projects and expenditures rather than instruments for socio-economic improvements¹⁰. Other reasons are lack of adequate logistics,

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¹JFJ Toye, (ed) Taxation and Economic Development: Twelve Critical Studies (Routledge, New York 2013) 1

²D Sykes Wilford and W T Wilford 'Estimate of Revenue Elasticity and Buoyancy in Central America: 1955-74' in JFJ Toye, (ed) Taxation and Economic Development: Twelve Critical Studies (Routledge, New York 2013) 83

³Ayua I. A. The Nigerian Tax Law, (Ibadan) Spectrum Law Publishing, 1986.

⁴Ibid., at page 3.

⁵See Nichols v. Arnes 173 U S 509 (1899).

⁶Ibid. page 515.

⁷Quoted from Donald J.J. Tax and Wealth Creation. In OECD Observer No. 230, January, 2001, p.1.

⁸FIRS Raids Tax Defaulters, In Daily Trust, Wednesday, September 1 2010, p7

⁹Nigerian Tax Reform in 2003 and Beyond, Report of the Study Group on Nigerian Tax System 2003, p 270

¹⁰Ibid

undue political interference, slow judicial process, bribery and corruption, unskilled cum poorly motivated staff, and sheer ignorance, to mention but a few¹¹. In other words, there is a lack of internal and external integrity. Institutional integrity in the context of this paper means that the tax system is well organized and coherent at the internal level, and the tax collection achieves its purpose. The external integrity aspect of tax means the extent to which the general public perceived the tax authority as performing its duty with a sense of purpose, carrying out its operations competently, reasonably and justly with awareness of and consideration for those affected by them¹².

Therefore, it goes to logical reasoning why Governments at all levels put up all manner of legal and institutional frameworks to ensure high-yielding revenue generation and impose tax schemes that require mandatory enforcement strategies to compel obedience to it. The process is referred to as enforcement procedure. It is a fundamental imperative of a good tax system because it constitutes a benchmark for measuring effective tax administration standards. The income tax laws¹³ prescribed various mechanisms for the enforcement of income tax. Therefore, this paper takes a critical look at the legal framework governing enforcement of income tax and the challenges they pose for sustainable development in Nigeria. The paper highlights the components of the income tax enforcement instruments principally to fizzle out their legal deficiencies and their misapplication in practice.

The rest of the paper is rendered in three major parts: the part that clarified the technical terms in the legislative frameworks and mechanism for the enforcement of Income Tax in Nigeria. This part equally took a cursory examination of the history of tax administration in the country. The subsequent part explored and analyzed tax recoveries by Distress, as well as other legal procedures for enforcement of tax compliance in Nigeria. The last part highlighted the major findings of such loopholes and inefficiencies relating to Income Tax Administration, and provided suggested remedies before concluding.

Clarification of Keywords

Understanding the legal frameworks and institutional mechanisms to enforce income tax compliance in Nigeria, as opposed to everywhere else, is essential to this discourse. However, because taxation is a subject of international economic law and governance, most terms used in this discussion cannot remain in their local contexts. For example, one of the global cardinal imperatives of taxation is certainty. This explains why the scope of the chargeable tax should be clear both in form and content. The logical implication of this

is that tax being a fiscal product of statutes, any legal (both civil and criminal) liability arising from its non-compliance must be ascertainable and made pursuant to a particular taxing statute. Its execution was made following the spirit and tenor of the extant statute. Tax liability carries along with enforceability rules, dictated either by civil remedy or punitive measures. In other words, since taxing principles are outlined by law, so also the commanding instruments for enforcement must equally be prescribed by written law. Their scope and procedures are borne out of the content of tax law that defines them. For instance, the *Companies' Income Tax Act (CITA)*¹⁴, the *Personal Income Tax Act*¹⁵ and the *Federal Inland Revenue Service (Establishment) Act*¹⁶ all provide for powers to levy distress, layout requisite conditions for its employment and outline its procedures. Further to this, while the *FIRS Act*¹⁷ makes litigation an enforcement instrument, sister legislation equally gives a pointer to how it can be employed within the conventional rules and procedures of the court.¹⁸ Thus, any derailment from the limit set by these legal prescriptions may bring about illegality.

The income tax laws equally make provisions for administrative instrumentalities through which tax objectives of government are realized. They encapsulate human resources (tax officers) and facilities (tools) for the goals of government from tax to be achieved. In other words, human resources and facilities constitute two essential components of administrative mechanisms to enforce income tax. Tax is a dynamic economic phenomenon, and its enforcement's instrumentalities cannot afford to be retrogressive. This being the case, while the substantive law of taxation is being amended to align with international best practices, the organizational structure of its administrative agencies must equally be reinvigorated to accommodate the progressive tendencies of the law. For the human element, tax administrators are equipped with training and operational rules for improving their efficiency in tax administration; these guidelines also enhance their understanding of complimentary agency roles in achieving the overall objectives for which their singular and collective departments or agencies were conceived. Be that as it may, the examination of the legal framework for income tax enforcement in Nigeria, as done in this paper, is first to contextualize challenges to implementation and proffer penultimate solutions to both the legal, factual and potential problems militating against effective tax administration.

The Antecedents of Modern Tax Administration In Nigeria:

The evolution of tax enforcement of the income tax regime is as old as the concept of taxation itself. Tax being a

¹¹Ibid p101.

¹²Valerie Braithwaite, *Defiance in Taxation and Governance: Resisting and Dismissing Authority in Democracy* (Edward Elgar UK and USA 2009) 179

¹³*Companies' Income Tax Act*, CAP C21, Laws of Federation of Nigeria (LFN), 2004; *Personal Income Tax Act*, CAP P8 (LFN) 2004; *Petroleum Profits Tax Act*, CAP C1, LFN, 2004

¹⁴ See Section 86(1).

¹⁵ See Section 104.

¹⁶ See Section 33(1).

¹⁷ See Section 34(1)

¹⁸See also Section 78 (1), *PITA*

compulsory contribution to support the revenue base of each ruling government, it was usual for such government to impose, usually under the authority of the legislature, legal strategies that engender enforcement frameworks. It equally excites institutional mechanisms that will propel the legal instruments into action. Suffice to say that incometaxlaws prescribed legal proceedings, distress, search and seizure, as well as production of tax clearance certificates as instruments of enforcing tax liability.

Those incomes usually taxable for the purpose of such revenue collection include Personal income tax by taxable adult individuals and Companies income tax by corporate bodies. The Personal income tax framework includes those who either provide services for remuneration or engage in personal businesses or other commercial activities. Our discussion here is, therefore, limited to the incidences of enforcing compliance with the requirements of such taxation regimes in Nigeria.

The *Companies' Income Tax Act* as well as the *Personal Income Tax Act*, prescribes various legal instruments to enforce tax recovery. They are legal proceedings (this constitutes civil litigation and criminal prosecution for tax delinquencies), distress, search and seizure, and tax clearance certificate system. These will be sub-analyzed hereafter, with a view to confirming their adequacies or otherwise in their respective applications in tasks of administering various income tax regimes in Nigeria

Both from the indigenous African and traditional British perspectives, the court has been considered to be the place to resolve disputes. This system, *inter alia*, was part of the legacies that were bequeathed by the British Empire to virtually all her colonies.²² This explains why the *corpus* of the modern concepts and principles outlining income tax in Nigeria is of distinctly British origin. It equally accounts for why litigation is the foremost enforcement and recovery measure for income tax. For instance, the first indigenous Nigerian Companies Income Tax Law²³ (which was later variously amended) prescribed legal proceedings for the recovery of unpaid income tax. It thus follows that the rules of the English Common Law, the Statutes of General Application and the Doctrines of Equity as were exercised in English Courts were *mutatis mutandis* of common application in Nigeria; so also were the powers of the Courts to order for search and seizure as will be examined later in this paper.

The legal concept of "Distress" is another formal instrument for income tax enforcement and recovery. As was the case with the adjudication process, this doctrine did not also get into the Nigerian tax jurisprudence by accident. In my humble view, its introduction may have been dictated by the

prevailing exigencies in the post-independence years of Nigeria. The evolution of 'power to *distrain*' dates back to 1966 when the then ruling Supreme Military Council promulgated the first taxation decree²⁴ in Nigeria. Prior to that time, litigation was the only prominent means of enforcing tax payment²⁵. The rationale for its introduction is not far-fetched. The period between 1961 and 1978 characterized the era of indigenous fiscal policy measures and inquisition in Nigeria. It was the period when Nigeria was grappling with challenges of fiscal stability in nation building. During the above mentioned period, various levels of government introduced tax measures. The laws were characterized by what we may today call a harsh inquisitorial system whereby the revenue power of the government was strengthened by imbuing the Federal Inland Revenue Board with the power to interrogate taxpayers, examine bank accounts, insist on returns of total incomes of taxpayers and prosecute tax defaulters. To accomplish this, for example, the 1966 Tax Decree²¹ gave the Revenue Board the power to levy distress on the property of tax defaulters where tax remains unpaid. This statutory power remains constant invirtually all subsequent Nigerian incometaxlaws²².

II. CLASSIFIED ENFORCEMENT PROCEDURES FOR RECOVERY OF INCOME TAXES

Recovery of Tax by Distress

Distress is the seizure of personal property of the tax defaulter by which the administrator of tax can enforce payment of income taxes to be followed by its public sale if the taxes are not voluntarily paid²³. By this process, personal goods and chattels of the tax defaulter or that of the third party in his safekeeping are impounded and taken out of legal possession into the custody of the relevant tax authority to procure satisfaction for non-payment of tax or arrears of tax due from the tax defaulter. Under both the *CITA*, 2004²⁷ and the *FIRS (Establishment) Act* 2007²⁸, the Federal Inland Revenue Service is empowered to levy distress on a tax defaulter. A community reading of both legislations shows clearly that the distressed power by the FIRS can be exercised discretionarily. In other words, the tax authority has the option of enforcing income tax by other means than by distress. If distress is chosen as an instrument to enforce the income tax on a taxpayer, do the other instruments become otiose for the same purpose? This paper's humble submission that the tax authority should exercise its discretions judiciously by

²⁴ Tax Amendment Decree No. 65 of 1966.

²⁵ Arogundade J.A., *op cit.*, pp. 367-368.

²¹ Section 34(1)

²² Section 86 (1), *Companies' Income Tax Act*, CAP C21, Laws of the Federation of Nigeria (LFN), 2004; *Federal Inland Revenue Service (Establishment) Act*, 2007.

²³ See Garner B.A. *Black's Law Dictionary*, 8th Ed. West Publishing Co, U.S.A. 2004, p. 508.

²⁷ Section 86(1)

²⁸ Section 33(1)

²² Peter Harris, *Income Tax in Common Law Jurisdiction: From the Origins to 1820* (Cambridge University Press, UK 2006) 1

²³ See Section 58(3) of CITA. 1961

ensuring that all the requisite conditions and procedures guiding distress, as outlined below, are fulfilled and complied with before detaining the tax defaulters properties.

Terms and Conditions for Levying Distress

Distress as an instrument to enforce tax is regulated by rules and procedures. The rules are prescribed by the law and are meant to be strictly followed to avoid encroachment on the fundamental human rights of the taxpayers. There are equally prerequisite conditions to be attained by the tax administrator to exercise the power of *distraint* for non-payment of tax. First, the power becomes exercisable only when the assessment raised against the taxpayer becomes final and conclusive²⁹. That is when the tax payable has been decisively determined and no valid objection or appeal has been lodged against the assessment within the time prescribed by the law.³⁰

The second requisite condition for levying of distress is a prior demand, which is essentially compulsory. Where an assessment of tax based on an income is made, and a distress levied without a demand notice for its remittance, it was held that such an assessment was made without jurisdiction and therefore, the distress so carried out was not only *ultra vires*, but also null and void³¹. The demand note must, necessarily, be served on the taxpayer before any distress is made. Besides, a reasonable time limit within which the taxpayer is expected to comply with the demand note must be specified thereon, and the time so stipulated must first have elapsed before a distress is embarked upon.³² In other words, the service of a demand note upon the taxpayer is a condition precedent. This waiting period is intended to enable the taxpayer time to source for not only the money to pay but to put across his objection, if any, to the demand notice. Both conditions are also intended to insulate the taxpayer against possible abuse of his fundamental right to information but also afford him an opportunity of stating his income and other relevant matters arising from the assessment and demand notice thereafter. Thus, an assessment and demand notice which does not fulfil either of those conditions will be considered as having been made without jurisdiction and consequently could be declared null and void³⁰.

It is pertinent, at this juncture, to observe that the mandatory demand notice to levy distress appears to conflict with section 55 *CITA* 2004, which, on the other hand, requires every company to file a tax payment return, at least once a year, without notice or demand from the Revenue Board. It is to be borne in mind that the *Companies' Income Tax (Amendment)*

Act 2007 deleted Sections 55 of the principal Act (i.e. *CITA*). Notwithstanding, it is the humble view of this paper that the *CITA (Amendment) Act* 2007 is otiose in this respect. It is observed that by *CITA (Amendment) Act* 2007, all that the legislature did was incorporate and re-arrange the earlier legislations between 1990 and 2004. For example, it is noteworthy that Section 55 of *CITA* CAP 60, LFN 1990 provided for the procedure before Appeal Commissioners. That section was simply renumbered as Section 73 of *CITA* CAP C21, LFN, 2004. In other words, if all that the National Assembly in 2007 would do as an amendment was the deletion of the section of *CITA* regarding the procedure before Appeal Commissioner, it should be Section 73 of *CITA* 2004 and not section 55 of *CITA* 1990 Act.

It is further observed that the legislative error, as pointed out here, is one of the effects of unnecessary legislative duplications in Nigeria³⁴. In particular reference to such inelegant legislative drafting, it will be noticed that Section 55 *CITA* of 2004 remained as it was in the 1990 Act, which, in the humble view of this paper, conflicts with its subsequent Section 86(1) and even with the provisions of the *FIRS Act* 2007³⁶ that makes demand notice mandatory before assessment.

III. PROCEDURE FOR LEVYING DISTRESS

For the purpose of levying distress, it is a legal condition that a tax collector must obtain a warrant of distress. The warrant is a writ authorizing the revenue officer to make a distress³⁷. It is an authority issued to a collector of taxes, empowering him to make distress and even sell the goods or land in lieu of the default tax payment³⁸. The law provides that the warrant must be issued and signed by the Chairman of the Federal Inland Revenue Service³⁹. Although this is the position of law, it is observed to be a flagrant usurpation of the judicial power of the court; as such it is at variance with constitutionalism. Going by the definition of the warrant of distress above stated, the warrant has the same status with a warrant of arrest under criminal proceedings or, at best being a writ, it is *ejusdem generis* with a writ *offeri facias*, otherwise known as a writ of execution and as such it has to be a judicial order authorizing or directing a revenue officer to perform a specified act. That is levying distress. In this regard, only a judicial officer and not an executive or administrative officer is qualified to issue it. We are strengthened in this proposition by section 36 (2) *FIRS (Establishment) Act*, which provides that a judicial

²⁹ Section 66, *Personal Income Tax Act*, CAP P8, *Laws of Federation of Nigeria* (LFN), 2004

³⁰ *Ibid*.

³¹ See for example, the case of *Joseph Rezcallar & Sons Ltd v FBIR* (1962) 1 All NLR, 1

³² See also *Gibbs v Stead* (1828) B & C 528

³⁰ See particularly *CITA*, Cap 60, LFN., 1990 and *CITA* Cap C21 LFN 2004.

³⁴ For instance, the substantial provisions of the Penal and the Criminal Codes in respect of property offences were repeated in the Economic and Financial Crimes Act, as well as the Independent Corrupt Practices Act.

³² See Section 33(1) of the *FIRS Act*, 2007.

³³ Section 86 (2), *CITA*, 2004; see also section 33 (2), *FIRS (Establishment) Act*, 2007

³⁶ *Ibid*

³⁷ *Ibid*

³⁸ Garner B.A. op.cit p1616

³⁹ Fourth Schedule, *CITA*, 2004; Fourth Schedule, *FIRS (Establishment) Act* 2007

officer must issue a search and seizure warrant. This conforms to the principle of separation of powers recognized by the Constitution of Nigeria, 1999. Anything contrary may result in executive encroachment on judicial powers. Besides, authorizing the Chairman of the Federal Inland Revenue Service to sign or issue the warrant portends economic danger as the power may be abused for political advantage, especially in Nigeria where the fiscal mechanism and political aspect are not treated as independent variables⁴⁰.

If the warrant is laid before a judicial officer prior to issuance, it will create the opportunity to be preceded by a judicial inquiry that will satisfy the judge that the requirements for its issuance have been met. Otherwise, it will constitute a breath-taking in-road on the taxpayer right to own property. Nevertheless, the warrant must set out the full identity of the collector and the fact that he is authorized to exercise the functions of a tax collector⁴¹. Then, the tax collector may break open any building or place in the daytime to levy distress, first on the taxpayer's goods or other chattels, bonds or other securities⁴². The distrainable goods may be tangible or intangible but not perishable goods⁴³. This is because goods of a perishable nature cannot be restored in the same state as that in which they were taken⁴⁴. In this respect, tax is charged on the person and only goods belonging to the person so charged can be seized and taken. Second, the tax collector may *distrain* upon any land, premises, or place in respect of which the taxpayer is the owner, thereby empowering him to *distrain* on any goods found on the premises, including those of third parties⁴⁵.

One advantage of the procedure of *distrain* is the idea of making it open and public. This brings social stigma and disfigurement to the tax defaulter and may serve as a deterrent to others. However, lack of courage, ignorance and apathy on the part of tax collectors has not made this enforcement procedure yield a positive result. In the last couple of years, events have revealed that tax administrators are exhibiting ignorance of the explicit procedures governing distress. They grope in darkness so manifestly obvious that when they intend to *distrain*, they embark on sealingup of business premises of companies, which method is alien to Nigerian income tax laws⁴⁶. This is a clear indication of the lack of periodic training of tax officials to update their knowledge to enhance their performances.

Enforcement of Tax by Legal Proceedings

The term legal proceeding means proceeding before any court, tribunal or person having the power by law to hear, receive and examine evidence on oath⁴⁷. It may be civil or criminal. The attempt on this sub-head is on a civil proceeding. Under the income tax laws, the government of the federation or the relevant tax authority are empowered to sue for recovery of income tax in a court of competent jurisdiction with full costs of action from the person charged therewith as a debt due to it⁴⁸. In this regard, a court of competent jurisdiction includes High Courts (State or Federal), and Magistrate's court provided the amount claimed in any action does not exceed the amount of the Magistrate's jurisdiction concerned concerning an action for debt⁴⁹.

The power of the High Court to recover unpaid tax may be either in its original jurisdiction, supervisory jurisdiction or appellate jurisdiction. Original jurisdiction is the power of the High Court to hear and decide a matter as a court of first instance before any other court can review the matter⁵⁰. Supervisory jurisdiction arises when, upon leave of the court, the proceedings of an inferior court or tribunals (magistrate court or body of appeal commissioner) is brought before it for the purpose of being quashed for either *ultra vires* (excess of power); illegality (error of law); irrationality (unreasonableness) and procedural impropriety (violation of rules of natural justice)⁵¹. This is what is technically referred to as judicial review. Appellate jurisdiction of the high court is the power it has to review and revise a lower court's decision by way of an appeal brought before it.

The jurisdiction of the state high court becomes exercisable on tax matters only if the revenue to be recovered is that accruable to the state and the state Internal Revenue or state Government is a party. Companies' income tax is recoverable at the Federal High Court. In other words, if the tax recoverable is that of the state, regardless of whether the defendant tax defaulter is a Federal Government's agency, the state high court will have jurisdiction. Although the Supreme Court in the case of *NEPA V EDEGBERO*,⁵² decided that a state high court will no longer have jurisdiction on matters in which the Federal Government or any of its agencies is a party, notwithstanding the nature of the claim. A situation whereby a state high court is to recover a state's revenue from the Federal Government or any of its agencies is an exception

40 Ayoade J.A- *The Changing Structure of Nigeria Federalism*; In Elaigwu J. & Akindele R (ed.) Foundations of Nigeria Federalism, National Council on Inter-Government Relations (N.I.R) Abuja, Federal Capital territory (FCT), Nigeria, Vol.2 1996, p56

41 Section 33 (2), *FIRS (Establishment) Act*, 2007

42 Ibid, Section 33 (3)

43 *Morley v Pincombe* (1948) 2 Ex. Ch. 101

44 Simon's Income Tax, 2nd edition Vol. 1, Butterworths 1952, p322

45 *Jusen v Dixon* (1813) 1 m & s 601, *Macgregor v Clamp & Sons* (1914) Ik.B 288

46 *A.M Shittu v NACB Ltd & 2ors* (2001) 10 NWLR (Pt 721) p298

47 Garner B.A- *Black's Law Dictionary*, op.cit p915

48 Section 34 (1), *FIRS (Establishment) Act*, 2007, Section 87(1), *CITA*, 2004: Section 78 (1), *PITA*, 2004

49 Section 87 (2), *CITA*, 2004

50 Sections 251, 257 & 272 (1) & (2), *CFRN*, 1999.

51 Abdulrazaq M.T – *Nigerian Revenue Law*, MaltHouse Law Books, Lagos, 2005, p19, see also Order 37 Kaduna State High Court (Civil Procedure) Rules 2007, see also Section 272 (2) *CFRN*, 1999,

and the cases of *Civil Services Commission Imo State & 1or v Godwin Onyema Anuforom* (2007) ALL FWLR (Pt 396) 155 @ 172, *Rayyawu Mohammed V KSBIR & 20rs* unreported suit N0: KDH/Z/02/2007, per B.F Isah J; *R V IRC* (1982) Ac 617.

52 (2002) 18 NWLR (Pt 798) p79.

to that apex court decision⁵³. This is particularly so that Section 251 (1) (a) of the 1999 Constitution vests exclusive jurisdiction on Federal High Court only when the revenue to be collected is that of the Federal Government. Besides, Section 251 of the Constitution does not confer jurisdiction on parties but on subject matter or nature of the suit⁵⁴. Be that as it may, the procedure for instituting a civil proceeding to recover tax is as prescribed by the various civil procedure rules of the courts. One common criticism of Nigerian courts is the delay in proceedings. In proffering a solution to this problem, various States have evolved a new High Court Civil Procedures Rules introducing the front-loading system. However, one noticeable flaw in the new rules, particularly in Kaduna State, is the clumsy nature of its summary judgment procedure which would have assisted quick disposal of tax cases to enhance revenue generation. A critical look at order 11 of the High Court Civil Procedure Rules of Kaduna State, 2007, reveals that it is slower than the undefended list procedures in the old rules that it claims to improve upon in terms of time consumption and complexity of the procedures involved.

One noticeable flaw in this enforcement instrument is the issue of post judgment default by taxpayers. The trite position of the law is that where the Federal Inland Revenue Service or any other relevant tax authority has obtained a judgment against a company or taxpayer, execution of such judgment against the judgment debtor (tax defaulter) follows. In spite of this, Section 89 (b) CITA, 2004 provides that post-judgment default by a taxpayer can be addressed by the issuance of a bench warrant on the director of the company. This provision is a misconception of the law. In fact, it is an aberration from the Nigerian civil procedure jurisprudence. In the first instance, the judgment envisaged by the provision is a monetary judgment obtained through civil proceedings. As such, the issuance of a bench warrant does not arise. The judge issues bench warrant to a law enforcement officer, especially for the arrest of a person who has been held in contempt; has been indicted; has disobeyed a subpoena or has failed to appear for a hearing or trial⁵⁵.

Again, six months' grace after the judgment is obtained and the judgment sum remains unpaid as provided in the same section is not desirable; except if the appeal is lodged against the said judgment and an application for stay of execution accompanies it; otherwise, the six months' period, in the humble view of this paper is tantamount to indifferent attitude of the government towards revenue accretion to the public treasury.

Instead, the next step after obtaining judgment by the FIRS is the execution of the judgment. This is the enforcement of that judgment by giving effect to it except in declaratory judgment or when the judgment is voluntarily complied with⁵⁶. By virtue of Order IV Rule (2) Judgments (Enforcement) Rules, except by leave of the court vide motion *ex-parte*, execution cannot be levied on the judgment debtor (tax defaulter) until after the expiration of three days after the judgment is entered.

Monetary Penalties and Criminal Prosecution

The income tax laws⁵⁷ make adequate provisions for monetary penalties or terms of imprisonment or both for certain tax delinquencies pursuant to criminal prosecution. Tax delinquency is a technical term for failure or omission to pay tax when due with criminal intention. Such delinquencies prescribed by the law are; failure to deduct tax; non-payment of income tax; making incorrect returns; false statements and returns; obstructing a tax collector, obstructing a tax officer to conduct search and impersonating tax officials⁵⁸.

It is instructive to state that payment of penalties for default in tax matters is quite different from criminal prosecution, which may earn term of imprisonment upon conviction. The main difference between the two is that while penalties are imposed privately and subject to the general confidentiality surrounding a person's tax affairs; criminal prosecution is conducted in open court⁵⁹. A criminal prosecution does not exclude penalties and does not relieve a person from liability to payment of any tax for which he is or may become liable⁶⁰. In other words, criminal prosecution and civil action for recovery of tax due can go on simultaneously.

Actus Reus and Mens Rea in Income Tax Offences

The tax delinquencies enumerated above are offences of either commission or omission. The general effect of them is to forbid tax avoidance and evasion but to enjoin the performance of civic obligations of payment of tax. The *actus reus* is the physical aspect of the tax offences. It is the definitional element of each of the tax offences which constitute the ingredients which must be proved beyond reasonable doubt before any tax accused may be convicted. Failure on the part of the prosecuting tax authority to establish each of the ingredients of the offences would be resolved in favour of the tax accused.

⁵³ Adedokun K.A. *The Rule in NEPA V EDEGBERO. A case of Absolute Rule?* An article published In Ahmadu Bello University Zaria, Journal of Private and Corporate Law (JPCL) vol. 2 & 3, 2007-2009 Pp191-196.

⁵⁴ *Omotesho v Abdullahi* (2008) 2 NWLR (Pt 1072) 526 @ 546 paras D-H per Salami JCA (as he then was)

⁵⁵ Garner B.A.-*Black's Law Dictionary*, op.cit p162

⁵⁶ Nwadialo F- *Civil Procedure in Nigeria*, M.J Professional Publishers Limited, Lagos, 1990, p765

⁵⁷ PITA, CITA & FIRS Act 2007

⁵⁸ See Sections 74, 76, 94, 95, 96 & 97, PITA, 2004 and Sections 40-46 *Federal Inland Revenue (Establishment) Act*, 2007. For detail discussion of all the tax delinquencies see Abdulrazaq M.T – *Nigerian Tax Offences and Penalties*, Tosco Press Ilorin, 1993 P85; Graham Balter – *Tax fraud and Evasion* 5thed., Warren, Gorham & Lamont Inc. U.S.A, 1982. Adedokun K.A – *Enforcement and Recovery of Income Tax in Nigeria (Law, Practice, and Procedures)*, Corporate Transactions Ltd, Lagos, 2010, Pp51 – 71

⁵⁹ Tilley J.- *Revenue Law*, Butherworths, London, 1978, p52

⁶⁰ Abdulrazaq M.T. op.cit Pp21-22;

However, the mere commission of any tax offences is not enough to ground the term of imprisonment or fine. The mental element required for those offences must equally be proved beyond a reasonable doubt. The prosecuting tax authority must establish that there is a criminal intent, guilty knowledge and willfulness on the part of the tax accused. This is what is technically referred to as *mens rea*; a guilty mind. The general spirit of the tax offences is that they are not offences of strict liability.

The income tax laws that create those offences provide that *mens rea* is an essential ingredient of the offences. This is evident from the words such as willfully, lawful justification, reasonable excuse, knowingly, unlawfully, used to qualify almost all the offences. It is indisputable that those adjectives and adverbs are subject to proof beyond a reasonable doubt. They are equally open to judicial examination in spite of their subjective form. They constitute the question of fact to be tried on evidence. That being the case, the words such as lawful justification, reasonable excuse, lack of willfulness, lack of guilty knowledge constitute defences open to tax defaulter/accused.

Tax Clearance Certificate System

The failure of conventional enforcement measures in dealing with tax evasion is the reason for recourse to the tax clearance certificate system as a measure for income tax enforcement⁶¹. Notwithstanding, the tax clearance certificate system is an effective enforcement instrument⁶². Tax clearance certificates are official written assurances by the relevant tax authorities, evidencing that the tax payer has fulfilled his civic responsibility for the three years immediately preceding the current assessment year. In other words, they are certificates issued by the relevant tax authority to the effect that the company or the individual stated thereon has paid all taxes assessed on it up to a particular period or that it is not liable to tax⁶³. The certificates must particularly disclose chargeable income; tax payable; tax paid, tax outstanding, or alternatively a statement to the effect that no tax is due; source of taxpayer's income and purpose for which tax clearance certificate is sought⁶⁴.

The Rationale for Tax Clearance Certificate

The rationale for a tax clearance certificate is not far to seek. Every citizen has some legal rights that entitle him to a just and valid claim from the government, its agencies, or individuals⁶⁵. Also, citizens have legal duties to perform to the government that renders a person liable to coercion or punishment for neglecting it. One of such is the tax obligation of every taxpayer. A person who benefits from society must establish that he is a good citizen. One of the ways of showing

this is the payment of tax as and when due⁶⁶. Therefore, tax clearance is evidence that a person has performed his tax responsibility. It is a demonstration of reciprocatory obligations to the government.

Again, tax clearance certificates are necessary for those who wish to remit dividends, fees abroad since exchange control permission will not be granted to remit if an application is not supported with a tax clearance certificate. Foreigners leaving the country permanently usually require a certificate to enable them to remit the balance of their funds in Nigeria⁶⁷. From the foregoing, tax administrators usually issue two types of certificates- *exemption certificate* issued where there is an absence of liability; and *exit certificate* in the event of liability indicating that all taxes have been paid⁶⁸.

The production of the tax clearance certificate is now a legal requirement both for individuals and companies as a prerequisite for various economic and other purposes⁶⁹. In order to satisfy the requirement of the law in all the transactions, the relevant tax authority is empowered to issue a tax clearance certificate to a taxpayer within two weeks of demand by him. The issuance must be preceded by the assurance that such a person has paid tax or is not liable at all to tax for the three years immediately preceding the current year of assessment⁷⁰. It is worthy of mention that this enforcement instrument cannot be effective, and the tax authorities alone cannot actualize its motive. The maximum cooperation of other government ministries and Parastatals is highly required. More so that all the Government agencies are working towards actualizing the goals and objectives of the government concerned, and the government cannot function effectively well without sufficient revenue.

One particular area that caught the Researchers' attention is the area of public appointment and elective positions. The legislative houses are obligated to ensure genuine tax clearance certificates are produced before any proposed appointments to either Federal or State Ministries are approved⁷¹. Not only this, before any prospective candidate is elected into a public office at whatever tier of government, tax clearance is one of the required documents for such a candidate to scale through the hurdle of eligibility⁷². Therefore, both the Independent National Electoral Commission (INEC) and the various States Electoral Commissions must cooperate with the relevant authority to comply with this law. However, the Court of Appeal has divergent views on whose duty it is to verify payment of tax

⁶¹ Nigerian Tax Reform in 2003 and Beyond op.cit p102

⁶² Adedokun K.A. op.cit p8

⁶³ Section 101, CITA, 2004; section 85 (1) PITA, 2004

⁶⁴ Section 101 (3) CITA, Section 85 (3) PITA

⁶⁵ Section 33-46, CFRN, 1999

⁶⁶ AfeBabalola-Election Law and Practice, Intec printers Ltd, Ibadan, 2007; p457

⁶⁷ Section 101 (5) CITA; Section 85 (5) PITA

⁶⁸ See Toby R.A op.cit p121 for details

⁶⁹ Section 101 (3), CITA& section 85 (3) PITA

⁷⁰ Ibid

⁷¹ Section 147 (2) CFRN, 1999 to be read together with sections 85 (2) PITA and 101(2) CITA

⁷² State Government (Basic Constitutional and Transitional Provisions) Decree, 1998

as and when due in election matters. At one breath, some hold the view that it is the INEC and not Election Tribunal that should verify into the compliance of payment of tax as and when due by producing tax clearance certificate to evidence same⁷³. In other words, if the INEC is satisfied at the screening stage that a candidate has paid the requisite tax for the prescribed period, a petition seeking the nullification of such candidate's election on the ground that he did not pay his tax as and when due is incompetent⁷⁴. In another breath, others hold the view that election petition may be nullified on the ground of non-payment of tax as and when due even at the election tribunal.⁷⁵

This shows that the court, in some instances, has passed the buck to INEC. But INEC, in a manner depicting how the Nigerian government and its agencies are holding a very important issue of revenue generation with a levity hand, dodged the responsibility. INEC claims that candidates for elections into public offices are not by virtue of the relevant provisions of the Constitution 1999, required to present a current tax clearance certificate, unlike the position in the past⁷⁶. In the humble view of this paper, neither of these views is a correct notion of the law. The assertion by INEC constitutes sheer shirk in responsibility. The Constitution and Electoral Act cannot be read in isolation without recourse to other vital enactment that has a bearing on the issue.

Section 85 (2) *PITA* and 101 (2) *CITA* mandates Government agencies to demand tax clearance certificates from persons. Sub-section (4) of the Acts, particularly *PITA*, states that the provisions of sub-section (2) of this section (i.e. section 85) SHALL apply in relation to appointment or election into public office, among others.⁷⁷ It is not in dispute that INEC is an agency of the government. It is an organ established by law through which the Federal Government carries out its electoral functions. Paragraph F 15 of the third schedule to the 1999 Constitution saddled INEC with the responsibility of conducting elections into the offices of President, Governor, and membership of legislative houses and other omnibus functions.

A community reading of the provisions of the two enactments above stated reveals that the use of the word SHALL in them implies a mandate on INEC. The *Companies' Income Tax Act* and *Personal Income Tax Act* are Acts of National Assembly, and particularly *PITA* confers a mandate on INEC to demand tax clearance certificate of any prospective candidate for an election into the offices above stated. Any shirk in this constitutional responsibility by INEC will mean aiding and abetting tax evasion.

Apart from INEC, the court cannot, in the view of the paper, decline jurisdiction to entertain an election petition that set non-payment of tax as and when due as its major ground. With the pervading corrupt practices in Nigeria, a candidate for an election may manoeuvre his way out of INEC search by presenting a spurious or fake tax clearance certificate, having tricked tax officials to achieve tax clearance racketeering⁷⁸. The court being an important organ of government, cannot close its eyes to a petition that hinges on this kind of instance. It is the collective responsibility of all organs of the government to ensure citizens pay their taxes as and when due. Therefore, it is not out of place to state that our courts are envisaged by the provision of Section 85 (2), *PITA*. But to make it clearer, there is the need for electoral law in Nigeria to make non-payment of tax as and when due to a ground for nullification of the election petition

Search and Seizure

Both the *Personal Income Tax Act* and *Companies' Income Tax Act* vest the relevant tax authority with the power to enter and conduct a search in respect of a trade, vocation, profession or business carried on in Nigeria by a person.⁷⁹ The said tax authority must be satisfied that there is a reasonable ground for suspecting that an offence involving any form of total or partial non-disclosure of information or any irregularity or an offence in connection with or in relation to tax has been committed⁸⁰. The subsection prescribes what the state of mind of tax authority must be in order to make it lawful for it to decide to seize a document. He must suspect based on reasonable ground that tax fraud has been committed. The statute confers the decision-making power on the officer of the relevant tax authority. He is not required to give any reason for his decision, and the public interest immunity provides justification for any refusal to do so⁸¹.

The relevant tax authority, coupled with satisfaction or reasonable grounds, must have formed the opinion that evidence of the offence or irregularity is to be found in the premises, the registered office or place of management of the trade, vocation, profession or business or in the residence of the principal officer, factor, agent or representative of the individual⁸². The opinion and satisfaction of the relevant tax authority is not just conceptualized in the whims and caprices of the tax officer. The investigation and intelligence section of the relevant tax authority must bring to bear its honest and investigative skills and wiles to entrap the person concerned.

⁷⁸ Bombshell: Wabara not pay tax between 1993-1996 FBIR exposes senate president; in Saturday Sun edition of March, 19, 2005 p8

⁷⁹ Section 53 (1), *Personal Income Tax Act*, (*PITA*) CAP p8 LFN 2004 & Section 64, *Companies' Income Tax Act* (*CITA*) CAP C21 LFN, 2004

⁸⁰ Ibid

⁸¹ *IRC v Roostminster Ltd* (1980) STC P 56 Per Lord Diplock

⁸² Section 53 (1) (b) *PITA*, Section 64(2) *CITA*

⁶³ *IRC v Roostminster* (Supra) Per Lord Wilberforce

⁷³ *Lanto v Wowo* (1999) 7 NWLR (Pt 610) p227

⁷⁴ *Ikuomola v Ige&ors* (1992) 4 NWLR (pt 236) 511 @ 523

⁷⁵ *Gatawa V Bakwai* (1998) 5 NWLR (Pt 554) 471

⁷⁶ Tax Clearance: Revenue Board Sue INEC, in Daily Trust edition of Monday March, 5 2007 Vol. 15 No 96 at Pp 1 & 4

⁷⁷ Section 85 (4) (S), *PITA*, 2004

In other words, the tax officer must have the foreknowledge of *prima facie* credible information regarding evasion of tax by the assessee. This can be achieved if the relevant tax authority mounts secret surveillance on the assessee's business activities.

The relevant tax authority may authorize its officers to enter, if necessary by force, the premises or place of management or residence of the said person at any time from the date of authorization to the conduct of the search.⁶³ The phrase "at any time" does not suggest a blanket opportunity for the tax officer to conduct the search at odd times. The authority to enter and conduct a search must be in the form contained in the precedent of the warrant in the eighth schedule of the *Personal Income Tax Act* and the sixth schedule of the *Companies' Income Tax Act*. In that regard, therefore, the search must be in the daytime.

Issuance of Warrant of Search

The authority given to tax officials to enter premises to conduct a search shall be carried out with a warrant as an authority to enter issued by Federal Inland Revenue Service or State Internal Revenue.

The word 'warrant' simply means a document issued by a person in authority under a power conferred on that behalf authorizing the doing of an act that would otherwise be illegal⁸⁴. The person affected has the right to be satisfied that the power to issue it exists. It, therefore, means the warrant should contain a reference to that power⁸⁵.

Armed with the warrant, the tax officer can search, seize, and remove any records, documents, and anything found therein⁸⁶. While on this tax drive, he should bear in mind that he's not on a mission to distrain, as the person under this section is not in default of payment of tax yet. Therefore, anything whatsoever found in the premises envisaged by the Acts are in *ejusdem generis* with records, files, documents, computer system or any other information storage system which the tax officer has reasonable cause to believe may be required for the purposes of arriving at a fair and correct tax chargeable on the person or as evidence for the purposes of proceedings in respect of offences of non-disclosure of relevant information to the tax authority⁸⁷.

The Validity of the Warrant

The principles applicable to search warrants under the criminal procedure code equally apply to searches and seizures made under tax laws.⁸⁸ From the content of the precedent of warrant and authority to enter premises in the 8th

schedule of Act, the warrant has no prescribed life span. In other words, its validity is not affected if not executed within the month or year of issue. It is equally not invalid only for non-indication of the nature of the things, which might be seized and removed. In other words, the warrant does not need to specify particular books of account or documents to be seized. A blank authorization to search and seize any papers that may be found is not bad in law.⁸⁹ It cannot be expected that there must be conclusive proof of the relevancy or usefulness of the materials seized at the search stage.⁹⁰ All that is necessary is that the tax officer must act honestly and believe, as reasonable persons, that the material would be relevant or useful. It may be that in a particular case, having regard to the magnitude of suspected evasion, a large quantity of material may have to be seized; that by itself does not make the search *mala-fide*.⁹¹

Warrants and Taxpayers' Fundamental Human Right

After the relevant tax officer, applying his mind and giving serious thought and consideration, issues a warrant of search and seizure, can it be said that the Act violates the fundamental human right to privacy constitutionally available to the taxpayer?⁹² Can it also be said to have expropriated the assessee's property, thereby infringing his right to own immovable property?⁹³ There are different views on this issue. First is the fact that though the integrity and privacy of man's house and his place of business are important human rights. However, the right may be eroded by a number of statutes passed by the parliament in the belief that this right of privacy ought to be overridden by the interest the public has in preventing evasion of the tax law. Secondly, to issue search warrants based on no more than suspicion is an unnecessary power, which dangerously encroaches on a person's liberty. It can lead to disastrous results for persons who may be innocent of fraud.⁹⁴ Nevertheless, a tax officer will be justified if a positive law empowers him to enter into taxpayers' business premises to conduct a search.⁹⁵

Although the provision of tax law regarding search and seizure is restrictive and derogatory from the fundamental right of the assessee to privacy and own property, however, the restriction and derogation are justifiable by virtue of Section 45 of the 1999 Constitution of Nigeria. All the tax officer needs to bear in mind while acting under the warrant of search and seizure is that he should not be arbitrary, indiscriminate, and highhanded. Considering all the legal instruments for the enforcement of tax above highlighted, they are combative in nature. They are characterized by harsh inquisitorial tendencies. The reason for this is that taxpayers' ingenuity at

⁸⁴ Section 53 (2) *PITA* & Section 64(3) *CITA*

⁸⁵ *IRC v Roostminster* (Supra) Per Lord Wilberforce

⁸⁶ Section 64 (3) *CITA* & Section 53 (3), *PITA*

⁸⁷ Section 53 (2) & (3) *PITA*

⁸⁸ See the Indian Case of *SW Venkateswara Lodge v Comm. of Income Tax* (1969) ITC, Vol. 71 p.2. Note that Indian Tax System is similar in every respect with Nigerian Tax System

⁸⁹ See the case of *Durga Prasad v. HR Gomes* (1966) AIR SC 1209

⁹⁰ *IRC v Roostminster* (Supra)

⁹¹ *IRC v. Roostminster* (1980) STC p42

⁹² Section 37, *CFRN*, 1999

⁹³ *Ibid*, Section 44

⁹⁴ *IRC v. Roostminster* (Supra), Per Lord Wilberforce

⁹⁵ *Latick v Carrington* (1764) 19 State tr. 1029 @ 1066 Per Lord Camdem

times outreaches legislative prescience. Once the transaction to be taxed has been described by reference to its legal characteristics, the potential taxpayer gets to work to device a new transaction whose legal characteristics do not comply with the statutory description yet nevertheless achieve the same kind of economic result.⁹⁶ This is technically called tax avoidance. It is not the same thing with tax evasion, which is the willful attempt to defeat or circumvent the tax law in order to reduce one's tax liability illegally. The parliament is adequately determined to mount a massive attack against both tax evasion and avoidance. Hence, the coercive nature of all the enforcement instruments analyzed above. In the observation of this paper, none of the instruments accommodates settlement of tax disputes by mutual agreement procedures. Notwithstanding, none of the instruments forbids it either. It, therefore, connotes that any attempt at suggesting Alternative Dispute Resolution as an additional means of enforcing tax disputes may not be out of place. In view of this, this paper proposes the introduction of the Alternative Dispute Resolution process as a suitable alternative for each of the legal instruments⁹⁷.

IV. CONCLUSIONS

This Paper dwelt on the law, the applicable procedures forenforcement and administration of income tax in Nigeria. It is evident from the analysis that there are unnecessary duplications of taxing statutes in Nigeria, which consequently created a whole range of confusion in understanding and compliance on the part of the taxpayers and wastages on the part of tax administrators in Nigeria. The current practice whereby Income Tax is paid only by those (both of individuals and of corporate bodies) whose incomes are on the disclosed list of income generation radar of the Tax Authorities, speaks more to inefficiency in fiscal and financial management of the nation's economy. There are a vast majority of taxable persons or businesses whose incomes are not within the regulated platforms of the tax authorities and are thereby uncaptured by the Income Tax legal regimes. As if these are not enough challenges, this paper also discovered that due to inadequate training, many tax administrators are ignorant of the basic enforcement skills, which engenders misapplication of the laws guiding enforcement. What is more, in the constructive examination of the variety of these tax laws, this paper highlighted some of their provisions relating to enforcement which are not only harsh and inquisitorial but are also in contradiction with constitutionalism. The effect of this is the creation of a hostile relationship between the taxpayers and tax administrators. In order to avoid this, Alternative Dispute Resolution processes are suggested as an addition to the existing legal instruments

for income tax enforcement in Nigeria, particularly in the areas that do not require statutory interpretations.

Another essential point is that collaboration between taxpayers and tax authorities would bring about a sound voluntary taxpaying culture, which is more than an 'assurance that these basic performance standards are met.'⁹⁸ In order for the tax authority to obtain the trust of a taxpayer, the latter need to be assured of the gains linked to taxpaying. Another point is that the procedure and tax collection methods should be equitable and that the authority in charge of taxing is responsive to the general public's concerns. Through these actions, the integrity of tax authority would be manifested, which would increase trust in tax authority and weaken the 'defiant posturing of taxpayers as they deal with the threat of taxation.'⁹⁹ In other words, for a tax system to work without apparent gaps, there must be institutional integrity, characterized by internal and external faces¹⁰⁰.

Enforcement is the hallmark of a good tax system. It can only be vibrant if the legal mechanisms are proactive and the proceeds realized from tax payment are judiciously used for the benefit of the citizens. The taxpayers and other stakeholders have vital roles to play in this regard. A taxpayer having paid his taxes promptly is under the additional civil obligation of being vigilant to ensure that the tax proceeds are judiciously utilized to secure the maximum welfare and enjoyment of their rights as enshrined in the constitution.

⁹⁶ Commissioner of Customs and Excise v Top Ten Promotion Ltd (1969) 3 All ER, p.69

⁷⁷ K.A Adedokun - *Resolving Tax Dispute* by Alternative Dispute Resolution (ADR) Processes: A Useful Tools for Nigeria, In Prof. I. A Aliyu (ed.) *Alternative Dispute Resolution and Some Contemporary Issues*, M.O Press & Publishers Ltd, Kaduna, 2010 Pp 439-449

⁹⁸ Valerie Braithwaite, *Defiance in Taxation and Governance: Resisting and Dismissing Authority in Democracy* (Edward Elgar UK and USA 2009) 178

⁹⁹ Ibid

¹⁰⁰ Ibid at 179