

Revenue Law

By

Abiola Sanni¹

1.1 Introduction

There are four principal ways by which a government can raise fund to carry out its functions. These are: (i) by printing money; (b) by raising loans; (c) by charging for services and (d) by taxation.² Revenue Law therefore encompasses the legal and administrative framework for raising funds through the foregoing sources, among others. Taxation, which is the focal point here, is a device to provide government with regular, dependable and continuous source of revenue by transferring money from private hands into government treasury in order to finance the public sector.

Taxation has been surprisingly neglected in Nigeria both as a Law subject and a source of government revenue. The subject is however beginning to attract more attention from the government because of the volatility of oil prices, the agitation of oil-producing states for 'resource control' and felt need to diversify the base of the nation's economy.³ The reduction of petroleum revenue invariably means less revenue for all the levels of government.⁴ Hence, the three levels of government are now constrained to revitalise their tax systems either by modifying the existing laws or introducing new ones. These developments impact greatly on companies, charitable organisations,⁵ the ordinary citizens, inter-governmental fiscal relations and, to some extent, the economic health of the country. Consequently, an increasing number of legal practitioners, other professionals and ordinary citizens, are now faced with more tax-related issues than they probably could have imagined a decade ago.

This paper is written against this background to provide a general framework of the Nigerian tax system. Hence, the paper is introductory as it attempts mainly to provide the basic legal framework of the Nigerian tax system and its peculiarities.

1.2 Justification for Taxation

At the risk of putting the cart before the horse, it may be useful to first examine the justification for taxation before the definition of the concept. This is partly because the subject of taxation is usually a

¹Abiola Sanni, LL.M., B.L., FCIT, Senior Lecturer, Department of Commercial and Industrial Law, University of Lagos, Nigeria. <abiosanni@yahoo.com>, <08033958020>

²See O. Akanle, "The Government, The Constitution and The Taxpayer." In *Tax Law and Tax Administration in Nigeria*, ed. M.A. Ajomo, NIALS, 1991, p. 1.

³About 90 per cent of the foreign exchange earning of Nigeria is derived from sale of petroleum and petroleum profits tax.

⁴This is because Nigeria operates a centralised account called "Federation Account" in which all main 'federal' revenues are paid and later shared among all the three levels of government. See generally section 162 of the Constitution of the Federal Republic of Nigeria, 1999.

⁵There is no blanket exemption for charitable organisations, hence, they are taxable to the extent that they engage in trade and business.

hard sell. Everyone may desire a good government but not everyone is prepared to pay for it. The aim of this section is to establish the significance and necessity of taxation in any society before considering its definition.

It is quite obvious that public services such as maintenance of national security, provision of good roads, health care system, electricity, housing, education, to mention but a few⁶ are necessary for the social and economic well-being of the people of a given society. It is also quite obvious that the discharge of these responsibilities requires funding, otherwise their provision cannot be reasonably guaranteed on a sustainable basis. Even where a few individuals, have the means, there is an extent to which such services can be provided privately without the support of the state in some ways.⁷ In essence, there are certain public services that have to be jointly provided and financed for the overall welfare and security of everyone in the society. The question then is, how does the government get fund to provide these services?

There are a number of ways for a government to obtain the economic resources it needs. It can seize material or manpower if it is a conquering nation or a nation drafting its youth to war. It can borrow. It can inflate the currency by printing currency or manipulating the banking system. None of these is suitable as a permanent means of financing a government based upon the rule of law and consent of the governed.⁸ However, people will naturally resist sacrificing their private wealth to the public fiscal.⁹ They will want to retain and enjoy as much of their wealth during their lifetime, or preserve them for their estate for the benefit of their dependants after their death.¹⁰ Yet, members of the public who enjoy or desire to enjoy the benefits of security of lives and property, provision of water supply, roads, electricity and allocation of land, among other things, have to pay for them in certain ways. Hence, taxation was devised to provide government with a regular, dependable and continuous source of revenue. A good tax system allocates the economic burden in a prescribed and understandable way that permits citizens to plan and pursue their private affairs without fear of unexpected demands.¹¹ Taxation is therefore more or less the price of the social contract between the government and the governed for the provision of basic goods and amenities.¹² Therefore, every state, no matter how richly endowed it may be, usually requires some form of taxation from its citizens and/or residents.

1.3 What is a Tax?

⁶The extent to which these functions are provided will depend, among other things, on the political and economic ideology of the state. Nigeria operates a mixed economy. See chapter 2 of the Constitution of the Federal Republic of Nigeria, 1979 for the duties and responsibilities of the government. See O. Akanle, *Nigerian an Income Tax Law and Practice* (1991) Centre for Business and Investment Studies Limited, Nigeria, p. 4.

⁷An individual may be able to construct or repair the road leading to his house but he will not be able to construct and maintain all the intra-city and inter-state roads required by him to go about his life and business. Also, private security arrangement such as acquisition of firearms, has to be done within the framework of the law.

⁸G.W. Fisher, "The Real Property Tax", *Handbook on Taxation*, ed. W. Bartley Hildreth & J.A. Richardson, (1999), Marcel Dekker Inc., N.Y., p.101.

⁹W. Bartley Hildreth & J.A. Richardson, "Introduction", *Handbook on Taxation*, *ibid.*, p.1.

¹⁰S.O. Fashokun, "An Assessment of Efforts against Tax Avoidance and Evasion. The Legal Viewpoint," *The Nigerian Law: Journal of Contemporary Law*, Vol. 7, Nos. 1 and 3, April and Dec. 1976, p. 16.

¹¹G.W. Fisher, *op. cit.*

¹²J.K Naiyeju, *Value-Added Tax: The Facts of a Positive Tax in Nigeria*, (1996), Kupag Public Affairs, Nigeria, p. 12.

Taxation is a universally accepted contrivance for financing government services, whether in peace or war, depression or prosperity. It is the process by which a government transfers resources (almost always money) from the private to the public sector.¹³ Akanle defines tax as "a compulsory levy imposed on a subject or upon his property by the government having authority over him."¹⁴ Tax has also been defined as "a compulsory payment levied on the citizens by the government for the purpose of achieving its goals".¹⁵ Chief Justice Lathan of the Australian Supreme Court, on his part, stated:

A tax is a compulsory exaction of money by a public authority for public purposes or 'taxation is raising money for the purposes of government by means of contributions from individual persons'.¹⁶

While each of the definitions may not be comprehensive for all purposes, they at least provide us with enough insight into the nature of taxation as follows:

- (i) Tax is an imposition by a government. The government could be federal, state or local, military or civilian. If a person or group of persons such as a club, religious body, society or community imposes a levy, it is not a tax, regardless of the name it is called;
- (ii) The payment must be compulsory and not voluntary, once the taxpayer comes within the scope of the tax. Payment is not dependent upon the conferment of any enjoyment or benefit directly on the taxpayer. Also, it is not necessary that all taxpayers should receive or enjoy the same measure of government services. As a matter of fact, some may not even receive or enjoy certain perceivable benefits at all. This notwithstanding, they are still obliged to pay. Taxes are therefore not a contractual matter between persons and the governmental entities nor are they a debt in the strict legal sense. Rather, they are based upon the authority of government to levy them;
- (iii) It is an imposition made for general public good and purposes.¹⁷ It is not exacted for wrongdoing, neither is it an appropriation for the direct benefit of some group.¹⁸ The application of the revenue will depend on the policy and priorities of the government at a particular time.

A tax must therefore be distinguished from a fee, charge, fine, penalty, donation, confiscation, etc.

The United States Supreme Court in *Nichols v. Ames*¹⁹ graphically captured the essence of taxation in the following words:

¹³M. J. Graetz & D.H. Schenk, *Federal Income Taxation, Principles and Policies*, 4th ed., (2001) Fend of Press, N.Y. , p.1.

¹⁴O. Akanle, op. cit., pp 4-5.

¹⁵J.K Naiyeju, *The Value-Added Tax: The Facts of a Positive Tax in Nigeria*, (1996) p. 9.

¹⁶*Matthews v Chicory Marketing Board (Vict)*, (1938) 60 C.L.R. 263 at 276.

¹⁷However, some taxes may be collected for some particular purposes. Such taxes raised to provide particular 'benefits are termed hypothecated taxes. They are unpopular with the government which sees these taxes as undermining its control of public expenditure. See D.Hancock, *Taxation Policy & Practice*, 3rd ed., p.13.

¹⁸Revenue from Excise taxes may be used for the direct benefit of those who pay them.

¹⁹173 US 509 (1899) 515.

It is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy; it is also the power to keep alive.²⁰

Benjamin Franklin made perhaps the most popular statement about taxation since the late 18th Century when he was expressing his optimism and doubt about the new Constitution of the United States 1787 as follows:

Our Constitution is in actual operation. Everything appears to promise that it will last. But in this world nothing is certain but death and taxes.²¹

Happily, the United States Constitution has endured for over 200 years since then to become the oldest and perhaps the most respected constitution in the world. Similarly, the instrumentality of taxation has been utilised by every nation from generation to generation in one form or the other with varying degrees of success.

1.5. Objectives of Taxation

It is not the imposition of taxes that matters but their effectiveness in meeting certain fiscal, social and economic objectives. As a matter of fact, the significance of taxation in any nation depends on the uses to which taxation is put. The objectives of taxation could be summarized as follows:

- (i) *Generation of Revenue:* The classical or traditional objective of taxation is to raise money for government. Government imposes taxes in order to generate regular and continuous flow of income to finance its expenditures. However, the bulk of the country's total revenue not only comes from oil, but also the Petroleum Profits Tax which yields the largest tax revenue.
- (ii) *Stimulation of Economic Growth:* Taxation can be used to achieve economic objectives such as the stimulation of economic growth. For instance, if government desires to encourage the production of local goods for export, it could remove or reduce the export duties on the basic raw materials of locally produced goods in order to boost capacity utilisation of local industries.²² Taxation can also be used to achieve other economic aims such as the control of inflation, the attainment of a stable exchange rate, etc.²³
- (iii) *Resource Allocation Functions:* Taxation can also be used to redistribute income between the rich and the poor through an "equitable" application of progressive taxation. As progressive tax

²⁰ *Ibid.*

²¹ See *The United States Constitution and Fascinating Facts About it*, 7th ed., Oak Publishing Company, 11 p.11.

²² The Federal Government introduced an array of incentives in the 2002 Budget partly to achieve this purpose, See the 2002 Federal Budget.

²³ An increased taxation by government withdraws money from the economy. This should ordinarily keep inflation low, but may also slow down the pace of economic activities. On the other hand, reduction of taxation would lead to an increase in money supply in the economy. It also increases or stimulates economic activities and investments. See C. Igwe, "Taxation in Nigeria, The Problem of Tax Avoidance and Tax Evasion - A Legal Appraisal." (Unpublished Long Essay (1993), p. 44.

demands more from the rich, the revenue realised from taxation is then applied for the provision of social services such as hospitals, pipe-borne water, mass public transit system and electricity which otherwise may not be available to the poor. In 1979, the Federal Military Government introduced a Capital Transfer Tax on wealth transfer inter vivos or as a bequest with the aim of discouraging the tendency among the children of the rich to be idle and look unto the wealth of their parents. The statute, therefore, is aimed, among other things, at minimising the undeserved inter-generational advantages which the children of the rich have over their poor counterparts in such situations.²⁴ However, the Capital Transfer Tax was 'abolished' in Nigeria in 1997 due to lack of commitment of the government to the efficient administration of the tax.²⁵

- (iv) *Social Functions:* Certain taxes usually impact on the behaviour of taxpayers. For instance, the raising or lowering of tax rate may encourage or discourage taxpayers, including corporate entities, from making certain investment decisions. "Sin taxes" may also be imposed to discourage a particular type of behaviour such as drinking of alcohol, smoking or consumption of expensive items, pollution of the environment, etc.

From the above, it can be seen that the objectives of taxation have gone beyond merely raising revenue for government. This makes taxation a better source of financing government compared to borrowing and printing of money.²⁶ It is important to point out, however, that the extent to which taxation alone is attributable to the attainment of any or a combination of the above objectives may be difficult to evaluate. Nevertheless, the prime objective is still to raise revenue. Usually, when countries attempt to achieve some of these other objectives, they do so without sacrificing the prime objective of revenue.

1.6 Principles of Taxation

Taxation may have benign objectives but its history is somewhat odious. It was often used in the early times as an instrument of oppression by the ruling class to secure the obedience of their subjects. In point of fact, the earliest "taxes" were viewed as nothing short of "organised and legitimised form of robbery."²⁷

Hence, taxmen were hated by members of the public with passion. A clay tablet found in Iraq about 3,500 years ago was inscribed with the following words:

You can have a Lord, you can have a King, but the man to fear is the tax collector.²⁸

²⁴See P.S.A. Layade, "Towards an Administrable Capital Transfer Tax", ed. O. Akanle, op. cit., p. 194.

²⁵The 'abolition' of the tax was only announced in the Federal Military Government's Budget Speech and has not been formally abolished by any statute. Since this was during the military era, budget speech was considered a major source of tax law in Nigeria

²⁶While it may be expedient for government to raise revenue through other sources apart from taxation, these however should not be the main source of revenue.

²⁷P.A. Oluyede, "Prospects of State Sales Taxation." See *Tax Law and Tax Administration in Nigeria*, O. Akanle, ed., p. 154.

²⁸Quoted in P.A. Oluyede, op. cit.

However, as the society became more developed, it became imperative to give taxation a "human face." Adam Smith's work, *The Wealth of Nations*, was one of the earliest expositions of taxation. Smith defined what he called the principles or maxims of a good tax system as equity, certainty, convenience and administrative efficiency. Let us consider each of them.

(i) Equity: The portion of the taxpayer's property being demanded as tax should be as proportionate as possible to his ability to pay. To impose a disproportionate burden is not only unjust but could encourage evasion and even rebellion. If A earns twice the income of B, it will be inequitable to impose the same amount of tax on A and B. However, while this argument may be valid for certain taxes such as federal income tax, it may not be so for others such as consumption taxes or taxes based on benefits.

(ii) Certainty: The amount of tax that the taxpayer is expected to pay should be exact, i.e. certain and not arbitrary. So also is the time and manner of payment. An arbitrary and uncertain imposition will put taxpayers at the mercy of officials who could exploit the situation for their selfish ends.

(iii) Convenience: Every tax ought to be levied at the time, or in the manner, in which it will most likely be convenient for the taxpayer to pay. The burden of compliance should be made as simple as possible. For instance, a tax upon the rent of property is best payable when the rents are usually collected and, in the case of consumer goods, at the time of purchase. For this reason, a system of collection of personal income tax known as Pay As You Earn (PAYE) scheme²⁹ was introduced whereby employers withhold at source, on behalf of the tax authority, the Personal Income Tax of their employees. In this way, most employees tend to regard their net income as their total income since they are usually not confronted with demand note for tax payment like their counterparts who are self-employed.

(iv) Administrative Efficiency: It is not enough to have a good tax law; this must be complemented with good administration. The agency responsible for the administration must be well-staffed and equipped. The cost of administering the tax should be reasonable. A case whereby 20 - 30 per cent of the revenue collected is used for administration, as was the vogue during the era of the private tax consultants in Nigeria, is unacceptable.³⁰ Furthermore, the provisions of the law must be enforced as much as possible in order to ensure that the objectives of the tax system are achieved.

Though the above principles may appear simple, their practical application is not without some difficulties.³¹ For instance, while it is generally accepted that there should be equity in taxation, the yardstick for measuring it in particular cases is still controversial.³²

The principles are therefore not immutable. If a tax law offends one or more of them, it does not *ipso facto* make the law bad or unjust. Where a tax imposed is within the powers of a government, the court

²⁹See s. 80 *Personal Income Tax Act*, 1993, as amended.

³⁰In the mid-1990s, some state governments engaged the services of private firms to collect taxes on grounds of inefficiency of the State Board on Internal Revenue. The cost of collecting the various taxes by the FBIR was about 2 per cent of the revenue collected.

³¹See Mill, *Principles of Political Economy*, Vol. II, BK.Ch.II, pp.394-400.

³²See generally Gaa, *Contemporary Thoughts on Federal Income Taxation*. Dickenson Publishing Company, 1969, pp.26-66.

will generally not interfere with the reasonable discretion of the legislature in deciding what to tax and fixing the rate. Recently, an application was made to the Lagos High Court by some taxpayers to restrain the enforcement of a tax law on the ground that it was unconstitutional pending the determination of the substantive suit. The Court, in refusing the application, held:

The courts have long recognised the power of government to tax and the court would restrict this power only with great caution bearing in mind that taxes are the lifeblood of government.³³

Nevertheless, any tax system that will endure cannot justifiably ignore the canons of taxation. Hence, in designing a tax law, the canons should be kept constantly in mind as pathways or guiding principles. Until this is done, the hope of our taxes serving as vehicles of social engineering is still distant.

2.0 Evolution of the Nigerian Tax System and Its Peculiar Features

A country's tax system is essentially a derivative of the history, economic structure and political economy of that country. Thus, in the case of Nigeria, her colonial history is particularly relevant. In fact, the broad outline of Nigeria's tax system took shape during the colonial era and has remained substantially unchanged up to the present period. Such is the colonial link that most of the Nigerian tax laws are essentially copies of similar laws in Britain or other British former colonies such as Australia.³⁴

2.1 Pre – Colonial Taxation

A system of taxation had been in existence in Nigeria before the advent of colonial rule. In Northern Nigeria, there was in existence a politically well-organised system. In Southern Nigeria, although there was an indigenous system of taxation, it was not as organised and broad-based as in the North. However, at the turn of 19th century, there had developed in the South-western parts of the country certain kingdoms headed by Obas who had legislative, executive and judicial powers and all the paraphernalia of modern government; though rudimentary at this stage.

There is evidence that throughout the 19th century, taxes such as capitation, sales excise and customs, among others, were already well established. These taxes were imposed on the subjects and collected by the *Baale* (ward heads) for and on behalf of the paramount rulers. Usually the family head, at the time of harvest, would receive the tax (capitation) from the individual within his household. He in turn would take this to the *Baale* after retaining his own share. The *Baale* on his part would convey the tax to the paramount ruler always retaining a portion that would be sufficient for his maintenance.

Apart from the tax payable by every taxable adult for the maintenance of royalty and government, there were also taxes payable by every trader coming to trade within the jurisdiction called *Owo - onibode*³⁵ and one paid by every seller on market days. Payment of death duties was common among the *Egbas* and the *Ijebus*. Furthermore, every able-bodied individual was expected to earmark certain days for

³³See *Shell Petroleum Development Company of Nigeria Ltd. & 1 Or. v. The Government of Lagos State* & IOr. Suit No. M1721/2002.

³⁴A. Phillips, "The Nigerian Tax System at the Crossroads.", See *Essays on Nigerian Taxation*, ed. S.A Rabi, Vol 1, SAR Tax Publications, 2002, p.14.

³⁵i.e. border fee reminiscent of custom duty.

communal work such as the clearing of roads, building of community houses, markets, halls and construction of bridges. In addition, there were special levies in respect of special/unusual occasions. With the gradual introduction of money economy towards the end of the 19th century; these various taxes were computed in money. However, in the 'stateless' society of Ibo, Tiv, Bura, Igbira and Bachama areas, there existed little or no form of organised taxation. From the above, it can be seen that taxation during the pre-colonial era functioned more or less on ethnic basis.

2.2 Introduction of Modern Form of Taxation

At the inception of British rule in Nigeria, the colonial government was faced, among other things, with the problem of financing the government. The people resisted the introduction and superimposition of the English system, partly because it was felt that the tax was meant for the support of an alien authority. Similar moves were made in the Yoruba-speaking areas. In Ilesa, capitation tax of between six shillings and ten shillings on every adult male and female was introduced.³⁶ Apart from a few instances of direct taxation in the South, the tax system of the region was mainly indirect.

The first ever comprehensive attempt at direct taxation by the British was through the *Land Revenue Proclamation Law of 1904*. In the Southern Protectorate, indirect taxation, mainly from customs tariff, continued to predominate. The system of direct taxation continued to be administered by the local or traditional political institutions. With the extension of indirect rule into the South and the amalgamation, the *Native Revenue Ordinance of 1917* was enacted to cover the areas of the Western Region of Nigeria. It was not until 1927, after much debate and hesitation, that the first personal income tax law was introduced into the Eastern Region. This sparked off disturbances culminating in the Aba Riot of 1929, which resulted in the loss of lives and destruction of property.

What led to the riot was lack of adequate information on the scope and purpose of the tax. In 1926, when the personal income tax was about to be introduced, all the male adults in the area were counted. When another head count was about to be taken in 1929 to review and revise the list of taxpayers, a Warrant Officer, acting on the instruction of the District Officer, proceeded to count women, children and domestic animals. This was interpreted to mean that women would be taxed after the completion of the exercise. There was demonstration in Aba, which later extended to other major towns in the East such as Asaba. Okigbo Commission of Enquiry was set up to investigate the causes of the riots.

In 1931, the *Non-Natives (Protectorates) Ordinance* was enacted. This was the first time a direct tax would be imposed on the income of non-natives resident outside the Colony of Lagos. The next stage in the development of the Nigerian tax system was the enactment of a series of ordinances in 1937 such as *Colony Taxation Ordinance No.4 1937*, *Non-Native Income Tax (Protectorate) Ordinance, No.1, 1937* and *the Native Direct Taxation (Colony) Ordinance No. 41, 1937*.

The year 1940, however, marked the watershed in the history of taxation in Nigeria when comprehensive pieces of legislation on income tax were enacted. These were the *Income Tax Ordinance No.3 of 1940* and *the Direct Taxation Ordinance No. 14 of 1940*. These two enactments formed the basis

³⁶See Gazette of 16/1/04 and Lugard,. Political Memoranda, p. 178.

for income tax legislation in the country and some of their provisions have been re-enacted in the present income tax laws in the country. The Direct Taxation Ordinance applied in relation to companies and business income generally. Apart from the repeal and re-enactment of the Income Tax Ordinance in 1943, there was no significant change in the tax system until 1956.

Meanwhile, at the Constitutional Conference of 1953 when Nigeria was bracing to adopt a federal system, a Sole Commissioner in the person of Louis Chick was appointed by the Conference to recommend a system of revenue allocation, under a federal constitution. The 1954 Constitution provided that:

- (i) the regional government should have jurisdiction over personal income tax of Africans and retain the proceeds;
- (ii) the Federal Government should have jurisdiction over companies and retain the proceeds of the tax.

The Eastern Region in 1956 was the first to exercise its taxing power in this regard when it enacted the *Finance Law No.4, 1956*. One significant innovation of the law was the introduction of the PAYE system or collection whereby employers were made agents for the collection of income tax from their employees by authorising them to deduct the tax at source. The Western Region also enacted its own *Income Tax Law* in 1957 whereas the Northern Region did not enact its *Personal Tax Law* until 1962.³⁷

The question of division of taxing power also came up at the 1957 Constitutional Conference and was referred to a commission headed by Raisman which recommended that:

- (i) The regions should be given full jurisdiction over personal income tax while the Federal Government should have power to legislate on certain areas in which uniformity was desirable. Furthermore, the Regions could tax both Africans and non-Africans.
- (ii) The Federal Government should continue to enjoy exclusive power over taxation of companies.

The *Petroleum Profits Tax Act (PPTA)* was enacted in 1959, the Companies Income Tax Act (CITA) in 1961, the Income Tax Management Act in 1961 (ITMA) and the *Personal Income Tax (Lagos) Act* also 1961 (PITLA).

PITLA was enacted because of the peculiar position of Lagos as the seat of government of the federation; the Federal Government had to assume legislative and executive jurisdiction for day-to-day administration. Consequently, this Act was made to provide for the taxation of persons other than companies who were resident in Lagos.

Other developments of the '60s were the introduction of Capital Gains Tax and Super Tax in 1967. The super tax was a wartime levy, which was repealed at the end of the civil war in 1970.³⁸ The creation of states in 1967 resulted in the transformation of Lagos from that of a federal territory to a full-fledged

³⁷ Cap. 99 laws of N.N. 1963

³⁸See Super Tax (Amendment) Act No. 12 of 1970.

state. Thus, the *Personal Income Tax (Lagos) Act*, 1961 ceased to be applicable. Following the provisions of the 1960 Constitution, the Western Region enacted the *Personal Income Tax Law, 1962*, and the Eastern Region the *Eastern Nigeria Finance Law, 1962*. In 1972, the Federal Government enacted the *Income Tax (Armed Forces and Other Persons) (Special Provisions) Act 1972* to enable the Federal Government tax the income of certain members of the armed forces and non-residents who were not subject to the tax jurisdiction of any tax such as:

- (a) Persons employed in the Nigerian Army, Navy or Air Force;
- (b) Officers of the Nigerian foreign services; and
- (c) Persons resident outside Nigeria who were shareholders of Nigerian companies.

Individuals under category (a) were subjected to constant transfer and postings which made it difficult to determine their places of residence. Hence, they were deemed to be resident in the FCT. Individuals listed under (c) were persons who derived income from Nigeria but resident outside Nigeria. Since such people were not resident anywhere in Nigeria, they were deemed to be resident in the Federal Territory of Lagos.

It is instructive to note that ITMA did not contain any charging provision. As a matter of fact, it did not impose any tax on anyone or thing. Rather, the main purposes of enacting the Act were to:

- (i) provide a model income tax law for all the regions in Nigeria which they could adopt and incorporate in their respective personal income tax laws;
- (ii) prevent the taxation of income of an individual by more than one government, i.e. to avoid internal double taxation. Before the promulgation of ITMA, while the Eastern Region taxed only the incomes of those who were resident in the Region, the Western Region taxed not only those resident in the West, but also any income which was derived from the Region irrespective of the residence of the recipient. The result of this was that a resident of Eastern Nigeria working in Western Nigeria would be taxed twice on the same income by two governments.

The 1967 states creation exercise indeed posed a possibility of having income tax rate differentials in different states unless something was done. As a result, it was then felt that the Federal Government should assume the legislative power over Personal Income Taxation from the state in order to have a uniform law on personal income tax throughout the country. Towards this end, the Federal Government in 1975 enacted the *Income Tax Management (Uniform Taxation Provisions) etc. Act No.7, 1975*. Unfortunately, the Act merely succeeded in imposing uniform tax rates throughout the country while each state continued to regulate and administer its own income tax.

Under the 1979 Constitution, income tax was placed under the exclusive tax jurisdiction of the Federal Government (See item 58 Exclusive Legislative List with power vested in the Federal Government to delegate the administration of the tax to the states.³⁹

A Study Group on the Review of Nigerian Tax System led by Prof. Edozien was set up to review direct taxes under the jurisdiction of the federal and state revenue services. The Committee recommended the introduction of a uniform Personal Income Tax administered by the states. After the Prof. Edozien- led Study Group on the Review of the Nigerian Tax System, another Study Group led by Dr Sylvester U. Ugoh was set up later in the year (1991) with the responsibility of studying the feasibility of introducing VAT in Nigeria. After making series of empirical studies and research tours both within and outside the country, the Ugoh Study Group came up with a firm recommendation in November 1991 that VAT should be introduced in Nigeria after two years of preparatory work. As a follow-up, the Ijewere-led Modified Value-Added Tax (MVAT) Committee was set up in 1992 to undertake preliminary work for the introduction of the new tax. The Committee handed over to the Federal Inland Revenue Service (FIRS) which eventually took over the administration of the tax.⁴⁰

The year 1993 witnessed the introduction of two major tax legislation in Nigeria - the *Personal Income Tax Decree No 104 of 1993* and the *Value-Added Tax Decree No 102 of 1993*. These two statutes had been amended by the various Finance (Miscellaneous Taxation) Decrees recently consolidated into Laws of the Federation of Nigeria, 2004.

Another Study Group led by Prof. Dotun Phillips was inaugurated by the Minister of Finance, Mallam Adamu Ciroma, in August 2002 to, *inter alia*, review all aspects of the Nigerian Tax System and recommend improvement therein, review all tax legislation and recommend amendments where necessary, review the entire tax administration and recommend improvements in the structures for the whole country as well as the administrative structures at the federal, state and local government levels, with a view to enhancing performance and efficiency. The recommendations made by the Dotun Phillips Study Group was later referred to a Working Group chaired by Seyi Bickersteth whose recommendations formed the nucleus of the ongoing tax reform.

2.3 Features of the Nigerian Tax Law

The salient features of the Nigerian tax law will be discussed in seriatim.

2.3.1 Federal Structure

Nigeria operates a federal system having federal, state and local governments. As a matter of strict conceptual analysis, Nigerian federalism is a partnership between the federal government and the states. Hence, section 2(2) of the Constitution provides that "Nigeria shall be a federation consisting of states and a federal capital territory."

³⁹See item D of Paragraphs 7 and 8 of the Exclusive Legislative List.

⁴⁰See. J.K. Naiyeju, *Value-Added Tax. The Facts of a Positive Tax in Nigeria*, Kupag Public Affairs (1996), p. 35.

Consequently, the division of legislative power under section 4 of the Constitution involves only the federal and state governments. The adoption of a federal system has far-reaching implications for the intergovernmental fiscal relations and resource mobilisation.

2.3.2 Dominance of Federal Government/Tax System

According to the Study Group and the Working Group Reports, virtually all major taxes in Nigeria are under federal jurisdictions with the Federal Government collecting about 99% of annual tax revenue and 97% of overall (tax and non-tax) government revenue in Nigeria. This underscores the pre- eminence of the FIRS and other revenue collection agencies such as the Nigeria Customs Service to the economic survival of the nation. However, it demonstrates the limited power of the states and local government councils to use taxation as an instrument of social engineering.

2.3.3 Dominance of Petroleum Profits Tax

The oil and gas sector (primarily upstream) provides the bulk of funding for the three tiers of government and has become the dominant driver of the Nigerian economy providing over 95% of the nation's foreign exchange earnings and over 70% of government revenue. The overall economy is currently over dependent on oil. As a matter of fact, the challenge faced by the present administration is how to diversify the economic base by increasing the contribution of non-oil revenue to the economy. Consequently, taxation policy must treat upstream petroleum taxation differently from the rest of the economy.

2.3.4 Pervasiveness of the Withholding Tax Mechanism

The bulk of tax revenues is collected through the withholding tax mechanism which has now been extended even to certain aspects of VAT administration.

Withholding tax (WHT) is not a separate tax but a convenient method of collecting tax, although in practice it is usually treated as if it is a separate tax WHT generally applies to royalty, rents, dividends and interests. A general power is vested in the Minister of Finance to extend WHT to other forms of payment and specify the rates. Pursuant to this power, WHT has been extended to an array of payments such as consultancy fees, technical fees, management fees, directors' fees, building construction and contract supplies generally.

Other features of the Nigerian tax system are:

- Most tax laws were made during military regimes;
- Dearth of regulation on many issues;
- Weak and inefficient administration;
- Poor judicial enforcement of tax laws;
- Pervasiveness of corrupt practices; and

- Poor quality of tax cases.

3.0 Tax Policy, Tax Law and Tax Administration in Nigeria

It is well settled that taxation stands on a tripod, viz:

- (i) the policy;
- (ii) the law, and
- (iii) the administration.

Therefore, in order to have a good and efficient tax system, the three aspects must be roundly developed and in tune with one another, otherwise the tax system will be dysfunctional. The varying degrees of the failures of any tax system, including that of Nigeria, can be traced ultimately to a measure of weaknesses with regard to one or more of these three fundamental structures.

3.1 Tax Policy

Policies are the fundamental principles which guide the orderly development of the tax laws and administration and, therefore, form the foundation of the entire tax system. If the tax policies are inconsistent or weak, it is certain that the entire tax system will be dysfunctional. Hence, since Adam Smith's *Wealth of Nations* in 1776, different nations have tried to align their tax systems, as much as possible, with the principles of equity, certainty, convenience and administrative efficiency propounded by Smith in his epic work.

Against this background, the ongoing attempt by the Federal Government to clearly articulate its tax policy in a comprehensive document is commendable. This intervention will no doubt provide the stakeholders a reliable indication of the future direction of the tax system of the Federal Government and its possible implications.

The main objectives of the *Draft Document on the National Tax Policy* are to "provide a set of principles for all taxation in Nigeria" and serve as a "standard on which all stakeholders will be held accountable." The 50-page document contains proposed measures to achieve these objectives which include reduction of the number of taxes, shifting the focus of the tax system from direct to indirect taxes, reduction of internal multiple taxation, streamlining the tax incentives, strengthening the Joint Tax Board (JTB), comprehensive review of tax laws every three years, honouring and concluding more international tax treaties, ensuring that taxes are collected by career tax administrators, etc. It is envisaged that the document will eventually become an integral part of the Constitution of the Federal Republic of Nigeria, 1999 "after it has been approved by the Federal Executive Council (FEC) and enacted into law by the National Assembly."

Concern has, however, been expressed about the appropriateness or even constitutionality of a 'National' Tax Policy in a federation. The Federal Government does not have the exclusive preserve of managing the economy, including its tax system. Thus, the Constitution has vested the power to

concurrently manage the economy on the federal, state and local governments respectively, within the limits of their legislative powers. In this regard, the Federal Government has power to impose certain taxes in the Exclusive Legislative List while the rest are residual to the States with the exception of tenement rates which is specifically earmarked for the local government councils in the Fourth Schedule. The intendment, here, is to divide the field of tax policy decision between the federal and state governments, in such a way that neither can dictate its policy preferences to the other. Therefore, it is advisable for the Tax Policy Document to be limited to the Federal Government and the Federal Capital Territory while the states are encouraged to adopt it with or without necessary modifications.

3.2 Tax Law

The question, "what is law?" is almost irrelevant to a practising lawyer or tax practitioner who is more concerned with a much more specific question: what is the law relating to this particular issue, say whether an item of expenditure is deductible. However, the question is an extremely important one in a training programme of this nature in order to appreciate the extent, diversity, possible utility and limits of law.

Law, in the context of this paper, can be defined as "a rule or body of rules which are binding and enforced among the members of a given state or society made by institutions, bodies and persons vested with the power to make such rules." It is easy to assume that "law" can be found in one big book, which will give answer to every legal question.⁴¹ If this were true, there would be little need for lawyers! Clearly it is not true.⁴² As a matter of fact, law consists of multifarious rules, some of which are contained in several sources such as the Constitution,⁴³ statutes⁴⁴ and cases decided by the courts in real-life disputes involving individuals and between individuals and governments, *inter alia*. Contrary to what many practitioners may think, the sources of Nigerian tax laws go beyond the statutes and case laws.

Law is not static but dynamic. The content of the law of any society is the product of the prevailing social, political, economic and cultural conditions at a particular time. For the law to play a vibrant role, it must be in tune with the pace of the development of the society. It must neither lag behind nor be far ahead. However, while it is totally unacceptable for the law to be anachronistic in terms of being behind the society, there are certain areas where the law is deliberately made to be ahead of the society in order to raise the standard and educate the citizens towards development. The content of the law of each society usually changes as the social, political and economic conditions in which the individual lives

⁴¹For instance, a layman may think that all the laws of a State are contained in the Constitution. This is incorrect. The constitution simply refers to the frame or composition of a government, to the way in which a government is actually structured in terms of its organs, the distribution of powers within it, the relationship of the organs *inter se* and the procedure for exercising powers. Hence, the laws that govern the day-to-day activities and conduct of individuals are contained in laws made by the legislature such as Sale of Goods Act, Criminal or Penal Code, etc., and case laws.

⁴²J.A. Holland and J.S. Webb, *op. cit.*, p.1.

⁴³The current Constitution in Nigeria is the *Constitution of the Federal Republic of Nigeria*, 1999.

⁴⁴Statutes are laws made by the primary organ of government established by the Constitution to make laws, which is the Legislature.

change. Some changes are little more than passing fads, and make a slight impact upon the legal structure while some others may bring about permanent and far-reaching effects.⁴⁵ This writer is delighted that FIRS has taken the responsibility to champion the reform of the Nigerian tax system and amend the various federal tax laws. It is hoped, however, that this will be a continuous exercise so that in the near future our tax system would mature to a level where it can accommodate more fundamental structural changes that will set it on a greater path of sustainable growth.

3.2.1 Sources of Tax Laws

We have seen from the features of law that law is a body of rules. This is also true of Law of Taxation. In so doing, the writer wishes to draw particular attention to the relatively poor appreciation of the utility of other sources of tax laws in Nigeria apart from statutes and case laws.

3.2.1.1 The Constitution

The constitution is the fundamental law in Nigeria. Section 1(1) of the *Constitution of the Federal Republic of Nigeria, 1999* (1999 Constitution) proclaims the supremacy of the Constitution while section 1(3) provides that anything inconsistent with the provisions of the Constitution shall be *null and void* and of no effect to the extent of its inconsistency.

Most of the tax laws in Nigeria were enacted during the military era when the Federal Military Government wielded nearly omnipotent powers vide successive *Constitution (Suspension and Modification) Decrees* as the *grundnorm*. The position is, however, different with the commencement of the 1999 Constitution and the enthronement of the principle of constitutional supremacy. The implication, therefore, is that some of the existing tax laws will have some military flavour which will require a review in order to be in line with democratic tenets. Also, a number of provisions under the existing laws stand the risk of being challenged on the ground of unconstitutionality.

For instance, section 2(2) PITA provides *inter alia* that "tax shall be "imposed" by the Federal Board of Inland Revenue" when it is clearly indisputable that the FIRS lacks power to impose taxation, being an administrative agency.

Another example is an attempt by the Federal Military Government to demarcate the extent of the taxing powers of all tiers of government vide the *Taxes and Levies (Approved List for Collection) Act*.⁴⁶ The Act was couched in a peremptory manner that its provisions were superior to the Constitution by the use of the phrase "notwithstanding anything to the contrary in the Constitution." However, it is trite that since the commencement of the 1999 Constitution, the provisions of the Constitution are now supreme and any other acts or laws which are inconsistent with it will be null and void on account of their unconstitutionality.

3.2.1.2 The Statutes

⁴⁵P. Harris, *op. cit.*, p.14.

⁴⁶No 21 of 1998.

While a tax must be within the powers of a level of government under the Constitution, the actual imposition is to be done expressly by a statute. Consequently, taxation law is based entirely on statute. In Nigeria, there is no single legislation governing all the taxes that are in force. Virtually every type of tax is governed by a separate legislation. Consequently, the law on each type of tax is to be found in a specific statute devoted exclusively to the tax. The major tax statutes are well known to the participants and need not be rehearsed here.

3.2.1.3 Case Laws

Where the tax authority has refused to favourably consider the objection of a taxpayer, the taxpayer may appeal to the Body of Appeal Commissioners (Body) which is a *quasi*-judicial body. The decisions of the Body are given in private and are not generally available to the public.⁴⁷ Such decisions are, strictly speaking, not binding, being decisions of a quasi-judicial body. In practice however, the Body keeps records of its decisions and tends to follow them unless they have been reversed on appeal.⁴⁸ Appeal goes to the Federal High Court in respect of federal taxes (with the exception of Personal Income Tax) and the State High Courts in respect of others. There are provisions for further appeals to the Court of Appeal and the Supreme Court. Few cases have gone beyond the Body. For instance, in the over four decades of the establishment of the Supreme Court in Nigeria, only two tax cases have been decided by the court.⁴⁹

3.2.1.4 Budget Speech

In every fiscal year, the President always makes a budget speech setting out, among other things, the monetary, fiscal and economic policies for the year and seeking legislative approval to spend public funds. The proposed policies may impact on the existing tax laws and necessitate their amendment or even abrogation. It must be pointed out that the budget speech is a secondary source of tax law requiring legislative backing before it can become enforceable.

However, the practice during the military era was to commence the implementation of fiscal policies as soon as circulars were issued to that In most cases, the necessary legislation may not be enacted until several or even years just for the sake of formality. And whenever the laws are eventually enacted, the commencement dates were usually back dated of commencement of implementation of these policies. Therefore, in practice, budget speeches and pronouncements of the Minister of elevated to the status of a primary source of tax laws in Nigeria military era. This, however, has not been the practice since the commencement of the 1999 Constitution: An attempt by the President Olusegun regime to introduce fuel tax through the budget speech without an enabling law was successfully challenged by the civil society. Currently, both and budget breakdowns are, strictly speaking, no longer sources of tax laws. At

⁴⁷It may be pointed out however that two volumes of the decisions of the Body of Appeal Commissioners were published early in the '70s, one dealing with company income tax cases while the other dealt with personal income tax cases arising out of the former capital territory of Lagos, when the Federal Board of Inland Revenue was the tax authority.

⁴⁸P.G. Whiteman & Milne, *The Law of Income Tax, Surtax and Profits Tax*, Sweet & Maxwell, London, 3rd ed., p.80.

⁴⁹*Marina Nominees Ltd v FBIR* [1986] 2 NWLR (pt.20), p.45 and *Shell Petroleum Development Company v. FBIR* (1996) 8 NWLR (pt.466), 256.

best, they are indications of government's intention of what the law might be in future. A taxpayer is not obliged to comply with a policy statement contained in the budget speech until it has been given especially where such a policy is unfavourable to him. A good example in this regard is the proposed increase of VAT rate to 10 per cent.

3.2.1.5 Delegated or Subsidiary Legislation

These are the enactments made by executive bodies or agencies pursuant to express powers conferred on such persons or bodies by the legislature. The use of delegated legislation has become inevitable due to the dynamics of modern day governance. It is practically impossible for the legislature to make laws for every aspect of human life due, among other things, to lack of time or even technical expertise on certain details that may be required for the implementation of the law. It thus becomes reasonable and the legislature should merely provide the general framework of principles, leaving specialists, technocrats and those who are involved in the matter on a day-to-day basis to deal with the details in form of rules and legislations. Any legislation made pursuant to a delegated power must not exceed the limits of the power so granted, otherwise the wrongful exercise of *ultra vires* (beyond power), *null* and *void*.⁵⁰ The tax authorities, in their subsidiary legislative power, must act within the principal statute.

3.2.1.6 Concession and Advance Ruling

There are situations where the law on some points may be very clear but a strict compliance with its provisions may be difficult to apply or bring hardship to the taxpayers. In such circumstances, the tax authority may officially decide not to strictly enforce the rules. Concession may either be general or specific. In some jurisdictions, Revenue Practice and Concessions are usually issued for general information; however, it is not normally published in Nigeria. This writer advocates that existing concessions should be compiled and published in order to increase transparency and democratise access to information among the taxpayers.

Generally, the courts in Nigeria do not give advance ruling on tax cases in form of case stated. Also, the tax authorities do not officially give advance ruling on proposed schemes by the taxpayers. Consequently, any informal advice or opinion that may be offered by any of its officers will, as a general rule, not be binding on the tax authority.

3.2.1.7 International Law

The growing interaction among countries inevitably calls for co-operation in many areas, including tax laws. It is this reality that often gives rise to Double Taxation Treaties. It must however be noted that, by virtue of the constitutional system in Nigeria, a treaty does not become operative until the National Assembly has enacted it into law.⁵¹ With the regional integration of West African countries and the introduction of Common External Tariffs (CET), international law will certainly assume a more prominent role in the Nigerian tax system in the near future.

⁵⁰See Owoade, T.O (2001), *Jurisdiction in Administrative Law* (Ibadan: p44. et seq.

⁵¹Section 12(1), 1999 Constitution.

3.2.1.8 Law Textbooks and Treatises

A textbook or treatise written by learned scholars and jurists constitute a secondary source of tax law which may be called in as aid where there is either no authority or the authorities are scanty. The works of eminent writers like C.S. Ola, Prof. O. Akanle, Prof. M.T. Abdulrazaq, J.K Naiyeju, and a few others, are highly respected in the Nigerian tax circles. However, it suffice to say that their opinions, notwithstanding their prominence, are merely persuasive and not binding on the court or tribunal. Therefore, a taxpayer is not under obligation to tow a particular line simply because an eminent author had opined that that is the correct thing to do.

4.0 Constitutional Framework

The citizen's right to property is entrenched in section 44(1) of the Constitution of the Federal Republic of Nigeria, 1999 thus:

44(1) No moveable property or any interest in an immovable property shall be taken possession of compulsorily....."⁵²

Like every other fundamental human right, the right to property is not immutable. A measure of derogation is permitted for reason of taxation through section 44(2) (a) which goes further to provide that:

44(2) "Nothing in subsection (1) of this section shall be construed as affecting any general law -
(a) for the imposition or enforcement of any tax, rate or duty..."⁵³

The derogation from fundamental right to property is allowed because taxation is not only essential but it is indispensable to the existence and operation of any nation.

Other tax-related provisions of the 1999 Constitution include sections 4(3) & (7) & ELL & CCL, 7(5) & item 1(J) of the Fourth Schedule, 24(f), 44(2)(a), 59(1)(b), 162(1), 163, 165. The provisions are highlighted below:

- Sections 4(3) & (7) vest legislative power on the National Assembly and the State House of Assembly to make laws for the peace, order and good government of the federation and states respectively, including tax laws subject to the extent provided in the Exclusive and Concurrent Legislative Lists;
- Section 7(5) provides that each House of Assembly shall confer on its local government councils certain minimum functions including "assessment of privately owned houses or tenements for the purpose of levying such rates";

⁵²See section 44(1), CFRN, 1999.

⁵³See section 44(2)(a), CFRN, 1999.

- Section 24 (f) imposes a duty on every citizen to "declare his income honestly to appropriate and lawful agencies and pay his tax promptly;
- Section 44(2) requires a "law" for "the imposition or enforcement of any tax, rate or duty";
- Section 59(1) (b) provides a special procedure for the passage of a tax bill, inter alia;
- Section 120 and 163 (a) provide that the revenue collected by the state governments from personal income tax, capital gains tax and stamp duties should form part of the Consolidated Revenue Fund;
- Section 162(1) exempts the payment of the proceeds from personal income tax of personnel of the armed forces of the Federation, the Nigeria Police Force, the Ministry or Department of Government charged with the responsibilities for Foreign Affairs, and the residents of the Federal Capital Territory collected by FIRS from the Federation Account;
- Section 163 mandates the Federal Government to distribute to the states on the basis of derivation the net proceeds of the personal income tax, capital gains tax and stamp duties collected by the Federal Government;
- Section 165 mandates each state to pay the Federal Government the expenditure incurred by it for the purpose of collecting taxes on behalf of the state; and
- Sections 173 (4) and 210 (4) provide that pensions in respect of service of the federation and states shall not be taxed.

As the Nigerian tax law develops, certain administrative rules and practices may be challenged on the grounds of violation of fundamental human rights such as right to fair hearing, right to property and illegality, for instance, where the tax authority fails to follow due process in the enforcement of tax laws.

5.0 Tax Administration

Tax administration can be briefly defined as the implementation of the tax laws in order to achieve their objectives. If there are good tax laws which are badly administered, we will still fall short of achieving the objectives of taxation. John F. Due in his book "Government Finance" stressed the importance of tax administration by saying:

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.

Tax administration in Nigeria is basically a function of the three tiers of government. Each tier has, or should have, a machinery to ensure the effective collection of taxes within its jurisdiction. Normally, public officers are employed to do the job, but now there is a tendency to delegate some aspects to independent firms of tax consultants. The current position and practice is that a tax authority may

delegate certain auxiliary aspects of its work but cannot delegate the core functions of raising assessment.

The FIRS (Establishment) Act No 132007 (FIRSEA) generally establishes a new legal framework for the (re)establishment and reorganization of the erstwhile Federal Board of Inland Revenue (FBIR). The establishment of the FIRS under FIRSEA is particularly significant from the legal perspective. It has transformed the FIRS from the humble status of an extra-ministerial agency into a government parastatal (a statutory body) with certain powers and functions clearly spelt out by the enabling statute. It is significant to note that the powers vested on the FIRS are only subject to the express provisions of the Constitution and judicial review.

FIRS is now autonomous to the extent provided in the FIRSEA. Autonomy is crucial for planning, capacity building, human resource development, training, and design of an efficient reward system. FIRS is now able to innovate in the formulation and implementation of policies geared towards efficient administration of tax laws; recruit, train and fire personnel, in appropriate circumstances, and consult experts in situations it considers expedient. The 'autonomy' conferred on the FIRS is however not without limit. Under section 21, the powers of the Service to borrow by way of loan, overdraft or otherwise from any source and appoint any governmental agency to collect revenue are subject to the approval of the Minister. As a matter of fact, section 51(1) provides that the Board shall be subject to the general direction of the Minister in the exercise of its powers and duties, except that the Minister cannot give direction or instruction from which a particular person will benefit in relation to the person's tax liability or which will have the effect of influencing an ongoing process in relation to enforcement of the laws.

5.1 Technical Committee of the FIRS

Within the FIRS there is a technical committee which considers all tax matters that require professional and technical expertise. The Committee is also empowered to advise the FIRS on all the powers and duties of the Board. Members of the Technical Committee include the Chairman, FBIR; all Directors and Heads of Departments of the FIRS; and the Legal Adviser to the FIRS.

5.2 State Boards of Internal Revenue

The Personal Income Tax Act⁵⁴ establishes for each state of the federation a State Board of Internal Revenue (SBIR). The operational arm of each SBIR is known as the State Internal Revenue Service (SIRS).

In accordance with the law, the executive head of the SIRS also chairs the SBIR. Other members of the SBIR include the Directors and Heads of Departments of the SIRS; a Director from the State's Ministry of Finance and the Legal Adviser to the SIRS. To complete the membership, the State Commissioner of Finance nominates three other persons on their personal merits to serve on the Board. The Secretary of the SIRS also acts as Secretary to the SBIR. He is an ex-officio member of the Board.

The responsibilities of the SBIR are as follows:

⁵⁴No. 104 of 1993, as amended by the Finance (Miscellaneous Taxation Provisions) (No.2) Act No. 31 of 1996.

- (a) Ensuring the effectiveness and optimum collection of all taxes and penalties due to the government under the relevant laws;
- (b) Doing all such things as may be deemed necessary and expedient for the assessment and collection of taxes;
- (c) Making recommendations to the Joint Tax Board on tax policy, tax reform, tax legislation, tax treaties and exemptions;
- (d) Generally controlling the management of the State Internal Revenue Service on matters of policy; and
- (e) Appointing, promoting, transferring and imposing discipline on employees of the State Internal Revenue Service.

Similar to what obtains at the Federal Government level, the SBIR also has a statutory Technical Committee. This comprises the SBIR Chairman, the directors, Legal Adviser and Secretary of the SIRS. The committee is to consider all matters that require professional and technical expertise and make recommendations to the SBIR. It also has the duty to advise the SBIR on all the Board's powers and duties.

5.3 Joint State Revenue Committee

A Joint State Revenue Committee was established for each state of the federation by virtue of section 85F of the Personal Income Tax Act.⁵⁵ The Committee is to:

- (a) implement decisions of the Joint Tax Board;
- (b) advise the Joint Tax Board and the State and Local Governments on revenue matters;
- (c) harmonise tax administration in the state;
- (d) enlighten members of the public generally on state and local government revenue matters; and
- (e) carry out such other functions as may be assigned to it by the Joint Tax Board.

Membership of the Committee includes:

- (i) the Chairman of the State Internal Revenue Service as the Chairman;
- (ii) the Chairman of the Local Government Revenue Committee;
- (iii) a representative of the Bureau on Local Government Affairs not below the rank of a Director; and
- (iv) the Legal Adviser of the State Internal Revenue Service.

⁵⁵Amendment inserted by virtue of the Finance (Miscellaneous Taxation Provisions) (No.2) Act of 1998.

A representative of the Revenue Mobilisation Allocation and Fiscal Commission and the State Sector Commander of the Federal Road Safety Commission participate in the activities of the Committee as observers. The Secretary of the Committee sits as a full member and must be a staff of the State Internal Revenue Service.⁵⁶

5.4 Local Government Revenue Committee

Section 85D of the Personal Income Tax Act, as amended, established a Local Government Revenue Committee for each Local Government Council of a State. The Supervisor for Finance in the Local Government Council acts as Chairman of Committee while three other councilors in the Local Government Council join him as members. In addition, the Chairman is empowered to nominate two persons on their personal merits to serve on the Board. The two must, however, be persons experienced revenue matters.

The Revenue Committee is responsible for the assessment and collection of all taxes, fines and rates under the jurisdiction of the Local Government Council. It operates through a Revenue Department. Both the Committee and the Revenue Department are autonomous of the Local Government treasurer.⁵⁷

It is remarkable that the State and Local Government established by a federal statute - PITA. This is a carry-over from the military era which cannot fit into the framework of the 1999 Constitution principle of fiscal federalism. The Federal Government cannot lawfully establish revenue agencies for the states and dictate the membership of such agencies. These, in our view, are the prerogatives of each state. Lagos state has rightly, in our view, charted the correct course by enacting a law establishing Lagos State Board on Internal Revenue whose membership is determined by state in accordance with its preferences.

5.5 The Joint Tax Board (JTB)

The administration of the Personal Income Tax is split between federal and state tax authorities. Some individuals like members of the country's forces, officers in the Foreign Service, residents of the Federal capital Territory, and foreigners who derive income from Nigeria, pay tax to the federal authorities. All others pay to the authorities in their state of residence. This, among other things, makes it necessary to have a joint forum for the discussion and resolution of issues arising in the course of tax administration.

Section 86(1) of the Personal Income Tax Board Act establishes the Joint Tax Board. The functions of the JTB are to:

- (i) to exercise the powers or duties conferred on it by the express provisions of PITA and any other powers and duties arising under this Act which may be agreed to by the government of each state to be exercised by the Board;

⁵⁶Section 85F of the Act.

⁵⁷See sections 85D & E, Act 31 of 1996.

- (ii) exercise powers and perform duties conferred on it by any enactment of the Federal Government imposing tax on the income and profits of companies, or which may be agreed to by the Minister to be exercised or performed by it under the FIRS Act;
- (iii) advise the Federal Government, on request, in respect of double taxation arrangement concluded or under consideration with any other country, and in respect of rates of capital allowances and other taxation matters having effect throughout Nigeria and in respect of any proposed amendment to this Act;
- (iv) use its best endeavours to promote uniformity both in the anticipation of this Act and in the incidence of tax on individuals throughout Nigeria; and
- (v) impose its decisions on matters of procedure and interpretation of this Act on any state for purposes of conforming with agreed procedure or interpretation.

From the foregoing, it can be seen that the JTB is a very important platform to advance the development of the law and administration of income tax throughout Nigeria. The body has, however, in recent times been delving into certain matters which are clearly outside its scope such as determination of the rate of user and service charges for parking fees, determination of development levy, banning states from using tax consultants, etc. Recently, it was reported that JTB insisted on screening the tax clearance certificates submitted by persons seeking election into public offices. The JTB does not deal with individual taxpayers and has no records of taxpayers. Since the body was not responsible for issuing tax clearance certificate, why then should it be concerned with the verification of the genuineness or otherwise of the TCC? Rather, it is the responsibility of each Board of Internal Revenue to assess residents within their territory and issue TCC in deserving cases. Similarly, the State Boards are also in the best position to determine and/or give evidence whether the TCC in possession of a taxpayer is fake or genuine, as may be considered necessary. The objects of the JTB will be better served if it focuses on its core functions and set fresh agenda on how to address practical issues relating to Personal Income Tax Law and Administration, such as information sharing among the SBIRs on tax evaders, review of the residency rule and information, and PAYE Regulations.

6.0 Forms of Taxation in Nigeria

6.1 Tax Base

The tax base of a tax can be loosely defined as the thing which forms the subject of a tax; that is, the thing upon which a tax is imposed. It could be tangible wealth such as income, property, or intangible things such as the privilege enjoyed, for instance, for use of space. It could also be in form of activities such as consumption, e.g. sale or purchase. In the history of taxation around the world, there are few things that have not been subjected to tax at one time or the other in different countries. For instance, windows and hearths taxes were once imposed in Britain on the number of window and hearths in houses. Apart from social and political considerations, a government can impose any form of tax (within the limits of its power under the constitution in a federation) and give it any name.

Taxes may be classified in various ways. The categories are not mutually exclusive, in the sense that a particular tax may traverse more than one category. Our consideration here will be limited to the classifications that are based on rates and the channel of levy.

6.2 Progressive, Regressive and Proportional Taxes

A tax is progressive when high-income taxpayers pay a greater percentage of their income in taxes than low-income taxpayers. Most income taxes are designed to be progressive,⁵⁸ meaning that they are based on vertical equity, which holds that a person with greater ability to pay should pay more than those with less ability.⁵⁹ For instance, the rates for the Personal Income Tax in Nigeria for the 2002 fiscal year were as follows:

Income		Rates
Below N30, 000	-	5%
First N30, 000	-	5%
Next N30, 000	-	10%
Next N50, 000	-	15%
Next N50, 000	-	20%
Above N160, 000	-	25%

In this way, a person whose taxable income is above N160, 000.00 pays 25 per cent of every naira he earns above that amount compared to someone with a taxable income of N30, 000.00 who pays only 5 per cent on every naira that he earns.

6.2.1 Regressive Tax

A regressive tax is the opposite of a progressive tax. A regressive tax is one in which the percentage of income paid in tax decreases as income increases.

Hence, low-income taxpayers pay a higher percentage of their income in taxes than do persons with larger incomes. Regressive taxes usually favour the rich more than the poor.

6.2.2 Proportional Tax

A tax is proportional if the same or an equal tax rate is imposed on every taxpayer irrespective of income. A good example of a proportional tax is poll tax. Most consumption taxes are usually proportional. For instance, the Value- Added Tax (VAT) rate on all taxable goods in Nigeria is 5 per cent.

⁵⁸Income tax is however proportional in some countries such as Jamaica. Also, income taxes imposed at state levels are usually proportional, for instance in the United States and Sweden

⁵⁹Ronald John HY & Williams L. Waugh, "Income Taxes", *State and Local Tax Policies*, Greenwood Press, London (1995) p. 51

Proportional taxes also usually favour the rich more than the poor because the rich are left with a higher percentage of their income after tax.

6.3 Direct and Indirect Taxes

Mill, in his *Principles of Political Economy*, defines direct and indirect taxes as:

.....one which is demanded from the very persons, who, it is intended or desired, should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of others.⁶⁰

The major distinction between direct and indirect tax is that direct tax is imposed upon, or on the property of, the person paying the tax; whereas in the case of indirect taxation, the payer is different from the person who bears the burden of the tax.⁶¹ Indirect taxes upon goods and services are usually passed to the ultimate consumer of the goods and services in form of higher prices. Examples of direct taxes are income tax, property tax, capital gains tax. Those within the category of indirect taxation are value-added tax, purchase or sales tax, customs duty, excise duty, etc.

An attempt will now be made to briefly highlight the major types of taxes in Nigeria under the broad classification of direct and indirect tax.

6.3.1 Direct Taxes in Nigeria

6.3.1.1 Taxes on Income

There are five main taxes on income in Nigeria. These are personal income tax, Companies Income Tax, Petroleum Profits Tax, Education Tax and Technology Tax. A separate statute governs each tax system:

- (i) *Personal Income Tax*: This is imposed on the income of individuals, communities, families and trustees.⁶² The governing statute is the *Personal Income Tax Act* (PITA),⁶³ as amended.
- (ii) *Companies Income Tax*: This is imposed on the profits of all companies in Nigeria, except companies engaged in petroleum operations. The governing statute is the *Companies Income Tax Act* (CITA).⁶⁴
- (iii) *Petroleum Profits Tax*: This is a tax imposed upon the profits of companies engaged in petroleum operations.⁶⁵ The applicable statute here is the *Petroleum Profit Tax Act* (PPTA),⁶⁶ as amended.

⁶⁰See generally, *Principles of Political Economy*, Book V, Ch.3.

⁶¹O. Akanle, op. cit, p. 13.

⁶²See Section 1 personal Income Tax Act No. 104,1993.

⁶³No. 104, 1993.

⁶⁴See Companies Income Tax Act, Cap. 60, Laws of the Federal Republic of Nigeria.

⁶⁵A special tax requirement is created for oil producing companies ostensibly for two main reasons, first, revenue from petroleum industry accounts for over 90% of Nigeria's foreign exchange earning and second, because of the peculiar nature and activities of petroleum producing companies

⁶⁶Petroleum Profit Tax Act.

- (iv) *Education Tax*: This was introduced into Nigeria by the Education Tax Act No.7 of 1993. The Act imposes an education tax of 2 per cent on the assessable profits of all companies registered in Nigeria (including companies engaged in petroleum operations). The revenue from the tax is earmarked for the rehabilitation, restoration and consolidation of education at all levels in Nigeria.
- (u) *Technology Tax*: This was introduced by the National Information Technology Development Agency (NITDA) Act. The Act imposes a one per cent tax on the gross profit of digital mobile operators and all telecommunication companies, pension managers, internet service providers, cyber companies and all financial institutions, including insurance companies whose income is above one hundred million naira (N100m). The Federal Inland Revenue Service (FIRS) is charged with the due administration of the tax. The proceeds of the tax go into a special fund to be known as National Information Technology Development Fund.

6.3.1.2 Taxes on Capital

These are basically of two types in Nigeria, viz:

- (i) *Capital Gains Tax*: This is chargeable when an asset is disposed off and the owner makes a profit over and above the original cost. The governing statute is *Capital Gains Tax Act*, as amended.⁶⁷
- (ii) *Capital Transfer Tax*: This was imposed upon the value of any property transferred by any person (other than by way of sale) to another person, including property inherited upon the death of a deceased person. The applicable statute was the *Capital Transfer Tax Act*. However, the Capital Transfer Tax was 'abolished' in Nigeria in 1997 due to lack of commitment of the government to the efficient administration of the tax.⁶⁸

6.3.1.3 Consumption Taxes

Consumption taxes are levied on the exercise of purchasing power through the goods and services purchased. Consumption taxes may be generally discussed under the following headings:

- (i) *Sales/Purchase Tax*: This is a tax on a commodity, be it a product or service, purchased for consumption. A sales tax typically is either levied per unit purchased or as an ad valorem tax, based on the percentage of the basic purchase price of a commodity.⁶⁹ Sales/purchase tax has been replaced with Value-Added Tax in Nigeria.⁷⁰
- (ii) *Value-Added Tax*: VAT is also levied on the supply of goods and services. The distinguishing feature between VAT and sales tax is that VAT is collected at the various stages of production,

⁶⁷See Capital Transfer Tax, Cap 43 LFN, 1990.

⁶⁸The 'abolition' of the tax was only announced in the Federal Military Budget Speech and has not been formally abolished by any statute. Since this was during the Military era budget speech was considered as major source of tax law in Nigeria

⁶⁹Ronald John HY & Williams L. Waugh, *op. cit*, pp.82-3.

⁷⁰See The Value Added Tax Act No. 102, 1993.

that is, production, wholesale and retail stages while sales tax is collected only at one stage, usually the retail stage. The VAT rate is 5 per cent. The governing statute is the Value-Added Tax Act.

- (i) *Import Duty*: Import duty is a tax levied on selected items of some manufactured goods imported into the country. The tax is used to discourage the importation of some foreign goods that can be produced locally to encourage the growth of local industries.
- (ii) *Export Duty*: This is a tax on selected items exported out of the country. Both import and export duties are often collectively called customs duties.

Apart from the above listed taxes, there are others such as property tax, stamp duties, entertainment tax, pool betting tax, casino tax, etc. There are also some other statutes with tax-related provisions, especially on various incentives. For instance, the *Industrial Development (Income Tax Relief) Act*⁷¹ makes provisions for the grant of relief to pioneer companies. Also, a company which has incurred expenditure in its qualifying building and plant equipment in an approved manufacturing activity in an Export Processing Zone is granted 100% capital allowance in any year of assessment.⁷² This makes the cost of capital acquisition entirely deductible in the year in which the qualifying expenditure was incurred.⁷³ The *Minerals and Mining Act* also gives various tax incentives to operators in the solid minerals sector.⁷⁴ (See also the statutes which established the NLNG, Export Processing Zones etc.)

It is appropriate at this point to briefly examine the applicable rule of interpretation of taxing statute and the concept of tax evasion and tax avoidance.

7.0 Tax Evasion and Avoidance

This is a very popular term even among non-experts, as everyone seems to know that tax evasion is illegal while tax avoidance is legal. The problem however is where to draw the line between the two. None of the two terms is defined in the statute. Rather, the various tax statutes simply criminalise certain conducts which are adverse to the administration of the tax system without expressly labeling them as evasion.

Evasion of tax is an act of illegally dodging or reducing one's tax liability. This may range from failure to file a return, making of false declaration in the return, failure to remit a tax, among others. Evasion entails some elements of untruthfulness or moral turpitude. Hence, the law usually imposes severe penalties on evaders when detected. In *Lord Howard de Walden v IRC*,⁷⁵ Sir Wilfred Greene M.R likened evasion to throwing the burden off one's shoulder unto those of one's fellow subjects. The learned judge went on to say:

⁷¹Cap. 179, LFN, 1990.

⁷²Section 28C of CITA.

⁷³

⁷⁴Act No. 34 of 1999.

⁷⁵(1942) 1 K.B. 389.

...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.⁷⁶

Tax avoidance, on its part, is the act of arranging one's affairs in such a way that the taxpayer pays less tax than he would otherwise have paid. Tax avoidance requires a good knowledge of the tax laws in order to lawfully take advantage of some of its provisions. This theoretically does not entail any moral wrong or act of illegality.

There are two dimensions to the issue of tax avoidance. The first is when a tax law is structured in such a way as to encourage certain activities by offering relief or generous allowance to encourage compliance. For instance, there is a bonus for voluntary compliance under both the Companies Tax and Personal Income Tax. Also, marriage and children allowances are available for married couples which taxpayers have to specifically claim when filing returns. The tax authorities and the courts usually do not frown at it when taxpayers take advantage of these types of provision. The other dimension is when a taxpayer attempts to take advantage of a loophole in the tax law to achieve tax reduction which the tax authorities do not intend or anticipate. The tax authorities are usually reluctant to honour such transaction, especially where it appears to be artificial, that is where tax consideration seems to be the only reasons for the arrangement.⁷⁷ When a compromise cannot be reached between the taxpayer and the authority, the dispute may be referred to the court for adjudication. At this stage, the matter depends on whether the court will strictly or narrowly construe the words employed in the tax statute. This brings us to a consideration of the rule of interpreting tax statutes.

7.1 Interpretation of Tax Statutes

The first cardinal principle of taxation is that the statute imposing a tax must do so clearly and unambiguously in a manner that what or who is being taxed is easily identifiable. For instance, if a tax is imposed on income, any earning that does not qualify as an income, for instance, a gift or wind fall, could not be taxed under the Income Tax Law. Nothing is to be read in; nothing is to be implied. In *Partington v Attorney General*,⁷⁸ Lord Cains admonishes as follows:

As I understand the principle of all fiscal legislation, it is this:

If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly

⁷⁶Ibid., at p.397.

⁷⁷For a detailed treatment of the different approaches to combat tax avoidance, see S.O. Fashokun, "An Assessment of Efforts against Tax Evasion and Avoidance: A Legal Viewpoint." *Nigerian Law Journal* (N.L.J.) 1970 Vol. 10, M.T. Abdulrazaq "Tax Avoidance," *CITN, Nigerian Tax Guide and Statute*, ed, M.T. Abdulrazaq, CITN, Lagos (2002), p.418.

⁷⁸ (1986) LR 4E&1 App. H.L. 100.

such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute.

This same principle was echoed by Rowlatt J. in *Cape Brandy Syndicate v IRC*⁷⁹ thus:

In taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. Nothing is to be read in, nothing is to be implied. One can only look at the language used.⁸⁰

This strict approach could be a double-edged sword. It could operate either in favour of the taxpayer or against him, depending on the circumstances. For instance, it means that once a tax is clearly imposed without any ambiguity, it must be collected from the taxpayer no matter how onerous or inconvenient it may be for him to pay. However, where there is any doubt in the language of a tax statute, it must be construed in favour of the taxpayer.

This approach has been applied in a number of Nigerian cases such as *S.A v. Regional Tax Board*⁸¹ and *Aderawos Timber Trading Company Ltd. v. FBIR*.⁸² However, some recent cases seem to suggest a relaxation of this cardinal rule. For instance, in *Shell v FBIR*,⁸³ the Supreme Court openly invoked the doctrine of equity as justification for its decision to allow certain expenditure by the Appellant which were not specifically allowed under the PPTA.⁸⁴ Notwithstanding these cases, it may not be correct to conclude that Nigerian judges favour the liberal approach. This is especially because no categorical statement has been made in those cases as indicative of a total rejection of the cardinal principle of strict interpretation. An examination of the fact of the Shell's case reveals a general reluctance by the court to allow either undue technicality to increase the tax burden of a taxpayer. If a company incurs expenses as a result of carrying out the directive of the Federal Government, it will be unfair for such expenses to be disallowed by tax authorities on technical grounds. For instance, can there be a logical basis for disallowing expenses of a scholarship scheme under which several Nigerian undergraduates have benefited and continued to benefit? Oil companies (and corporate bodies generally) would have been discouraged from providing scholarship schemes as part of their corporate social responsibilities if Mohammed Uwais C.J.N had not allowed the scholarship expenses as deductible. The current and future beneficiaries of such scholarship schemes owe their good fortunes to the judicial sagacity and ingenuity of Mohammed Uwais C.J.N. Against this background, the decision of the learned C.J.N in *Shell v. FBIR*⁸⁵ should therefore be understood based on its peculiar facts.

8.0 Conclusion

⁷⁹(1921) 1 K.B 64

⁸⁰*Ibid.* p. 71.

⁸¹(1970) 1 ALR Comm. 68.

⁸²(1969) 1 All NLR 247.

⁸³(1996) 8NWLR (pt.) 256.

⁸⁴See also the cases of *Mobil Oil Nigeria Ltd. v. FBIR* (1977) 1 NCLR 1 and *Phoenix Motors Ltd. v NPFMB*.(1993) 1 NWLR (Pt.272)718 at 731.

⁸⁵*Supra.*

Tax law and administration are so dynamic that changes are usually introduced periodically. During successive military regimes in Nigeria, changes were introduced through budget speeches and subsequent *Finance (Miscellaneous Taxation Provisions) Acts*. The ongoing tax reform at the federal and state levels have also introduced certain fundamental changes, which I understand will be the focus of subsequent papers. As budding tax practitioners, I enjoin you to ensure that you follow the development of the remaining tax bill pending before the National Assembly and tax reform at the state level. It is also important to keep abreast of tax-related developments in the local and international newspapers. In the final analysis, you must realise that law forms the foundation of taxation and therefore stay close to your tax laws. Notwithstanding how much you may advance in your career and gain more knowledge, you should always take a look at the letters of the law for fresh perspectives.