The Efficacy Of The Finance Act, 2019 In Curbing Tax Resistance In Nigeria: A Legal Approach

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ABSTRACT
Taxation is indispensably the main stay of national economies globally, be they developed or developing. However, in Nigeria, taxation hardly occupies the front seat in economic development due to the menace of tax resistance which manifest in the form of tax avoidance and evasion. The prevalence of the tax resistance industry is largely due to weak tax administration. Consequent upon the foregoing, the legislature has amended the various tax laws through the Finance Act, 2019 in the areas of imposition of mandatory use of Tax Identification Number (TIN) by taxpayers, major to regulate transfer pricing, prohibition of claim of double tax incentives, prompt payment of taxes, expansion of the VAT tax net and requirements of for registration of date of commencement and cessation of business in Nigeria by non-resident company. Through the doctrinal research method, this paper has found that though well intended, the efficacy of the said amendments in curbing tax resistance is doubtful due to the unwillingness of tax authorities to religiously enforce the provisions of the law, and loopholes in tax laws. As a way forward, the paper recommend strict enforcement of tax laws, and further amendments by the legislature to properly position the legal framework for the task of curbing tax resistance in the emerging global market.

Keywords: Taxation, Curbing, Resistance, Finance Act

INTRODUCTION
Taxation has been found to be, and acknowledged as the main stay of national economies globally. This is largely true for even economies that have abundant natural resources like Nigeria. It cannot be disputed that economies with even abundant natural resources can ignore the role of taxation to their detriment. Apart from its classical function of revenue generation for the government, an efficient national tax system provides a ready armory for reshaping economic landscapes of national economies, both developed and developing.
However, tax resistance has posed the greatest challenge to tax administrators and national tax systems globally.\(^1\) Tax resistance manifest in two forms; viz tax avoidance and evasion. Tax avoidance refers to the utilization of one’s affairs so as to legally minimise his tax liability. Wheatcraft simply describes it as “…the art of dodging tax without actually breaking the law, or alternatively, the right of every citizen to structure ones affairs in a manner allowed by the law, to pay no more than what is required”.\(^2\) The Royal Commission on Taxation of Profits and Income\(^3\) therefore describes the avoidance to include transactions where the taxpayer:

(a) avoids tax by tax planning in taking advantage of provisions for deductions and reliefs;
(b) adapts some artificial or unusual means for the purpose of avoiding tax;
(c) is carried out lawfully; and
(d) is not a transaction which the legislation had intended to encourage, but it has failed to clearly outlaw it.

In jurisdictions like the United Kingdom and New Zealand, a distinguishing line has been drawn between tax avoidance and tax mitigation, also termed tax planning. In those jurisdictions, tax avoidance means a reduction in tax liability designed to defeat the intent and spirit of the law or legislature. Tax mitigation also called tax planning, on the other hand, means an arrangement of one’s taxable activities capable of reducing his tax liabilities without avoidance or not intended to defeat the intent and spirit of the law. In Nigeria, this distinction has not been appreciated by the legislature. Whether or not the taxpayer attempt at minimising his tax liabilities is intended to or actually defeats the intent and spirit of the law, tax avoidance is legal.\(^4\)

Tax evasion refers to minimization of one’s tax liability by illegal means or non payment of tax at an when due. In *Bullen V. Eiscosin*\(^5\), Justice Holmes defined tax evasion as illegal or fraudulent attempts to escape or avoid the payment of taxes. To US Legal Inc.,

> Tax evasion is the intentional and fraudulent underpayment on non payment of taxes. It is paying less than legally due tax liability by using illegal methods. The crime of tax evasion involves deliberately misrepresenting or concealing the nature of financial affairs to the tax authorities to reduce their tax liability, and include such dishonest tax reporting tactics as under declaring income, profits or gains, or overstating deduction.\(^6\)

Tax evasion may therefore manifest in any one or more of the following forms:

(i) failure to pay tax as at and when due;
(ii) failure to make correct returns or even make any at all; or
(iii) outright failure to pay tax;
(iv) overstating deductible expenses.

Tax resistance has the tendency to bring down an entire economy to its knees since apart from denying the government of investable capital, it has the capacity to frustrate economic management and redistributional objectives of the tax system.

In Nigeria, tax evasion, a senior partner in the tax resistance industry appears to have a field day. In the words of Sosanya’,

> Tax evading has become the favourite crime of the Nigerian. So popular that it makes armed robbery seem like minority interest. It has become so widespread that there now exist a cash economy of vast

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\(^3\) Para 1016 (1955).

\(^4\) See *Seven-Up Bottling Co. Plc V. Lagos State Board of Internal Revenue* (2000) 3 NWLR (pt. 650) 565.

\(^5\) (1927) 275 US 100.


proportions over which the tax-man has no control and which is
growing at several times the rate of the national economy.

The prevalence of tax resistance in the country is largely due to the visibly weak administrative system. This has consequently resulted to low productivity of the Nigerian tax system. It has in addition, been argued that the loss of government revenue arising from low level of tax compliance is attributable to complex legislations. Cumulatively, the foregoing simply lay credence to the observation of Bird in 1970 in faraway Columbia that “in the hands of an incompetent administration, good tax policy and bad tax policy may end up looking remarkably alike”. The importance of an efficient tax administrative system has also been stressed by Due in the following words:

No tax can conform with expected standard of equity if it cannot be administered with a high degree of effectiveness. If persons are able to escape, by legal or illegal means, the tax to which they should logically be subject under the general scope of the tax, the theoretical equity of the tax is to a large measure lost.

In recognition of the importance of an efficient tax system, several statutory and institutional frameworks for the administration of Nigeria tax have been put in place. It must be noted that these laws have undergone several amendments, including the latest, The Finance Act, 2019. The Finance Act, 2019 was passed in 2019 and signed into law by the President with a commencement date of Monday, 13th January, 2020. The Act has amended some crucial areas of tax laws in Nigeria. The crux of these amendments is towards stimulating investment, and checking the menace of tax avoidance and evasion in the country. For the purpose of this paper, only the latter shall be discussed. Discussion in this paper commences by outlining previous laws that have not helped much in curbing tax resistance. The paper then analyses the efficacy of the provisions of the Finance Act, 2019 in curbing the menace of tax resistance in Nigeria. It proceeds to identify major impediments to the effectiveness of the provisions of the Finance Act in achieving its purpose under the backdrop of the prevailing dominance of tax avoidance and evasion in the country. Finally, recommendations are made for a way forward to enable taxation play its proper role in the Nigerian economy.

PREVIOUS LEGISLATIVE EFFORTS AT CURBING THE MENACE OF TAX RESISTANCE
The Nigerian tax laws contain elaborate General and Specific Anti-Avoidance Provisions. This is in conformity with the principles set out in Article 9 of the OECD and the United Nations Model Tax conventions.

1) General Provisions
In Nigeria, the Personal Income Tax Act, the Federal Inland Revenue Service (Establishment) Act, the Companies Income Tax Act and the Petroleum Profits Tax Act have made elaborate

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11From the statutory perspective, Laws like the Personal Income Tax Act Cap P8 LFN, 2004, Companies Income Tax Act Cap C12 LFN, 2004, the Federal Inland Revenue (Establishment) Act, 2007 etc. have been put in place. While at the institutional level, the Federal Inland Revenue Service and the State Boards of Inland Revenue have been established.
122020 No. 1.
14Section 31(1) of the FIRS (Establishment) Act, 2007.
provisions generally referred to as General Anti-Avoidance provisions. Section 22(2) of CITA provides that:

Transactions between persons one of whom either has control over the other, in case of individuals, who are related to each other or between persons both of whom are controlled by some other persons, shall be deemed to be artificial or fictions if in the opinion of the (FIRS) those transactions have not been made on terms which might fairly have been expected to have been made by persons engaged in the same or similar activities dealing with one another at arm’s length.

Similar provisions are found in the other tax laws. These general provisions have the potential of checking transfer pricing abuse. Transfer pricing is not illegal in itself. What is illegal and abusive is the transfer mispricing. That is, the deliberate mispricing of goods, service and intangible assets transferred between related enterprises as a means of minimising or avoiding tax liability. This general anti-avoidance provision has been confirmed as appropriate in checking tax abuses in the case of M/S DIT (International) Mumbai V. M/S Morgan Stanley & Co. Inc.17 Another General Anti-Avoidance provision is Section 31(1) – (3) of the Federal Inland Revenue (Service) Act18 provides that the Federal Inland Revenue Service can appoint by notice in writing any person as an agent of who is in position of any money belonging to a taxpayer for purpose of paying tax owed by a taxpayer.

ii) Specific Provisions

The Personal Income Tax Act19, the Companies Income Tax Act20, the Petroleum Profits Tax Act21, and the Federal Inland Revenue Service (Establishment) Act22 have also made elaborate provisions aimed at curbing the menace of tax avoidance and evasion in Nigeria. The tax authorities are vested with powers to distrain a defaulting taxpayer’s goods or other chattels, bonds or other securities and land or premises and sale anything so distrained in order to recover the amount of tax owed23, and power to raise additional assessment.24 Taxing statutory provisions in the light of the foregoing is the subject of the ensuring discussion.

172014 13 TLRN 116 at 124.
19Cap. P8 LFN, 2004 (as amended by Act No. 20, 2011).
23Section 33(1) Ibid.
24Section 34(2) Ibid.
Power to Distrain and Sale Goods of a Defaulting Taxpayer

The Federal Inland Revenue Service (Establishment) Act\(^ {25} \) empowers the Federal Inland Revenue Service to distrain a defaulting taxpayers’ goods or other chattels, bonds or other securities and land or premises and sale anything so distrained in order to recover the amount tax owed. Similarly, the Personal Income Tax Act\(^ {26} \) provides for the power of the tax authority to distrain the property of a taxpayer where a final assessment has been made and served on the taxpayer and he has defaulted in payment. Specifically, Section 104(1) provides that for the purposes of enforcing payment of tax due, the relevant tax authority has the powers to:

(a) Distrain the taxpayer by his goods, other chattels, bonds or other securities; or

(b) Distrain upon any land, premises or places in respect of which the taxpayer is the owner and, subject to the following provisions of this section, recover the amount of tax due by sale of anything so distrained.

Section 29 of the Personal Income Tax (Amendment) Act 2011 amends Section 104 of the Personal Income Tax in the following terms:

1. Without prejudice to any other power conferred on the relevant tax authority to the enforce of payment of tax due from a taxable person that has been properly served with an assessment which has become final and conclusive and a demand notice has been served upon the person in accordance with the provisions of this part of the Act, or has been served upon the person, then, it’s payment or tax is not made within the time specified by the demand notice, the relevant tax authority may, in the prescribed form, for the purpose of enforcing payment of tax due.

   a. Distrain the taxpayer by his goods, other chattels, bond or other securities; or

   b. Distrain upon land, premises or places in respect of the taxpayer is the owner and, subject to the provision of this section, recover the amount of tax due by sale of anything so distrained.

2. For the purpose of levying any distress under this section, an officer duly authorised by the relevant tax authority shall apply to a judge of a High Court sitting in chambers, under oath for the issue of a warrant under this section.

3. The judge may, on application made ex-parte, authorise such an officer referred to in sub-section 3 of this section, in writing to execute any warrant of distress and, if necessary, break open any building or place in the daytime for the purpose of levying such distress and be may call to his assistance any police officer and it shall be the duty of any police officer when so required to aid and assist in the execution of any warrant of distress and in levy the distress.

4. The distress taken pursuant to this section may, at the cost of the owner, be kept for 14 days, at the end of which time, if the amount due in respect of tax and the cost and charge incidental to the distress are not paid, the same may be sold.

The foregoing provisions received judicial approval in the case of \( I-D \) Sam Nig. Ltd. V. Lagos State Internal Revenue Service\(^ {27} \), where the Lagos State High Court held that:

Where a taxable person fails and or refuses to make the necessary tax payments, sanctions are prescribed in the relevant tax laws, which include, but are not limited to the power to distrain. There is no doubt that the claimant has the right to distrain for non-payment of tax including for unremitted deductions in respect of PAYE and withholding tax on directors fees, commissions and so on.

The court further laid down a condition for the sale of distrained goods, which is that things distrained may be kept at the cost of the taxable person if all outstandings are not paid, the goods may be sold\(^ {28} \). The

\(^{26}\)Section 104 PITA.Ibid.
\(^{27}\)2011 STLRN 41 at 50.
\(^{28}\)See I-D Sam Nig. Ltd. V. Lagos State Internal Revenue Service (supra) at 51.
court did not however state the position in an event where the total sales of distrained goods are in excess of the taxpayer’s liability. In other words, is the taxpayer not entitled to a refund of the balance of sales in excess of the amount of tax owed? The law and legal authorities are simply silent over this scenario. In *Edo State Board of Internal Revenue V. Okomu Oil Palm Company Plc* 29, the Court of Appeal held that an order of distrain for non-payment of tax deemed final and conclusive is a final judgment capable of enforcement through garnishee proceedings.

**Power to Seal up Premises**

The tax authority is also vested with the powers to seal up business premises where a tax avoidance or evasion scheme is suspected. However, where a tax authority has no power or seals a taxpayer’s property without regard to the relevant tax law and regulations, the taxpayer can recover damages under the Fundamental Rights Enforcement procedure.30

In terms of efficacy in checking tax avoidance and evasion schemes, it is hereby submitted that the power to seal premises of a defaulting taxpayer can effectively serve as deterrence since that taxpayer stands the risk of loosing his income as long as the default continues and his business premises remain sealed.

**Power to Access all Lands, Buildings and Documents for the Purpose of Collecting Tax**

Another anti-avoidance and evasion legislative enactment is that provided under Section 29(1) of the Federal Inland Revenue Service (Establishment) Act1 and Section 29(3) of the Personal Income Tax (Amendment) Act.32 These provisions permit an authorised officer of the Federal Inland Revenue Service to have access to all lands, buildings, places, books and documents in custody or under the control of a public officer, institution or any person at all reasonable times for the purpose of inspecting the books or documents including those stored or maintained in computers or on digital, magnetic, optical or electronic media and any property for the purpose of collecting tax. This provision represents a radical modern trend in checking incidences of tax avoidance and evasion and is intended to eliminate the tendency to conceal information regarding the taxpayers’ chargeable income. This is particularly in view of the fact that some businesses keep more than one account. While the real account is kept for business purposes, an artificial account with low income is maintained for tax purposes. With this power, it is hope, the tax authorities can have access to the taxpayers accurate income and accordingly charge same to tax.

**Use of Tax Identification (TIN) and Unique Identification Number (U-TIN)**

Section 8(a) of the Federal Inland Revenue Service (Establishment) Act33 introduced the use of the Taxpayer’s Identification Number (TIN) and the undertaking of the Unique Tax Identification Number (U-TIN).

The Taxpayer’s Identification Number (TIN) is a number unique to all corporate and individual taxpayers. It is a unique-digit sequential number generated electronically as part of the registration process of tax and assigned to a taxpayer company, enterprise or individual for identification. The use of TIN became mandatory from 1st January 2008 for all taxpayers dealing with the Federal Inland Revenue Service.

The mandatory use of the TIN by taxpayers has the advantage of providing a data base for taxpayers in the country and therefore reducing the incidence of tax avoidance and evasion. In all, the provisions in our tax laws have the capacity of checking tax avoidance and evasion schemes.

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29 2018 36 TLRN 60 at 63.
30 See *Panalpina V. Lagos State Board of Internal Revenue & 2 Ors* (2013) 10 TLRN 174.
31 FIRS (Establishment) Act Ibid.
The use of criminal sanctions to check the unwholesome activities of tax evaders has also received legislative attention in Nigeria. In the English case of *Lord Howard De Walden V. Inland Revenue Commissioners*\(^{34}\), Lord Green M.R. outline the determination of the legislature to curb tax evasion schemes by imposing the severest penalties on offenders. In his lead judgment, he stated that:

> For years, a battle of manoeuvre has been waged between the legislature and those who are minded to throw burden of taxation off their own shoulders on those of their fellow subjects. In that battle, the legislature has often been worsted by the skill, determination and resourcefulness of its opponents, or whom the present appellant has not been the least successful. It would not shock us in the least to find that the legislature has determined to put an end to the struggle by imposing the severest of penalties. It scarcely lies in the mouth of the taxpayer who plays with fire to complain of burnt fingers.

The underlying philosophy in the above dictum served as a major stimulus to the Nigerian legislature to provide for punitive measures in the tax laws. The Personal Income Tax Act\(^{35}\) therefore provides that in event of failure by any person who is under duty to deduct tax, he shall be liable to a penalty of an amount of 10% of the tax not deducted or remitted plus interest of prevailing monetary policy of the Central Bank of Nigeria. The Act\(^{36}\) also provide the same punishment for non-payment of tax, while Section 95 and 96 of the Act\(^{37}\) provides for various fines against taxpayers who understate their incomes and making incorrect returns respectively. Similar provisions are also contained in the Companies Income Tax Act\(^{38}\), Petroleum Income Tax Act\(^{39}\), Capital Gains Tax Act etc\(^{40}\).

Despite these criminal provisions, the tax authorities hardly utilise them. The number of tax offenders prosecuted in Nigeria is very negligible, if any. The tax authorities prefer to rely only on civil actions to recover tax owed or enforcement of payment of tax through distrain of property and sealing up of premises despite the fact that there are criminal elements in most of the cases that come before the court.\(^{41}\)

**AMENDMENTS BY THE FINANCE ACT, 2019**

The Finance Act was enacted to cure the inadequacies or close the gaps noted by the legislature in the Personal Income Tax Act, the Petroleum Income Tax Act, the Value Added Tax Act, the Capital Gains Tax Act and the Stamp Duties Act to be in conformity with global trends in the fight against tax resistance. The amendments occasioned by the Act to tax laws therefore forms the crux of the ensuing discourse.

(i) **Mandatory Use of Tax Identification Number**

The Companies Income Tax Act\(^{42}\) has been amended to introduce a new Section 10(1) of the Finance Act which has now made it mandatory for every company to have a Tax Identification Number (TIN) displayed by the company on all business transactions with other companies and individuals and on every document, statement, returns, audited account and correspondence with revenue authorities, including the Federal Revenue Service, Ministries and all Government Agencies. The amended Section 10(2) has also made the provision for the supply of a TIN as a precondition for opening a bank account by companies, and that in event of an already existing account, TIN be supplied within three months of the passage of the Act as a precondition for the

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\(^{34}\)(1942) 1 All ER 287.

\(^{35}\)Section 74 PITA.

\(^{36}\)Section 76 PITA ibid.

\(^{37}\)Ibid.

\(^{38}\)(n12).

\(^{39}\)(n15).

\(^{40}\)Cap. C1, LFN, 2004.

\(^{41}\)For instance, in *AktienGeseshisaft V. FIBR*, the taxpayers deliberately failed to disclose their taxable incomes to tax authorities, yet, they were subjected to only civil litigation without criminal prosecution.

\(^{42}\)CITA Section 10.
continued operation of their bank accounts. These amendments have removed the requirement for the use of Incorporation Numbers by companies and made the use of TIN mandatory. Similarly, a new Section 28(1) of the Personal Income Tax Act has been introduced in the amendment of the Act which requires a TIN for the opening and operation of an individual business account with the bank.

As commendable as these amendments may appear in checking the menace of tax resistance, it is doubtful whether the desired result is achievable. Firstly, the amendment in Section 10(1) of the Act has neglected a punitive provision for failure to comply with the requirement for the display of TIN on all business transactions with other companies and individuals. Secondly, it must be noted that many sole businesses in Nigeria, particularly traders, have not fully embraced the banking culture but prefer the use of unconventional methods. These classes of businesses do not need bank accounts to operate and may effectively escape this beautiful mechanism aimed at maintaining a reliable data base for businesses for tax purposes.

(ii) Transfer Pricing

Transfer pricing means a process where goods and services are exchanged within a single multinational corporation. One of the most aggressive, radical, cross-border tax avoidance and evasion schemes by transnationals, and indeed the biggest single tax resistance scheme that pose problems to tax systems of both developing and developed economies is said to be transfer pricing abuse.\(^43\) Transfer pricing is not ordinarily harmful. It is the abuse of it, called transfer pricing abuse, usually practiced by multinational corporations that are harmful to tax systems. The effect is devastating to the revenue base and tax yield of an economy through the intra-company exchange of goods and services not at arms’ length which artificially reduces the taxable income of the multinational company. This is a classical case of tax evasion.

It has been shown that the dramatic increase in global trade and cross-border direct investment has meant that transfer pricing tends now to be a significant determination of the tax liabilities of members of an Multinational Enterprise Group (MNE).\(^44\) These transactions are usually not at arm’s length. In Brasoi Services Co. V. Federal Inland Revenue Service\(^45\), the purpose of the arms-length doctrine was stated by the Tax Appeal Tribunal, Lagos Zone. It stated that “the arms-length doctrine is to rid frequent artificiality in related party transactions and inject rationality of commercial transaction between unrelated parties”. According to an estimate prepared in the late 1990s, 60 percent of the trade transactions into or out of Africa are miss-priced through abusive transfer pricing and re-invoicing, 11 percent, resulting in capital flight component of 7 percent of African trade, totaling US$10 to 11 billion annually in 1999 prices.\(^46\)

In recognition of the threat or actual harm done to the country’s tax revenue, the Nigerian legislature has amended the Companies Income Tax Act\(^47\) by introducing a new Section 29(g) which reads as follows:

Any expense whatsoever incurred within or outside Nigeria involving related parties as defined under Transfer Pricing Regulations, except to the extent that it is consistent with Transfer Pricing Regulations.

\(^45\) (2016) 24 TLRN 24 at 38.
\(^46\) (n43).
\(^47\) Cap. C12 LFN, 2004
In accordance with the Organisation for Economic Cooperation and Development (OECD), International Guidelines, the Transfer Pricing Regulation requires that transfer price should be the same as if the two companies involved were indeed two independent, not part of the same corporate structure and that goods sold to subsidiaries should be sold with world price as subsidiaries are just like any partner.

The amendment is a brilliant provision meant to check cross-border tax avoidance and evasion by multinational corporations in peripheral economies of the South, the important issue for present purposes its efficacy there are no world prices. It is difficult to find comparable market transactions to set globally acceptable transfer prices.

(iii) Use of Tax Incentives

Another form of tax resistance that has been addressed by the Finance Act is taking advantage of the generous tax exemption regime in our tax laws which the legislature did not intend. The idea behind tax incentives is that it is seen as a deliberate government strategy to attract investment, be it foreign or local. Companies reduce or completely evade tax liabilities by taking advantage of the generous tax incentives meant to stimulate investment in particular industries.

This has informed the amendment of the Companies Income Tax Act by introducing a new Section 39(3) which provides as follows:

- This section shall not apply with respect to any company that has claimed or wishes to claim the incentives under the Industrial Development (Income Tax Relief) Act in respect of the same qualifying capital expenditure.

This amendment is aimed at restricting the claim of tax incentives to the gas industry for the downstream operations to not more than one by a company. In other words, a company that has taken advantage of tax incentives in the gas industry under the Industrial Development (Income Relief) Act is forbidden from subsequently claiming to also take advantage of the incentives provided for the gas industry under Section 39 of the Companies Income Tax Act. To engage in such unwholesome practice would amount to unwarranted provision of double subsidy to such a company in an environment of already friendly tax environment. The consequence of claiming or taking advantage of more than one form of tax incentive by a company would impact negatively on government revenue. This is the point at which a tax avoidance scheme can be noticed.

Though well intended, this amendment may be lame in checking the menace of tax resistance. The enforcement of this provision may prove ineffective as no sanction is provided against offenders. Again, without due diligence in administering the tax incentive regime, the double subsidy which the legislature intend to prevent may still prevail.

(iv) Prompt Payment of Taxes

The amendment to Section 77 of the Companies Income Tax Act is another anti-avoidance and evasion provision which has adopted the stick and carrot approach in checking tax resistance. The Finance Act has now introduced a new sub-section (5A) which encourages prompt payment of taxes. The said sub-section (5A) stipulates that:

- Where a company pays its tax 90 days before the date as provided under Section 55 of this Act, such company shall be entitled to a bonus of –
  - a) 2%, if such company is a medium-sized company; and
  - b) 1% for any other company;

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48 2020 No. 1.
49 Ibid.
On the amount of tax paid which shall be available as a credit against of his future taxes. This provision is a commendable effort towards encouraging corporate taxpayers to promptly pay their tax liabilities, and therefore curbing the menace of corporate tax resistance. For, non payment of tax as at and when due is an element of the offence of tax evasion. Sub-section (5B) of the Finance Act which adopts the stick approach provides that:

Any balance of taxes unpaid as at the due date shall attract interest and penalties as provided in this Act or any other relevant law for failure to pay on the due date in accordance.

This punitive provision, it is submitted, appears good. However, it can be faulted on several fronts. It has failed to stipulate any punitive measure in particular for default. It therefore, falls short of certainty and predictability which are essential features of a good tax system. Again, payment of only fine as a form of punishment for tax defaulters has an imminent shortfall. For, what is the guarantee that a taxpayer who has defaulted in paying his tax liability will be disposed to payment of fine? In other words, the provision has no answer to this scenario. The visibly inefficiency of fines as the only punishment for deterring tax resistance explains the rationale for the current position where if companies are tried and convicted for crimes, especially serious offences that go beyond regulatory matters, the directing minds of the corporate entity are identified and made to serve prison terms while the company as an entity is fined.

(v) Taxable Goods and Services

The Finance Act has also amended the Value Added Tax. As a substitute for Section 2 of the Value Added Tax (VAT), a new Section 2 has been introduced which expands the tax base to include goods and services supplied abroad by a person physically present in Nigeria or supply to a foreign country of goods and services that originate from Nigeria. Specifically, sub-section 2(1) has been introduced to read –

(1) The tax shall be charged and payable on the supply of all goods and services in Nigeria other than those listed in the First Schedule to this Act;

(2) For the purpose of this Act, goods and services in Nigeria shall be deemed to be supplied in Nigeria if –

a) in respect of goods –

i) the goods are physically present in Nigeria at the time of supply, imported into Nigeria for use by a person, assembled in Nigeria, or installed in Nigeria, or

ii) the beneficial owner of the rights in or over the goods is a taxable person in Nigeria and the goods or right is situated, registered or exercisable in Nigeria:

b) in respect of services –

i) the services are rendered in Nigeria by a person physically present in Nigeria at the time of service provision, or

ii) the services are provided to a person in Nigeria regardless of whether the services are rendered within or outside Nigeria.


51Ibid.

52(n48)


54Ibid.
The expansion of the tax base occasioned by this amendment therefore subject to the Value Added Tax, goods and services derived from a source within Nigeria and those supplied to Nigerians from abroad whether or not the person supplying them is physically present in Nigeria. This is a remarkable provision with potentials to check tax resistance and remarkably improve on revenue generation.

(vi) Registration of Commencement and Ceasation Dates of Business
The Finance Act has also amended the Value Added Tax Act through the introduction of a new Section 8 which has made it mandatory for a taxable person doing business in Nigeria to register same upon commencement and upon cessation.

The Value Added Tax provides for when a business will be deemed to commence in Nigeria on the date that an entity carries out its first transaction which shall be the earliest of that date it—

a) begins to market or first advertises its products or service for sale;
b) obtains an operating licence from a regulatory authority in Nigeria;
c) first sale or purchase;
d) executes its first trading contract after in corporation;
e) issues or receives its first invoice;
f) delivers or receives its first consignment of goods; or
g) first renders services to its customers.

The courts have also laid down solid criteria for determination of the dates of commencement and cessation of businesses for tax purposes. In *Birmingham and District Cattle By-Products Co. Ltd. V. CIR*, a company carried on the business of processing and marketing butchers’ by-products, and for this purpose from June to October 1913 its directors were engaged in securing premises and plants, arranging for the supply of by-products etc., as well as taking on a Works Manager in August. Actual processing, however, commenced in October. It was held that the company’s trade commenced in October the period when actual processing commenced. For when a business is deemed ceased or terminated, it was held in *IRC V. Nelson* that where a sole proprietor of a business decided to close it down and notified his customers, one of whom bought it, it was held that the sole proprietor’s business had ceased when he notified his customers.

This amendment is important as dates of commencement and cessation of business determines the commencement and cessation of tax liabilities of the taxpayer. A business can only be assessed to tax when it has business, immediately upon cessation of same. The requirement for registration of both shall provide the required information to tax authorities for tax purposes.

Section 8(2) of the Act provides punishment for failure to register as required in Section 8(1) as follows:

a) ₦50,000 for the first month in which the failure occurs; and
b) ₦25,000 for each subsequent month in which the failure continues.

For this amendment to be effective, the tax authorities most efficiently perform their duties to be able to trace and locate any defaulting taxpayer.

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55Ibid. Section 8(1).
56Ibid. Section 8(3).
57(1919) 12 TC.
58(1938) 22 TC.
Registration for Tax Purpose, Withholding Tax and Remittance

The introduction of a new Section 10 of the Value Added Tax Act in the amendment in the Finance Act is also a significant anti-avoidance and evasion provision. A new Section 10 of the Finance Act reads as follows:

10 – (1) For the purpose of this Act, a non-resident company that carries on business in Nigeria shall register for the tax with the service, using the address of the person with whom it has a subsisting contract, as its address for the purpose of correspondent relating to the tax.

(2) The service may by notice, determine and direct the companies operating in the oil and gas sector which shall deduct vat at source and remit same to the service.

(3) A non-resident company shall include the tax on its invoice for the supply of taxable services.

(4) The person to whom the services are supplied in Nigeria shall withhold and remit the tax directly to the service in currency of payment.

Under the old Section 10 of the Value Added Tax Act, it was held in Vodacom Business Nig. Ltd. V. Federal Inland Revenue Service\(^60\), that registration of a foreign company supplying goods and services in Nigeria is not a requirement for vatability. In that case, it was argued for the appellant that since they did not carry on business in Nigeria and was not registered in Nigeria for VAT purposes, its profits from the supply bandwidth capacities in Nigeria were non-vatable. Though this submission was dismissed as being misplaced, the fact still remains that there was a lacuna which needed legislative intervention. That is, the requirement for registration for VAT purposes by a non-resident company is not a precondition for vatability of a taxpayer’s profit derived from Nigeria and that whether or not a non-resident company is registered for VAT purposes, its profits are vatable as long as they are derived from Nigeria. The legal position is in accordance with the principle in our legal system that one who creates an illicit activity should not be allowed to rely on his illegality in evading his tax obligation to pay tax.\(^61\) Thus, for certainty and predictability, the amendments by the Finance Act needed to have inserted a clear sub-section in Section 10 to prevent any arguments to the contrary in the future.

SUMMARY/RECOMMENDATIONS

The role of taxation is indispensable globally. However, tax resistance which manifest in form of tax avoidance and tax evasion has presented a major stumbling block in the raising of revenue globally, Nigeria, not an exception.

Tax laws in Nigeria have consequently been fashioned to curb the menace of tax resistance with amendments up to the year 2004. Even then, it would seem that a lot is not right with the laws in checking tax resistance. Sequel to that, the Finance Act, 2019 has synthesized and rejuvenated previous amendments to bring them in tune with present economic realities.

However, these amendments have been shown to be a rejuvenisation of the previous provisions for the purpose of strengthening them to stand to the test of modern capitalism. It has been shown that there is generally lack of will to enforce tax laws by the tax authorities. Despite the fact that a civil action to recover tax owed is not a bar to criminal prosecution, the tax authorities hardly prosecute tax offenders even in transactions with criminal elements.

The use of TIN has been made mandatory for companies and business accounts with the banks. However, sole proprietors may prefer to keep their monies outside the banking system. The provision in respect of the use of TIN to track the incomes of businesses for tax purposes may therefore be rendered lame in view of the non-banking culture by Nigerians.

\(^60\)2016 23 TLRN 72 at 81.

\(^61\)See the case of Federal Commissioner of Taxation V. Snowden (2013) 12 TLRN 28 at 52-53.
The amendment introduced in respect of transfer pricing may also be rendered nugatory by the fact that
there are no globally accepted prices for the operation of the arms’ length rule.

The amendment by the Finance Act has also sought to prevent companies in the gas sub-section from
taking advantage of incentives under the Industrial Development (Income Tax Relief) Act and tax
incentives provided under the Companies Income Tax Act concurrently. This will require efficient
administration of the tax incentive regime to be able to identify defaulters, for the provision to be
effective.

Also remarkable is the amendment which has adopted the stick and carrot approach in discouraging tax
resistance by making provision for bonus in favour of companies that fulfill their tax obligations
promptly, and penalties for defaulters. However, these may not inflict enough pain to serve as deterrence
to tax evaders.

The Value Added Tax Act has also been amended by the Finance Act. Under the amendment, the supply
of goods and services physically present in Nigeria and goods and services supplied to a Nigerian by a
person who is not physically present in Nigeria are all vat able in Nigeria; thus, broadening the VAT base.
Again, provision has been made for a non-resident company doing business in Nigeria to register for tax
purposes under VAT. However, a lacuna has been created by not clearly providing that even without the
said registration, any business conducted by the non resident company in Nigeria is vat able.

The way forward, therefore, is the will to enforce the letters of the tax laws. The tax authorities must also
prosecute tax evaders while also trying to recover tax owed through civil claims. This has the capacity to
be more effective in serving as deterrence against tax evaders than simply seeking to recover tax owed
alone.

Closely related to the above is the fact that tax officials must be well trained to efficiently perform their
duties. It is only then that the mandatory use of TIN by businessmen and companies can have any
meaningful impact on tax compliance.

Furthermore, Section 10 of the Value Added Tax must be amended to include the provision that a non-
resident company that carries on business in Nigeria must be vat able whether or not it is registered with
the service. In this regard, too, the Value Added Tax Act and the Companies Income Tax Act must be
further amended to provide specific punishments for particular offences. Section 39 of the Finance Act
specifically comes to mind. Most importantly, jail terms must be provided for both personal and corporate
tax evaders. Fines, as penalties seem not to be painful enough to serve as deterrence to tax evaders. A
more server approach of confinement certainly has the potentials to curb the unwholesome activities of
tax evaders which inflict catastrophic consequences on economic development of the nation.

CONCLUSION

Tax evasion and avoidance inflict devastating marks on economic development of nations, be they
developed or developing. Though, Nigeria has the required legal framework to stimulate investment, and
development, tax resistance has robbed the country of the required revenue for such development to take
place. This may however not be the sole impediment to revenue generation and development in Nigeria
since what becomes of even the revenue generated can hardly be adequately explained. Be that as it may,
the impact of tax resistance on revenue generation in Nigeria cannot be under-estimated.

Consequent upon the foregoing, the Finance Act 2019 has been passed to solidify the already existing
framework for curbing tax resistance in Nigeria. This paper has however identified certain loopholes in
the Finance Act that are capable of rendering same lame. The paper has consequently offered solutions
which cumulate into a further amendment of the Act. The position taken here is that though well
fashioned, the Finance Act needs further amendments to effectively check and curb the menace of tax
resistance in the country. Only then would the legal framework be well positioned to effectively challenge
tax resistance schemes arising from the complexities of the emerging global economy termed
“globalisation”.


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