Acta Universitatis Danubius
ŒCONOMICA

Combating Legal Uncertainty in the Nigerian Tax Avoidance Laws

Howard Chitimira[1], Oyesola Animashaun[2]

Abstract: Nigeria utilises its oil earnings to finance over fifty percent of its budget. Therefore, the fall in oil price has negatively impacted the revenue earnings of the federal Nigerian government since the 1980s. This has led to strict enforcement of the relevant tax laws on all persons (including juristic persons), leading to rampant tax avoidance challenges in Nigeria. This article investigates the ambiguity in the relevant laws, which enabled tax avoidance by taxpayers in Nigeria. The article employs a qualitative and doctrinal methodology. In addition, it provides that the Nigerian tax authorities' enforcement efforts are hindered by the lack of clarity and predictability of the tax laws, which is worsened by the conflicting aspects of tax incentives and the general anti-avoidance provisions in the different taxing statutes of Nigeria. The article also provides that the ambiguity in anti-avoidance provisions and certain provisions of the tax laws gives rise to uncertainty and unpredictability in tax avoidance cases in Nigeria. Thus, the article isolates the gaps and flaws in the tax laws and recommends robust measures to combat such flaws.

Keywords: Tax avoidance; tax incentives; uncertainty; artificial transactions

1. Introductory Remarks

The term "tax avoidance" is very difficult to define because there is no consensus amongst the scholars regarding its meaning and when it is unacceptable (Oats & Tuck, 2019, pp. 565, 568; Filipczyk, 2015, p. 31; Faulhaber, 2009, p. 183; Barker, 2009, p. 230; Freedman, 2006, p. 362). Moreover, no Nigerian tax statutes or tax authorities' directives contain a definition or description of what constitutes tax

[1] Research Professor and Professor of Securities and Financial Markets Law, Faculty of Law, North-West University, Address: Private Bag X2046, Mmabatho, 2735, South Africa, Corresponding author: Howard.Chitimira@nwu.ac.za.
[2] Faculty of Law, North-West University, Private Bag X2046, Mmabatho, 2735, South Africa, E-mail: anitrust2@gmail.com.

avoidance. Thus, it is the dicta of the judges, writings of tax professionals and scholars that has provided some definitions and/or description of tax avoidance in Nigeria to date (Obadina, 2015, p. 38; Barker, 2009, p. 230).

Tax avoidance is the legal use of the tax regime to one's advantage to reduce the amount of tax that is payable by planning strategies or exploiting loopholes in the relevant tax laws to create tax incentives or legal ways of not paying excessive tax (Croome & Croome, 2017, p. 271). In other words, tax avoidance empowers one to employ legal methods to minimise or avoid tax liability in their country. Tax incentives are special tax provisions that deviate from the general tax codes and/or tax requirements to enable companies to pay minimal tax or no tax to the government treasury (International Monetary Fund "IMF", 2015, p. 8). Moreover, tax incentives are measures that are usually intended by the government to encourage individuals and businesses to perform certain economic activities in exchange for a reduction in their taxes. Furthermore, tax avoidance is an art of dodging to pay tax without breaking the tax laws. However, certain tax avoidance arrangements are classified as unacceptable or aggressive (Onu, Oats, Kirchler & Hartmann, 2019, p. 1; Christians, 2017, p. 10; Barkoczy, 2017, p. 29; Faulhaber, 2010, p. 183; Freedman, 2004, p. 334). Tax avoidance enables one to arrange their transactions so that the payable tax is lower or avoided completely without violating the relevant tax laws.

Tax avoidance is different from tax evasion. The latter is illegal non-payment or underpayment of tax by concealing or misrepresenting the nature of a transaction (Storm & Coetzee, 2018, p. 151; Anesa, Gillespie, Spee & Sadiq, 2019, pp. 17-39; Christians, 2017, p. 10; Barkoczy, 2017, pp. 747-748; Croome & Croome, 2017, pp. 223, 272; Mclaren, 2008, p. 144). Notwithstanding the difference in the definition and treatment of tax avoidance and evasion, the outcome is essentially the same, that is, the loss of revenue to the government (Alstadsæter, Johannesen, & Zucman, 2018, pp. 1-2; Christians, 2017, p. 12; Karlsson & Matthiasson, 2015, p. 16; Gadžo & Klemenčić, 2014, p. 281; Otusanya, 2011, p. 316; Kirchlera et al, 2003, p. 535). However, the loss of revenue by the treasury led to the categorisation of tax avoidance into two classes namely, "acceptable" and "aggressive or unacceptable" tax avoidance (section 22 of the Companies Income Tax Act, Chapter C21 LFN of 2004 (Income Tax Act); Best Children International Schools Limited ("BCISL") v FIRS (2016, UAC/CA/A/393: 14, para 5; Walker, 2004, p. 416). Notably, these two classes of tax avoidance have mainly emerged from case law and statutes (Christians, 2017, p. 10; Barkoczy, 2017, p. 750; Miller & Oats, 2012, p. 15; Freedman, Loomer & Vella, 2009, p. 75; WT Ramsay Limited v Inland Revenue Commissioners (1982) AC 300; MacNiven v Westmoreland (2001) STC 248). Anti-avoidance provisions were introduced into the Nigerian tax statutes to curb aggressive tax avoidance. For instance, anti-avoidance provisions were recently introduced in Nigeria under the Finance Act, 2019 to prevent the undue tax advantage that accrues from the deduction of interest on a debt before the companies' income tax is calculated. Thin capitalisation refers to an excessively high ratio of debt to equity in a corporation's capital structure (Investor Words, 2020; Prijohandojo, 2016). Accordingly, thin capitalisation occurs when a company is financed with a high level of debt as compared to its equity. Aggressive tax avoidance occurs when a person obtains a tax advantage using artificial or fictitious transactions or an artificial arrangement not undertaken for valid commercial reasons contrary to the purpose of the law (Lenz, 2018, pp. 3-4). Aggressive tax avoidance, inter alia, entails the tax planning arrangements which are aimed at avoiding tax liability. Moreover, aggressive tax avoidance includes taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems to reduce tax liability (European Union (EU) Report 2017, p. 23). On the other hand, artificial arrangements are tax avoidance schemes with no commercial purpose, business reality or risk factor. Their principal aim is to exploit loopholes in tax laws to avoid paying tax (Miller & Oats, 2012, p. 493). It is submitted that the way to reduce aggressive tax avoidance is the reduction in the technicalities in tax laws, enactment of anti-tax avoidance provisions and cooperation between countries. Acceptable tax avoidance refers to tax planning arrangements which are intended by the statute and it conform to both the letter and the spirit of the law (Christians, 2017, p. 10; Payne & Raiborn, 2018, pp. 470-471). Freedman, (2006, p. 363; 2004, pp. 335-336) and other scholars maintained that tax avoidance, irrespective of its classification is not evasion, hence legal, in the absence of applicable anti-tax avoidance provisions (Christians, 2017, pp. 5-21; Ulrich, 2013, p. 47). From the above submissions, it seems that aggressive tax avoidance is a civil wrong at best, or a non-criminal act that sometimes attracts civil penalties in certain jurisdictions. However, certain countries like South Africa have categorised tax avoidance laws into permissible and impermissible tax avoidance. Permissible tax avoidance is like acceptable tax avoidance while impermissible tax avoidance is illegal (sections 80A to 80L of the Income Tax Act 58 of 1962, as amended).

Nigeria employs judicial, legislative and administrative rules, or a combination of these to reduce aggressive tax avoidance (Barkoczy, 2017, pp. 750-774; Animashaun, 2017, pp. 364-367; Loutinsky, 2012, p. 83; Evans, 2007, pp. 133-135). Judicial interventions include rules formulated by the judiciary to prevent tax avoidance. Legislative interventions and administrative rules include amendments to tax statutes and administrative policies or circulars used by tax authorities to prevent anti-avoidance schemes respectively. For instance, the Federal Inland Revenue Service (FIRS) instituted an Anti-Corruption and Transparency Unit to fight corrupt practices, tax avoidance and tax evasion in Nigeria (Schlenther, 2017, p. 225).

Furthermore, in a bid to prevent certain aggressive tax avoidance, Nigeria included general anti-avoidance provisions such as section 17 of Personal Income Tax Act, Chapter P8, LFN of 2004 (Personal Income Tax Act). General-Anti Avoidance Rule (GAAR) refers to broad sets of rules aimed at limiting tax avoidance by individuals and multi-national companies (MNC) in cases where abuses of tax rules have been detected (Eurodad, 2017, p. 6).

The need for certainty in tax law need not be overemphasized because "when government taxes, it takes citizens' property, usually money, to fund various projects" (Kades, 2002, p. 189). Bloom (2016, p. 970), stated that the public perception of justice is that tax laws must be predictable and tax cases should be decided based on the law and not upon an individual judge's concepts of what constitutes acceptable or aggressive tax avoidance. According to Gadžo and Klemenčić (2014, pp. 283-284), legal certainty guarantees all individuals the possibility of reasonably foreseeing the legal consequences of their acts and behaviour. Thus, legal certainty requires that the taxpayers are able to determine the tax implications of their activities before embarking on their business activities. Legal certainty allows people to plan their future and protect individuals and their businesses from arbitrary state interference (Gribnau, 2013, p. 54). The authors argue that certainty is paramount in tax law because if taxes were to be imposed on the citizens by the state for the common good, the process must be lawful, fair and transparent. Moreover, legal certainty helps both the taxpayers and the state to reasonably plan their affairs by factoring their tax outflows and receipts respectively.

Permissive and/or beneficial tax laws allow reasonable freedom of behaviour by the taxpayers due to the loopholes in the extant laws (Payne & Raiborn, 2018, p. 471). Tax avoidance has been rampant in Nigeria because the permissive tax legislation is sometimes poorly drafted and open to various interpretations (Oats & Tuck, 2019, p. 566; Otusanya, 2010, p. 318). For instance, section 10(1)(a)(ii) of Personal Income Tax Act, provides that the remuneration of an employee in any employment in Nigeria is payable if the employee continually resides in Nigeria for 183 days in a year. Expatriates exploit this section for tax avoidance purposes by embarking on leave before the duration of 183 days and returning thereafter.

It is against this background that the authors investigate if the high rate of tax avoidance highlighted by the National Tax Policy of Nigeria and scholars such as Adebisi & Gbegi as well Otusanya is caused by permissive tax laws (National Tax Policy, 2017, p. 2; Adebisi & Gbegi, 2013, pp. 125-126; Otusanya, 2011, p. 316; Slemrod & Yitzhaki, 2002, p. 1425).

2. Methodology

No empirical research methods are employed in this article. A qualitative and doctrinal research method is adopted. Accordingly, the relevant Nigerian tax law statutes and policies on tax avoidance are analysed. The research also relied on journal articles, textbooks, case law, legal encyclopaedias, conference papers, international instruments, legislation and other relevant sources. Thus, both primary and secondary sources on tax avoidance were consulted. Relevant court judgements and allied materials relating to avoidance of tax law in the Nigerian federation were analysed and utilised in the article. Furthermore, the reports and publications such as circulars and practice notes of Federal Inland Revenue Service and State Revenue Services were discussed.

3. Tax Avoidance Theory

Allingham and Sandmo postulated the deterrence theory of tax avoidance and evasion in 1972. This theory provides that individual taxpayers usually consider three main factors when deciding whether to pay their taxes or not. Such factors include the chance of being caught, the magnitude of the possible penalty and the degree of their risk aversion. This theory provides that individuals do not have moral judgement and civic duties regarding tax payments (Lee, Dobiyanski & Minton, 2015). It is submitted that tax payers may willingly decide to trade-off and/or compare the tax evasion benefits against the risk and costs of being detected or incurring fines (Sandmo, 2005, pp. 643-663). Tax authorities can deter offenders and combat tax evasion by increasing auditing activities and the magnitude of the penalties that may be imposed on the offenders. Tax avoidance and tax evasion are both risky. Hence, if the risk of being caught is high or the penalty is deterrent enough, fewer persons will embark on the tax evasion and tax avoidance schemes. Thus, individuals favour tax avoidance or tax evasion once they gauge that the potential gains of such activities are greater than the potential losses. Nevertheless, the choice of tax evasion or avoidance is influenced by the degree of the risks associated with such activities (Lee, Dobiyanski & Minton, 2015). Individuals who are risk-tolerant instead of those who are risk-averse will always take their chances irrespective of the penalties imposed or the high possibility of being detected.

4. Rationale for Tax Avoidance in Nigeria

Nigeria's tax-to-GDP ratio in 2017 was 5.7 per cent compared to South Africa's ratio of 28.4 percent in the same year (Organisation for Economic Co-operation and Development "OECD", 2019). Moreover, studies by the FIRS in 2018 show that tax avoidance and tax evasion constitute a severe challenge in tax administration in

Nigeria (Olanrewaju & Olayiwola, 2019, p. 203). Therefore, if tax payment was optional, most taxpayers would choose to pay little or no tax because it is a cost to business. Tax payment also reduces the disposable income available to both corporations and individuals (Barkoczy, 2017, p. 29; Freedman, 2004, p. 334). The reason for tax avoidance by any taxpayer is an attempt to reduce the tax liability. However, Barkoczy (2017, p. 29), Freedman (2004, p. 334) and other scholars stated that no civilized nation can prosper without a functional tax system. The Nigerian tax legislation is unnecessarily complex, flawed and it gives rise to rampant tax avoidance among both individuals and companies (Dare, Du Plessis & Jansen, 2019; Almendral, 2013, p. 135). For instance, section 16 of the Income Tax Act, is difficult to comprehend, even by legal practitioners, because it lumps up provisions regarding the taxation of Nigerian and non-resident insurance companies.

Freedman (2004, p. 334), argues that politicians frequently provide tax incentives to affect the behaviour of the taxpayers of which taxpayers, especially corporations could achieve a prescribed threshold to pay little or no tax. It is further argued that corporations pay their share of tax through payroll taxes, taxes on distributions and other payments. Therefore, an additional income tax that is levied on such corporations in Nigeria might be unfair. According to Freedman (2004: 334), it is inevitable that there will be conflicts between company directors' primary duty to boost the return on investment of the shareholders and the government's desire to raise revenue. The authors concur with the above position on the primary duty of company directors, but they do not support any artificial arrangements that may be employed by directors in respect thereof to avoid taxes. Accordingly, companies operating in Nigeria are obliged to collect or pay companies' income tax or petroleum profits taxes, withholding taxes, value-added taxes, sales tax, tertiary education tax, other taxes and levies on behalf of the government, as prescribed by the applicable Nigerian revenue laws. Some of these companies use different tax avoidance devices to reduce their tax obligation by complex, artificial methods with no purpose other than tax reduction, which amounts to aggressive tax avoidance (Christians, 2014, p. 46). The likely effect of this type of avoidance is that the government may increase its debt profile, reduce the budget or continue to increase tax to fulfil its obligations. The increased tax is likely to be borne by those incapables of employing sophisticated tax advisors and tax avoidance schemes.

Tax is essentially the reduction of the private wealth of the citizens for the provision of public goods and services. This may produce an incentive or disincentive. As a result, individuals usually choose low taxing regimes, and investors may be favorably disposed to businesses with low tax rates and invest therein (Crome & Croome, 2017, p. 42; Gribnau, 2013, p. 52). This is an agreement with the postulations of the deterrence theory of tax avoidance and evasion by Allingham and Sandmo, as earlier discussed in this article. The high tax rates in Nigeria bring certain consequences such as pressure for allowances on the part of the companies and individuals which could lead to tax avoidance (Barriosa et al, 2020, pp. 83-84). For instance, the assessable tax of oil companies under joint venture contract in Nigeria is 85 percent of the gross profit (sections 20 and 21 of the Petroleum Profit Tax Act, 2004). Thus, the pressure for allowances, incentives and creative ways of turning tax loopholes to the advantage of such oil companies is rife in this sector.

5. General Anti-Avoidance Legislation and Tax Incentives in Nigeria

Nigerian tax laws such as the Petroleum Profit Tax Act, 2004 (Petroleum Profits Tax Act) provides assessment and collection tax incentives and anti-avoidance provisions. There are also anti-avoidance provisions under the Income Tax Act, the Personal Income Tax Act and the Capital Gains Act, 2004 (Capital Gains Act). The anti-avoidance and tax incentive provisions under the different Acts are discussed hereunder.

5.1. Tax Incentives and Anti-Avoidance Provisions under the Income Tax Act

Section 22(1) of the Income Tax Act grants the FIRS powers to set aside artificial and fictitious transactions and to adjust such transactions to reflect the original tax payable. This general anti-avoidance provision gives discretionary powers to the tax authorities to assess and set aside any artificial and fictitious transactions so that they are taxed at the appropriate rate. The exercise of these powers read in conjunction with some incentive provisions has given rise to litigation with varied results. For instance, section 23(1)(c) of Income Tax Act exempts the income, interest and profits of companies engaged in ecclesiastical, charitable or educational activities of a public character from paying tax. The American International School and Best Children International Schools Limited claimed exemption from companies' income tax and tertiary education tax under the section 23(1)(c) of the Income Tax Act, but the FIRS rejected its request, and litigation ensued. In American International School of Lagos ("AIS") v FIRS 2014 URC/TAT/LZ/CIT/059 para 3, it was held that AIS was entitled to exemption from companies' income tax since it was an educational institution rendering services of a public character, while this exemption was denied in a similar case of BCISL v FIRS 2016 para 5. This follows the fact that the court held that AIS case was a company limited by guarantee while shares limited the latter. However, the emphasis of the courts in both cases was section 23(1)(c) of the Income Tax Act and the meaning of "education activities of a public character", and no reference was made to the type of registration of the companies in question.

Likewise, in a bid to prevent companies from declaring losses and not paying taxes while declaring a dividend to its members, section 19 of the Income Tax Act provides that dividends from retained earnings are not exempt from tax. In Oando Plc v FBIR 2014 16 TLRN 99 para 2, the applicant's contention that it had already paid dividends in the preceding years, hence not liable to pay tax for the particular year when it made a loss was dismissed. The court held that since the company paid dividends to its members from the preceding years' accumulated profit, it is liable to pay tax under section 19 of the Income Tax Act. The authors suggest that section 19 of the Income Tax Act should be amended to avoid double taxation of retained earnings that were already taxed in the preceding years. Similar decisions were reached in United Capital Assets Management Limited v FIRS 2018 URC/TAT/LZ/CIT/006 25 para 4 and Olokun Pisces Limited v FIRS 2014 URC/TAT/LZ/CIT/076 5 para 2, where it was held that the companies must pay income tax for paying dividends from accumulated profit in the year they declare losses.

Section 9(1) of the Income Tax Act provides that tax is payable upon the profits of any company accruing in, derived from or received in Nigeria. Likewise, section 13(2)(c) of the Income Tax Act provides that the income of foreign companies engaged in business with a Nigerian company shall be deemed to be derived from Nigeria if that trade or business or activities involve a single contract. Saipem Contracting Nigeria Limited & others v FIRS & others (Saipem) 2014 15 TLRN 76, para 2, provides some insight on the import of a single contract within the context of section 13(2)(c) of the Income Tax Act. The case involved onshore and offshore contracts between the appellants (three members of Saipem group of companies; one out of the three appellant companies is registered in Nigeria) and the third respondent (Shell Nigeria Exploration and Production Company Limited). Due to the flaws in sections 9(1) and 13(2)(c) of the Income Tax Act, the appellants in Saipem's case had obtained advance tax rulings from the FIRS before taking up the contract. FIRS in the advance tax rulings stated that the nonresident companies would not be liable to Nigerian corporate income tax, withholding tax or value-added tax on offshore contracts. However, the FIRS later reversed its position and assessed tax on the income of the nonresident companies. The Court of Appeal held in Saipem's case that the contract in question, regardless of the onshore/offshore structure, was a single contract, in accordance with section 13(2)(c) of the Income Tax Act. Therefore, the Court of Appeal held that the foreign companies were liable to pay tax on their income derived from the contract. The authors suggest that although the decision seems to prevent a tax avoidance scheme, the fact that an advance tax ruling had previously been obtained from the appropriate authority by the appellants in Saipem's case should have been a mitigating factor. In the JGC Corporation v FIRS 2014 15 TLRN 109 para 4, the appellant was awarded the offshore aspects of a contract by Mobil Producing Nigeria Unlimited. The onshore components were awarded to the appellant's Nigerian subsidiary, JGC Nigeria Limited, and another Nigerian company. The appellant executed the contractual obligations wholly outside Nigeria, and the appellant did not enlist its Nigerian subsidiary in the execution of the contract, like the earlier Saipem's case. In the JGC Corporation case, the court held that the appellant is not liable to tax in Nigeria because the offshore and onshore contracts were separate. In light of the above decisions, it is possible that a single project would subsequently be separated into onshore and offshore contracts by companies to avoid payment of taxes in Nigeria.

Under section 39 of the Income Tax Act, companies engaged in gas utilisation are exempted from paying tax for 5 years. These companies are further granted accelerated capital allowances after the tax-free period and tax-free dividends. In addition, section 2 of the Nigerian Liquefied Natural Gas (NLNG) (Fiscal Incentives, Guarantees and Assurances) Act, 2004, provides a 10-year tax relief period to the NLNG. Section 2 of the Act also provides that interest on loans obtained by the NLNG is fully deductible for tax purposes. The company is exempted from all customs duties, levies and charges of similar nature. Similarly, where a manufacturing company whose final products are exported has incurred capital expenditure in an Export Processing Zone under section 35 of the Income Tax Act, that company shall be granted 100% capital allowance in the assessment year and exempted from tax for the first 3 consecutive years. These incentives seem like a gesture to encourage companies whose products are solely for export to continue exporting their products. The authors' major concern is the ability of the appropriate authorities to establish the veracity of the wholly export assertion due to the porosity of Nigerian borders and the possibility of carrying goods across the borders and "re-importing" into Nigeria. Therefore, according to the deterrence theory of tax avoidance and tax evasion, natural and juristic persons who are risk risk-tolerant will take their chance of avoiding taxes by "re-importing" goods back into Nigeria because the probability of being caught is minimal.

Under section 23 of the Income Tax Act, export-oriented companies, manufacturing and charitable organisations are exempted from income tax. Similarly, sections 26, 28, 32-34 of the Capital Gains Act provides that gains to religious, charitable or public educational institutions, cooperative societies or trade unions are exempted from tax. Some individuals use these provisions to avoid tax as the flamboyant lifestyle of some religious leaders has been attracting critical comments from the public recently. and there have been calls for the removal of this exemption (Forbes, 2017). The authors suggest that the following criteria should be put in place before religious or registered charitable bodies could attain tax-exempt status. The organization must be registered under the state and federal laws. There should be a regulatory body in Nigeria like the Charity Commission for England and Wales. Charitable bodies file their returns and apply for the renewal of appropriate licenses annually. Moreover, business transactions by religious or charitable organizations should be taxed, and the income of the staff of these organizations should be taxed under section 3 of Personal Income Tax Act and enforced by the FIRS and the appropriate State Internal Revenue Service (SIRS).

Section 11 of the Income Tax Act provides that the interest derived by a foreign investor who advances loans to Nigerian companies is exempt from tax. Therefore, foreign investors may choose to invest in Nigerian companies by way of a loan rather than equity to avoid paying taxes.

5.2. Tax Incentives and Anti-Avoidance Provisions under the Petroleum Profit Tax Act and Other Relevant Acts

Sections 10 and 11 of the Petroleum Profits Tax Act provide tax incentives like capital allowances and allowable deductions like rent for companies operating in the oil exploration and drilling sector. The rationale for these incentives may be due to the capital-intensive nature of the investment and the need to attract investors. Conversely, section 15 of the Petroleum Profits Tax Act gives the FIRS the power to set aside artificial and fictitious transactions and impose the appropriate tax on such transactions.

In Esso Petroleum and Production Nigeria Limited & Shell Nigeria Exploration and Production Company Limited v FIRS & NNPC 2017 UAC/CA/A/402, para 7, there was a dispute on the computation and allocation of crude oil due to ambiguity in the production sharing contract and the relevant provisions of the Petroleum Profits Tax Act. The appellants referred the matter for arbitration while the respondents approached the court. Nigerian Court of Appeal decided that there is no provision by which the parties to a production sharing contract could refer tax disputes to arbitration under sections 3(g), 41 and 42 of the Petroleum Profit Tax Act. Similar cases with similar facts were decided otherwise in Shell Nigeria Exploration and Production & Ors v FIRS & Anor 2016 No. UAC/CA/A/208: 5, para 1 and Esso Petroleum and Production Nigeria Limited v NNPC 2016, UAC/CA/A/507: 3, para 4. The different outcomes in the latter cases could have been caused by the fact that the aggrieved parties may seek arbitral intervention because a contractual dispute about the lifting of crude oil was involved, apart from tax disputes.

In a bid to attract Foreign Direct Investment (FDI), section 18(1) of the Nigerian Export Processing Zones Authority Act, Chapter N107 LFN of 2004 (Processing Zones Authority Act), provides some tax incentives to enterprises within the processing zones such as exemption from all taxes, levies, duties. Likewise, section 8 of the Oil and Gas Export Free Zone Act, Chapter 07 LFN of 2004 (Export Free Zone Act), provides that approved enterprises operating within the free zone shall be exempted from all federal, state and local government taxes and levies. However, it is submitted that section 8 of the Export Free Zone Act should be amended to remove the blanket immunity from taxes and levies and such enterprises should be accessed based on the provisions of the Income Tax Act. In this regard, the authors concur with van Dorp (2016, pp. 14-17), who argues that while a lot of revenue was lost to Nigeria due to long tax holidays, the incentives did not attract enough FDI as envisaged.

5.3. Tax Incentives and Anti-Avoidance Provisions under the Personal Income Tax Act

Section 33 of the Personal Income Tax Act grants each taxpayer an allowance of N200,000 or 1% of the gross income (whichever is higher), plus 20% of the gross income. Furthermore, the sixth schedule to the Personal Income Tax Act exempts the following as deductible from the gross income-national housing fund contribution, national health insurance scheme contribution, life assurance premium, national pension scheme and gratuities. Conversely, section 17 of the Personal Income Tax Act empowers the FIRS or the SIRS to set aside artificial and fictitious transactions and impose adjustments to reflect the appropriate tax payable. Similarly, section 55 of the Personal Income Tax Act is an anti-avoidance provision that empowers the relevant tax authority to assess a taxable person and subject them to additional assessment regarding areas of non-compliance on taxes covered under the Personal Income Tax Act. Section 55 of the Personal Income Tax Act further provides that the recovery of additional tax due to non-compliance should be made within six years. However, where the taxable person or the proxy is negligent, willfully defaults or engages in any form of fraud, the six-year limit may be set aside. In addition, section 104 of Personal Income Tax Act grants the relevant tax authority the power to attach properties of the taxpayer for non-payment of tax.

In summary, in a bid to stimulate employment and encourage investment in certain sectors of the economy, tax statutes such as the Income Tax Act and the Petroleum Profit Tax Act grant investors certain reliefs and exemptions as stated above. Some of the taxpayers, especially corporations as stated in the cases above, plan their activities around these incentives to pay little or no tax to the government's taxing authorities. Some of the avoidance schemes were allowed by the courts while others were disallowed. For instance, the Court of Appeal rendered two different decisions in similar cases of AIS v FIRS (2014), and BCISL v FIRS (2016) as stated above.

6. Legal Certainty, Tax Incentives and Tax Avoidance in Nigeria

Tax avoidance constitutes a serious challenge to the revenue collection effort of the FIRS and SIRS in Nigeria because there are some loopholes in the Nigerian tax laws which some taxpayers exploit. For instance, some churches sell water, anointing oil and other products to the public and still claim the exemption granted to charitable and religious organisations under section 23 of the Income Tax Act. Tax avoidance and tax evasion contributes in no small measure to an unenviable poor tax-to-GDP ratio of 5.7 percent as at 2017 in Nigeria (OECD, 2019; Olarewaju & Olayiwola, 2019, p. 203; Faccio & Fitzgerald, 2018, p. 69; National Tax Policy, 2017, p. 2; van Dorp, 2016, p. 14). Similarly, an enormous amount of revenue is lost by the Nigerian government through tax incentives (World Bank, 2019, pp. 42-46; van Dorp, 2016, pp. 14-17). The IMF and the OECD argue that tax incentives had not been successful in attracting FDI in Nigeria (van Dorp, 2016, p. 14; OECD, 2019). In addition, using the cost-benefit analysis, the cost of tax incentives to the Nigerian economy outweighs the modest benefits of such incentives in Nigeria (van Dorp, 2016: 14-17; United States "US" Department of Treasury, 2018: 5). The MNCs manipulate these incentives to their advantage in order to pay less or no tax at all in Nigeria (World Bank, 2019, pp. 42- 46; Olanrewaju & Olayiwola, 2019, pp. 203-207; van Dorp, 2016, pp. 14-33). For instance, the thin capitalisation of companies to ensure that they are highly leveraged due to the high rate of debt to equity was used in order to enjoy the incentive of paying lower tax in terms of section 11 of the Income Tax Act (World Bank, 2019, pp. 42-46). There was no rule against thin capitalisation or the practice of excessive lending to subsidiaries in Nigeria. However, recently, section 6 of Finance Act, 2019 provides that when the interest payable is in excess of 30 per cent of the Nigerian company's earnings before interest, tax, depreciation and amortisation in the accounting period, the interest is disallowed. It seems that the aim of this provision is to reduce thin capitalisation in Nigeria companies. In addition, individuals could continue to exploit the gaps in the tax laws and use tax allowances and differences in tax rate to their advantage to avoid paying taxes in Nigeria.

Oats & Tuck (2019: 566) and Picciotto (2015), maintained that tax statutes "are uncertain on three levels of indeterminacy". The first level is linguistic, whereby the words used in a statute may be wide and capable of varied interpretation. The second level relates to liberal legality, which comprises general rules that leave tax authorities and the judges with wide discretionary powers. The third level relates to the normative character of the law where decisions about the application of law entail value judgements. For instance, sections 22, 17 and 15 of the Income Tax Act, the Personal Income Tax Act and the Petroleum Profits Tax Act respectively give the FIRS or the SIRS the power to set aside artificial or fictitious or arm's length transactions and/or to adjust such transactions so that they reflect the appropriate tax payable. Neither the laws stated above, nor any other Nigerian statutes clarify the key terms such as "artificial and fictitious transactions" or "arm's length transactions" or what constitutes unacceptable tax avoidance. This ambiguity leads to confusion when interpreting the relevant statutes. Nevertheless, unlike the Nigerian anti-avoidance provisions, the provisions under sections 80A-L of the South African Income Tax Act 58 of 1962 as amended (SA Income Tax Act), define impermissible tax avoidance arrangements and other related terms. The penalties for the commission of impermissible tax avoidance in South Africa are also provided in the SA Income Tax Act. Moreover, the Nigerian tax avoidance provisions are not as adequate as those of South Africa.

7. Concluding Remarks

The article explored the tax avoidance and tax incentive provisions under the relevant Nigerian statutes as discussed above. It was noted that the lack of clarity in the anti-avoidance provisions of the Nigerian tax laws has sometimes created confusing and conflicting decisions by the Nigerian courts. The ambiguity in the Nigerian anti-avoidance provisions that are contained in the Income Tax Act and other relevant statutes has given rise to uncertainty and unpredictability in tax avoidance cases. For instance, the advance tax ruling in Saipem case and the confusion regarding the final verdict amounts to a lack of legal certainty and the poor enforcement of the relevant tax laws in Nigeria. Furthermore, the ambiguity of sections 3(g), 41 and 42 of Petroleum Profit Tax Act on whether tax disputes could be resolved by arbitration led to two conflicting decisions of the same court (Esso Petroleum and Production Nigeria Limited & Shell Nigeria Exploration and Production Company Limited v FIRS & NNPC (2017); and Shell Nigeria Exploration and Production v FIRS & Anor (2016)). It was also observed that the permissive laws on tax incentives are open to abuse, and some individuals exploit them to avoid tax liability. For instance, individuals incorporate charitable and religious organizations which are tax-exempt under section 23 of Companies Income Tax Act and use them for personal gains without incurring any tax liability. Therefore, it is submitted that the Income Tax Act and other relevant tax laws should be carefully amended to enact clear and adequate anti-avoidance provisions to curb aggressive tax avoidance and tax evasion in Nigeria. Furthermore, the gaps in the different tax statutes as enumerated above should be remedied to increase deterrence in line with the deterrence theory of tax avoidance and evasion. The uncertainty in tax laws made detections and the prosecution of persons involved in tax avoidance difficult. In addition, it is recommended that the anti-avoidance provisions under the various statutes such as section 22 of the Income Tax Act should be carefully amended to define and clarify the appropriate terms such as “unacceptable tax avoidance”, “arm’s length” or “artificial transactions” to promote legal certainty and better interpretation of the relevant laws by the courts, regulatory bodies and other relevant persons in Nigeria.

8. References

Adebisi, J.F. and Gbegi, D.O. (2013). Effect of Tax Avoidance and Tax Evasion on Personal Income Tax Administration in Nigeria. *American Journal of Humanities and Social Sciences*,1(3), pp. 125-134.

Allingham, M. & Sandmo, A. (1972). Income Tax Evasion: A Theoretical Analysis. *Journal of Public Economics*, 1(3-4), pp. 323-338.

Almendral, V. R. (2013). Allocating Taxing Powers within the European Union. In Richelle, I., Schön, W. and Traversa, E. (Eds.) *MPI Studies in Tax Law and Public Finance*, Vol. 2 (New York Springer).

Alstadsæter, A., Johannesen, N. & Zucman, G. (2018). *Tax Evasion and Tax Avoidance.* http://gabriel-zucman.eu/files/AJZ2018b.pdf.

American International School of Lagos (AIS) v FIRS (2014) Unreported TAT/LZ/CIT/059/2014.

Anesa, M., Gillespie, N., Spee, A. & Sadiq, K. (2019). The Legitimation of Corporate Tax Minimization. *Accounting, Organizations and Society*, pp. 17-39.

Animashaun, O.O. (2017). A Legal Analysis of the Extent and Limit of the Nigerian State Powers of taxation. *Doctoral dissertation.* University of Ilorin.

Arezki, R., Rota-Graciozi, G. & Senbet, L.W. (2017). Natural Resources and Tax Avoidance. In OH Fjeldstad, S. K Jacobsen, P.H Ringstad, H.P. Ngowi, Å. J. R. Dahl and I. Hestad (Eds.). *Lifting the Veil of Secrecy Perspectives on International Taxation and Capital Flight from Africa*. Michelsen Institute.

Barker, W. B. (2009). The Ideology of Tax Avoidance. *Loyola University Chicago Law Journal*, 40(2), pp. 229-233.

Barkoczy, S. (2017). *Foundations of Taxation Law*. 9th ed., Oxford: Oxford University Press.

Barriosa, S., Ivaškaitė-Tamošiūnėa, V., Mafteia, A., Narazania, E. and Vargab, J. (2020). Progressive Tax reforms in Flat Tax Countries. *Eastern European Economics*, 58(2), pp. 83-107.

Best Children International Schools Limited (BCIS) v FIRS (2016), Unreported CA/A/393/2016.

Blaufus, K., Braune, M., Hundsdoerfer, J. & Jacob, M. (2015). Does Legality Matter? The Case of Tax Avoidance and Evasion. *Arqus Discussion Paper*, No. 193, Arbeitskreis Quantitative Steuerlehre (arqus), Berlin. https://www.econstor.eu/bitstream/10419/121168/1/837148987.pdf.

Brooks, K. (2009). Tax Sparing: A Needed Incentive for Foreign Investment in Low-Income Countries or an Unnecessary Revenue Sacrifice. *Queen's Law Journal*, 34(2), pp. 1-38.

Christians, A. (2014). Avoidance, Evasion, and Taxpayer Morality. Washington University. *Law Journal of Law and Policy*, 44, pp. 39-60.

Christians, A. (2017). Distinguishing Tax Avoidance and Evasion: Why and How? *Journal of Tax Administration*, 3(2), pp. 5-21.

Croome, B. & Croome, J. (2017). *Street Smart Taxpayers: A Practical Guide to Your Rights in South Africa.* Claremont, Juta & Company Limited.

Dare, C.; Du Plessis, S. & Jansen, A. (2019). Tax Revenue Mobilisation: Estimates of South Africa's Personal Income Tax Gap. *South African Journal of Economic and Management Sciences*, 22(1), pp. 1-8.

Esso Exploration and Production Nig. Ltd & Anor v NNPC (2016) Unreported CA/A/507/2012.

Esso Petroleum and Production Nigeria Limited & Shell Nigeria Exploration and Production Company Limited v FIRS & NNPC (2017) Unreported CA/A/402/2012.

EU Report (2017). Aggressive Tax Planning Indicators: Final Report. TAXUD/2016/DE/319, https://ec.europa.eu/taxation_customs/sites/taxation/files/taxation_papers_71_atp_pdf.

Eurodad, (2017). *Tax Games: The Race to The Bottom Europe's Role in Supporting an Unjust Global Tax System*. https://eurodad.org/files/pdf/1546849-tax-games-the-race-to-the-bottom.pdf.

Evans, C. (2007). Barriers to Avoidance: Recent Legislative and Judicial Developments in Common Law Jurisdictions. *Hong Kong L.J.*, 37(1), pp. 103- 132.

Faccio, T. & Fitzgerald, V. (2018). Sharing the Corporate Tax Base: Equitable Taxing of Multinationals and the Choice of Formulary Apportionment. *Transnational Corporations*, 25(2), pp. 67–89.

Faulhaber, L.V. (2009-2010). Sovereignty, Integration, and Tax Avoidance in the European Union: Striking The Proper Balance. *Columbia Journal of Transnational Law*, 4, pp. 177-242.

Federal Ministry of Finance of Nigeria (2017). *Nigerian Tax Policy 2017*. https://pwcnigeria.typepad.com/ files/fec-approved-ntp---feb-1-2017.pdf.

Filipczyk, H. (2015). Why is Tax Avoidance (Im)Moral? Ethics, Metaethics and Taxes. *Toruński Rocznik Podatkowy/ Toruń Tax Yearbook*, pp. 28-48.

Finance Act (2019). *Gazette of the Federal Republic of Nigeria*, 6(107).

Forbes, (2017). *Is it Time to Tax Nigeria's Churches?* https://www.forbesafrica.com/focus/2017/06/14/time-tax-nigerias-churches/.

Freedman, J. (2004). Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle. *BTR*, 4 pp. 332-357.

Freedman, J. (2006). The Tax Avoidance Culture: Who is Responsible? Governmental Influences and Corporate Social Responsibility. *Current Legal Problems*, 59(1), pp. 359-390.

Freedman, J., Loomer, G. & Vella, J. (2009). Corporate Tax Risk and Tax Avoidance: New Approaches. *BTR*, 1, pp. 74-116.

Gadžo, S. and Klemenčić, I. (2014). Time to Stop Avoiding the Tax Avoidance Issue in Croatia? A Proposal Based on Recent Developments in the European Union. *Financial Theory and Practice*, 38(3), pp. 277-302.

Gribnau, H. (2013). Equality, Legal Certainty and Tax Legislation in the Netherlands Fundamental Legal Principles as Checks On Legislative Power: A Case Study. *Utrecht Law Review*, 9(2), pp. 52-74.

IMF (2015). *Options for low Income Countries' Effective and Efficient Use of Tax Incentives for Investment: A Report to the G-20 Development Working Group by the IMF, OEC04-D, UN and World Bank*. https://www.imf.org/external/np/g20/pdf/101515.pdf.

Income Tax Act 58 of 1962 as amended.

InvestorWords (2020). *Thin Capitalization*. http://www.investorwords.com/14888/thin _capitalization.html#ixzz6LxDoNoih.

Kades, E.A. (2002). Drawing the line Between Taxes and Takings: The Continuous Burdens Principle, and Its Broader Application. *Northwestern University Law Review*, 97(1), pp. 189-265.

Karlsson, J. & Matthiasson, T. (2015). Tax Evasion, Tax Avoidance and the Influence of Special Interest Groups: Taxation in Iceland from 1930 to the Present. *Nordic Tax Journal*, 2, pp. 1–17.

Kirchlera, E, Maciejovskyb, B. & Schneiderc, F. (2003). Everyday Representations of Tax Avoidance, Tax Evasion, and Tax Flight: Do Legal Differences Matter?. *Journal of Economic Psychology*, 24, pp. 535–553.

Lederman, L. (2010). W(h)ither Economic Substance?. *Iowa Law Review*, 95, pp. 389-442.

Lee B. B., Dobiyanski, A. & Minton, S. (2015). Theories and Empirical Proxies for Corporate Tax Avoidance. *Journal of Applied Business and Economics*, 17(3), pp. 21-34.

Lenz, H. (2018). Aggressive Tax Avoidance by Managers of Multinational Companies as a Violation of their Moral Duty to Obey the Law: A Kantian Rationale. *Journal of Business Ethics*, pp. 1-17.

Loutinsky, G. (2012). Gladwellian Taxation: Deterring Tax Abuse through General Anti-Avoidance Rules. *Houston Business and Tax Law Journal*, pp. 83-120.

MacNiven v Westmoreland (2001) STC 237.

Mclaren, J. (2008). The Distinction Between Tax Avoidance and Tax Evasion Has Become Blurred in Australia: Why Has It Happened?. *Journal of the Australasian Tax Teachers Association*, 3(2), pp. 141-163.

Neck R., Wächter, J.U., & Schneider, F. (2012). Tax Avoidance Versus Tax Evasion: On Some Determinants of the Shadow Economy. *International Tax and Public Finance*, 19(1), pp. 104-117.

Nigerian Export Processing Zones Authority Act, Chapter N 107 LFN of 2004.

Nigerian Liquefied Natural Gas (Fiscal Incentives, Guarantees and Assurances) Act, Chapter N8, LFN 2004.

Oando Plc v FBIR (2014) 16 TLRN 99.

Oats L., & Tuck, P. (2019). Corporate Tax Avoidance: Is Tax Transparency the Solution?. *Accounting and Business Research*, 49(5), pp. 565-583.

Obadina, D.A. (2015). Tackling Aggressive Tax Avoidance in Nigeria: An Agenda for Reform. *Ife Juris Review*, 4(1), pp. 38-57.

Organisation for Economic Co-operation and Development. (2019). *Revenue Statistics in Africa 2019-Nigeria*. https://www.oecd.org/tax/tax-policy/revenue-statistics-africa-nigeria.pdf.

Organisation for Economic Co-operation and Development. (2020). *Glossary of Tax Terms* https://www.oecd.org/ctp/glossaryoftaxterms.htm#T

Oil and Gas Export Free Zone Act, Chapter 07 LFN of 2004.

Olanrewaju, O.M. and Olayiwola, J.A. (2019). Corporate tax planning and financial performance in Nigerian non-financial quoted companies. *African Development Review*, 31(2), pp. 202–215.

Olokun Pisces Limited v FIRS (2014) Unreported TAT/LZ/CIT/076/2014

Onu, D., Oats, L., Kirchler, E. & Hartmann, A.J. (2019). Gaming the system: An Investigation of Small Business Owners' Attitudes to Tax Avoidance, Tax Planning, and Tax Evasion. *Games*, 10(4), pp. 1-17.

Ordower, H. (2010). The Culture of Tax Avoidance. *Saint Louis University Law Journal*, pp. 1-68.

Otusanya, O.J. (2010). The Role of Multinational Companies in Tax Evasion and Tax Avoidance: The Case of Nigeria. *Critical Perspectives on Accounting*, 22, pp. 316-322.

Pasternak, M. & Rico C. (2008). Tax Interpretation, Planning, and Avoidance: Some Linguistic Analysis. *Akron Tax Journal*, 23(2), pp. 34-78.

Payne, D.M. & Raiborn, C.A. (2018). Aggressive Tax Avoidance: A Conundrum for Stakeholders, Governments, and Morality. *J Bus Ethics*, 147, pp. 469–487.

Personal Income Tax Act Chapter P 8, LFN, 2004.

Petroleum Profits Tax Act Chapter P 13, LFN, 2004.

Prijohandojo, K. (2016). *New Thin Capitalization Rules*. https://www.taxand.com/our-thinking/news/new-thin-capitalisation-rules/

Sandmo, A. (2005). The Theory of Tax Evasion: A Retrospective View. *National Tax Journal*, 58(4), pp. 643-663.

Saipem Contracting Nigeria Limited v FIRS (2014) 15 TLRN 76.

Schlenther, B. (2017). The Impact of Corruption on Tax Revenues, Tax Compliance and Economic Development: Prevailing Trends and Mitigation Actions in Africa. *E-Journal of Tax Research*, 15(2), pp. 217-242.

Shell International v FBIR (2004) 3NWLR (Pt 859) 46.

Shell Nigeria Exploration and Production & others v FIRS & Anor (2016) Unreported CA/A/208/2012.

Shell Petroleum Development Company Limited v FBIR (1996) NWLR 256.

Slemrod, J. & Yitzhaki, S. (2002). Tax Avoidance, Evasion, and Administration. In Auerbach, A.J and M. Feldstein, M. (Eds.). *Handbook of Public Economics*. New York: Elsevier.

Storm, A. & Coetzee, K. (2018). Towards Improving South Africa's Legislation on Tax Evasion: A Comparison of Legislation on Tax Evasion of the USA, UK, Australia and South Africa. *The Journal of Applied Business Research*, 34(1), pp. 151-168.

The JGC Corporation v FIRS (2014) 15 TLRN 105.

Ulrich, S. (2013). International Company Taxation: An Introduction to the Legal and Economic Principles. Springer Berlin-Heidelberg.

United Capital Assets Management Limited v FIRS (2018), Unreported TAT/LZ/CIT/006/2018.

US Department of Treasury, Resource Centre: Tax Expenditures (2018). https://www.treasury.gov /resource-center/tax-policy/Pages/Tax-Expenditures.aspx.

van Dorp, M. (2016). How Shell, Total and Eni Benefit from Tax Breaks in Nigeria's Gas Industry: The Case of Nigeria Liquefied Natural Gas Company (Amsterdam, Centre for Research on Multinational Corporations).

W.T. Ramsay Limited v Inland Revenue Commissioners (1982) A.C. 300.

Walker, R. (2004). *Ramsay 25 years on: Some Reflections on Tax Avoidance*. LQR, pp. 412-427.

World Bank. (2019). The Changing Nature of Work. http://documents.worldbank.org/curated/en/816281518818814423/pdf/2019-WDR-Report.pdf.