Legal Mechanism for Blowing the Whistle against Incidence of Tax Haven in Nigeria

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Abstract: Tax havens are jurisdictions with little or no direct tax imposition. The manifestation of the activities of tax haven is tax evasion and avoidance in high taxing jurisdictions. This often leads to capital flight to tax havens at the risk of economic misfortunes for the high tax jurisdictions. Tax haven has become a matter of global concern which has warranted several international responses especially from the Organisation of Economic Cooperation and Development. Nigeria has not been proactive with the global move. Our tax system is not fully developed to tackle tax avoidance and evasion from tax payers. At the level of international cooperation, Nigeria needs to enter into bilateral and multilateral treaties in this regard. At the domestic level, this paper reckons with the important role the use of whistle-blowers could have on information gathering by the tax authorities. Regrettably, Nigeria only has pockets of policies and codes which lack legal force to adequately guarantee the protection of whistleblowers. This, of course, limits the information gathering potentials from whistleblowers. This paper suggests the overhaul of existing tax codes and more visibility of Nigeria in the international scene in the battle against the incidence of tax havens.

Keywords: Tax Avoidance, Tax Evasion, Tax Haven, Capital Flight, Whistleblower.

Introduction

Countries over the world are devising means to raise enough revenue to meet their needs. Taxation is a major means by which a government finances its budget and runs the economy. While many countries have high tax rate, some other countries who feel they don't have the means to compete with other nations have reduced their tax to little or nothing in order to encourage foreign direct investments from multi-national companies which in turn will lead to increased rate of employment and development of the country. These countries are generally referred to as tax havens. Most of them are either very small countries or do not have mineral resources like most other countries which would ordinarily attract investment from companies. The removal of tax is therefore used as an enticement.

While it is within the purview of a nation to decide on its tax regime, global concern and outcry have been raised as to the activities of these tax havens. The concerns are not unconnected with the fact that these tax havens serve as avenue for multinational corporations in high taxing jurisdiction to avoid or evade payment of tax to their host government. This act is effectively perpetrated by the secret banking policies of these countries. The ultimate result is a huge capital flight from high tax jurisdictions to these tax havens.

For Nigeria, oil and gas revenue is the major source of her revenue. Her crude oil production capacity is approximately 2million barrels per day. This sector accounts for 40 percent of Nigeria's gross domestic product, and 80 percent of the government's total revenue and more than 90 percent of its exports. Nigeria also has abundant natural gas reserves, estimated at 166 trillion standard cubic feet, which regrettably remains relatively underexploited (Mezu n.d. 975). Uthman (2010/2011) maintains that petroleum profit tax is responsible for 60% of government revenue derived from taxation paid by upstream oil companies.

The bottom line remains that over the years, since the discovery of oil in commercial quantity, Nigeria has depended heavily on revenue accruing from oil and gas export. Little emphasis was paid to developing the revenue generating capacity of non-oil and gas revenue. The sharp decline in oil prices at the international market and up to 60 per cent fall in crude oil exports due to sabotage and vandalisation of oil export terminals and pipelines have reduced Nigeria's overall revenues (Ministry of Budget and National Planning 2017). The implication is the economic recession which the nation has been plunged into. One of the options open to the country is to resort to non-oil revenue. Concerted efforts made in this direction led to the increase in non-oil

revenues from N1, 357 billion in 2013 to N1, 967 billion in 2015. However, this is but a low share of 3 per cent GDP when compared to what is obtainable in other emerging economies with an average of 16 per cent of GDP from non-resource taxes (Ministry of Budget & National Planning 2017).

Ordinarily, the activities of tax haven had never given Nigeria a cause for concern. However, recently, publication by Panama papers made revelations of how the Mossack-Fonseca Law Firm was used as an instrument of capital flight from individuals and corporate bodies from other countries to Panama which is a tax haven. Some Nigerian citizens and companies where mentioned in the publication. These revelations have made us realise the effect the activities of tax haven may have on the revenue of the country.

Tax avoidance and evasion is prevalent in Nigeria. According to the Nigerian Stock Exchange, 85 percent of corporate tax revenue in the country accrues from the 196 listed companies compared to the 30,000 companies registered with the Corporate Affairs Commission (Adebisi & Gbegi 2013). From the estimated one million companies registered by the Corporate Affairs Commission, an estimate of 50 percent does not pay company income tax (Chambers n.d. cited in Uthman 2010).

Tax avoidance and evasion devices, whether for the purpose of repatriation to tax havens or not, thrives in secrecy. There is also a high level corroboration with professionals of different categories. In order to deal with this challenge, tax authorities need to get privileged information regarding the schemes devised to avoid and evade tax. This obviates the role of whistleblowers to give tax authorities useful tips. However, whistleblower protection mechanism is yet to be fully developed in Nigeria.

These challenges put the legal mechanisms and capacity of the tax authorities in Nigeria to question. This suggests that the government would have to put in place a well restructured framework of resources generation, allocation and distribution, well reformed tax regime, effective tax legislation to tackle tax avoidance, tax evasion and illegal capital flight (Bakre 2006).

Tax Haven

Tax haven is a phrase used to describe countries that have little or no tax regime. The challenges with finding a satisfactory definition for tax haven, made the Accountability Office of the U.S. Government in its December 2008 report on the use of tax havens by American corporations, identified the following characteristics: nil or nominal taxes; lack of effective exchange of tax information with foreign tax authorities; lack of transparency in the operation of legislative, legal or administrative provisions; no requirement for a substantive local presence of corporations; and self-promotion as an offshore financial center (Ordu & Anele 2015).

Individuals and corporate bodies generally do not want to pay tax. Ordinarily, corporations would want to operate in tax free jurisdiction. They establish shell subsidiaries or move themselves to areas with reduced or no taxation levels relative to average international taxation. This development creates a situation of tax competition among states. Different jurisdictions are havens for different kind of taxes, and different categories of persons and companies (Ordu & Anele 2015). For instance, in Nigeria S. 8 of the Oil and Gas Export Free Zone Act 1996 exempt enterprises operating within the Export Free Zone from all Federal, State and local government taxes, levies and rates. The CITA also provides several tax reliefs for companies with pioneer status, operating in rural areas, or involved in agricultural production.

Countries, such as Switzerland, Panama, and various nations in the Caribbean, have turned the guarantee of bank secrecy into a national asset. Banks operating in those countries are legally entitled and required, to refuse information to tax agencies concerning their clients. Funds from both legal and illegal sources are often channelled through countries with strict bank secrecy laws in order to avoid taxation and other liabilities (Van Houtte and McLure 2010). Many tax havens are thought to have connections to fraud, money laundering, capital flight, terrorism financing, tax avoidance and evasion. However, we shall be concerned with the incidence of tax haven that leads to direct loss of tax revenue.

Tax Avoidance

Obafemi (2014) defines tax avoidance as the reducing or minimizing of one's tax liability by carefully arranging one's affairs in such a way as to take advantage of loopholes in the tax provisions. It is the intentional act of a tax payer paying less than what he ought to pay to the tax authority. Kwaghkehe and Samuel (n.d. 160) are of the view that tax avoidance includes situations where a person reduces or eliminates tax through transactions which comply with the letter of the law but violate the spirit and intent of the law. The later definition takes a natural law school viewpoint of the concept.

The terminologies tax avoidance and evasion first got judicial recognition in 1920 by Justice Oliver Wendel Holmes in the case of Bullen v. Wisconsin 240 U.S. 625,630. In answering the question of the legality of tax

avoidance, Lord Clyde in the case of Ayrshire Pullman Motor Services and D. M. Ritchin v. Commissioner of Inland Revenue (1920) 14 Tax Cas 754, 763-764 held that: “No man in this country is under the smallest obligation moral or otherwise so to arrange his legal relations to his business or to his property as to enable the Inland Revenue to put the largest possible shovel into his stores. The Inland Revenue is not slow and quite rightly to take every advantage, which is open to it under the taxing statutes for the purpose of depleting the taxpayer’s pocket. And the taxpayer is in like manner entitled to be astute to prevent so far as he honestly can the depletion of his means by the Revenue. Every company has the option of carrying out tax planning in order to minimize tax liability within the law of the territory in which it operates.”

In support of the above, Lord Tomlin in the case of IRC v. Duke of Westminster (1936) A.C. 1 stated that it is within the right of a tax payer “to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax. This so-called doctrine of ‘the substance’ seems to me to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable”.

It is sometimes difficult to distinction between tax avoidance and tax evasion. This problem is even more compounded when one tries to pinpoint the departure line, as a transaction which “innocently” began as avoidance may eventually end up as tax evasion (Odubunmi 2015). In cognisance of this fact, the court in the case of Federal Commissioner of Taxation v Westgarth (1985) 18 Common Law Report (CLR) 396 at 414 noted that: “the word 'avoidance' is, I think, to be contrasted with the word 'evasion'. It involves, I think, no notion of escaping by any device or artifice, but conveys simply the notion of actually escaping through not being called upon to pay”.

Tax avoidance can be perpetrated by means of internal or external mechanisms. The internal means involve avoiding tax with the income still remaining within the country. External means would lead to capital flight of income into tax havens. There are various provisions in the tax statute that gives room for a tax payer to coordinate his affairs without breaking the law so as to avoid heavy tax without actually violating the law.

Under S. 24 of Companies Income Tax Act (CITA) certain expenses are tax allowable. All expenses for that period, by that company, wholly, exclusively, necessarily and reasonably incurred in the production of those profits including, but without otherwise expanding or limiting the generality of the foregoing- (a) any sum payable by way of interest on any money borrowed and employed as capital in acquiring the profits; (b) rent for that period, and premiums, the liability for which was incurred during that period, in respect of land or building occupied for the purposes of acquiring the profits, subject, in the case of residential accommodation occupied by employees of the company, to a maximum of 100% of the basic salary of employees; (d) any outlay or expenses incurred during the year in respect of- (i) salary, wages or other remuneration paid to the senior staff and executives; (ii) cost to the company of any benefit or allowance provided for the senior staff and executives, which shall not exceed the limit of the amount prescribed by the collective agreement between the company and the employees and approved by the Federal Ministry of Employment, Labour and Productivity, and the Productivity, Prices and Income Board, as the case may be; (e) any expenses incurred for repair of premises, plant, machinery or fixtures employed in acquiring the profits, or for the renewals, repair or alteration of any implement, utensil or articles so employed; (f) bad debts incurred in the course of a trade or business proved to have become bad during the period for which the profits are being ascertained, and doubtful debts to the extent that they are respectively estimated to the satisfaction of the Board to have become bad during the said period notwithstanding that such bad or doubtful debts were due and payable before the commencement of the said period.

A company may leverage on this provision to increase its capital expenditure thereby reducing its profit and consequently the tax payable to the government. While the company may be said to be investing into its future, the government loses revenue as a result. This is simply tax planning and the law has no grouse with that provided it is done within the ambit of the law.

Companies may also create trust fund whether operational or otherwise into which’s benefit the company may make donations. Donations so made are tax allowable. However, the CITA limits the making of donation of amount which is equal to 15 percent of the total profits or 25 percent of the tax payable in the year of the donation, whichever is higher. Also, the Act restricted the donations to institutions contained in the fifth schedule of the Act. In other words, even though a company may choose to make donations to bodies outside those listed out in the fifth schedule, such donations would be liable to tax (S. 25 CITA).

Under the Personal Income Tax Act (PITA) and CITA a tax payer can only reduce tax but cannot totally avoid payment of tax. This is due to the minimum tax requirement contained in the various tax laws. Under the Sixth Schedule of the PITA, where after the allowable deductions the applicable tax is less than 1% of the gross earning, the tax payable is liable to a tax of 1% of the gross earning. S. 33 of the CITA provides that where in any year of assessment the ascertainment of total assessable profits from all sources of a company results in a loss, or where a company's ascertained total profits results in no tax payable or tax payable which is less than the minimum tax, there shall be levied and paid by the company the minimum tax as prescribed by subsection (2) of this section.

> (2) For the purposes of subsection (1) of this section the minimum tax to be levied and paid shall- (a) if the turnover of the company is N500,000 or below and the company has been in business for at least four calendar years, be
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> (i) 0.5 per cent of gross profit; or (ii) 0.5 per cent of net assets; or (iii) 0.25 per cent of paid-up share capital; or (iv) 0.25 per cent of turnover of the company for the year, whichever is higher; or (b) if the turnover is higher than N500,000, be whatever is payable in paragraph (a) of this subsection plus such additional tax on the amount by which the turn-over is in excess of N500,000 at a rate which shall be 50 per cent of the rate used in paragraph (a) (iv) of this subsection. Sub section 3 however makes exemption for certain category of companies.

Under the PITA, one of the tax allowable deductions is pension savings. Under s. 4 Pension Reform Act 2014 an employer and employee can make a minimum contribution of 10% and 8% respectively. Where they, in the quest to avoid tax, decide to contribute above the minimum, under S. 10 (2) of the Act such additional contribution is taxable.

Oyedele (2015) contends that the minimum tax provisions force companies to pay tax out of their capital if they make losses or little profits. This, he states, does not promote investment and growth. Commencement rules under the CITA imposes double tax burden on start-up companies at the point of their vulnerability and struggle to survive. Taxes according to him should be paid only once. Uthman (2010) suggests that the minimum taxation clause and high tax burdens in Nigeria are partly responsible for companies' tax avoidance, evasion and relocation to tax friendly jurisdiction.

While the above concerns are legitimate and valid, one would argue on the other hand that the minimum tax clauses are part of the anti-avoidance mechanism which the act has put in place to check the practice. It suggests the helplessness of our tax administration authorities' ability to effectively tackle the ills of tax avoidance. Hence, the mere resort to contend themselves with getting little rather than nothing from tax payers in form of minimum tax clauses.

The external tax avoidance techniques as noted earlier take the form of capital flight to jurisdictions referred to as tax havens. These could be in form of transfer pricing, earning striping, double Irish and Dutch sandwich or taking advantage of tax incentives in certain industries before relocating to tax havens. We shall evaluate some of these schemes.

Eyitayo (n.d. 6) states that transfer Pricing, means the "setting, analysis, documentation, and adjustment of charges made between related parties for goods, services, or use of property (including intangible property)". Transfer pricing he submits is a potent strategy with far-reaching consequence of depriving revenue accruable to host governments of high-tax jurisdictions in favour of low-tax jurisdictions. The making of rules that require the use of arms-length transaction principle can be helpful to curtail this. Arms-length principle entails that the price should be equivalent to what is obtainable at the open market between unrelated and independent companies. Transaction between related or affiliated parties must be conducted as if they were unrelated, so that the issue of conflict of interest does not arise (Eyitayo n.d. 7).

Another method of shifting profits from a high-tax jurisdiction to a tax haven is earnings stripping. This means borrowing more in the high-tax jurisdiction and less in the low-tax one. Debt shifting can be achieved without changing the overall debt exposure of the firm as either the debt is associated with related firms or unrelated debt is not subject to tax by the recipient. For instance, a foreign parent company may lend to its U.S. subsidiary. Alternatively, an unrelated foreign borrower not subject to tax on U.S. interest income might lend to a U.S. firm (Ordu & Anele 2015).

S. 78 (1) and (2) CITA imposes withholding tax of 10 per cent on interest accruing from loans**.** This can be avoided by thin capitalisation. In thin capitalisation, a subsidiary in a high-tax jurisdiction would have to borrow more from another subsidiary in a low-tax jurisdiction, the taxes such subsidiary pays in a high-tax jurisdiction is greatly reduced because apart from the capital it is meant to pay back, it also pays with interest which are tax

deductible (Eyitayo n.d. 11). Under S. 11 (1) CITA interest payable on foreign loans are tax exempted in accordance with Table I of the Third Schedule to this Act. Corporations take advantage of this provision to avoid tax. This raises a need to reconsider this provision of the Act.

Double Irish and Dutch Sandwich is another scheme employed by multinational companies to reduce their tax obligations. This involves three companies within the same entity but with separate personalities. One would be located in a high tax jurisdiction, maybe due to availability of market, materials needed for manufacturing, cheap labour or other reasons; the remaining two would be located in low tax jurisdictions. The first company enters a cost sharing agreement with the other two companies located in tax havens to exploit intellectual property such as patents, copyright or trademarks rights through the use of its transfer pricing rules. The subsidiary in the tax haven is entitled to royalties from the parent company. This means reduced tax for the parent company as the royalties paid can be claimed as deductible expenses. The subsidiary on the other hand only pays little or no tax by virtue of their operating in a tax haven (Eyitayo n.d. 13-14).

Another means of tax avoidance happens where a company takes advantage of generous tax incentives provided by the government of a high taxing jurisdiction and the company folds up immediately after the lapse of the incentives relocating to a tax haven. Nigeria is more susceptible to this kind of tax avoidance as a result of the many tax incentives available to companies in certain industries. For instance, companies which attain pioneer status under the Industrial Development (Income Tax Relief) Act are entitled to 5 years tax holiday and 7 years for those companies located at economic disadvantaged Local Government Areas (Bhadmus 2013). A company may decide to leave Nigeria after 5 or 7 years of enjoying this incentive in Nigeria. S. 24 Nigerian Investment Promotion Commission Act even makes it easier for them to do so as it guarantees unconditional transferability of funds of such foreign investor. So many other incentives abound which multinational companies can take advantage of under the various laws that leans towards industrial promotion in Nigeria.

Tax avoidance, also referred to as tax planning, is a deliberate, but legally acceptable way of escaping tax payment. Though legally permissible, tax avoidance in extreme cases may raise some ethical issues when they are aggressively embarked upon such that it becomes detrimental to government revenue (Jim-Suleiman 2015 citing Cameron 2013). The ultimate consequence is that several billions of naira accruable from tax is lost every year, thereby denying government additional revenue that could be used to finance national budgets, execute projects, infrastructural development and provision of social amenities (Jim-Suleiman 2015).

Tax Evasion

Jim-Suleiman (2015) views tax evasion as a general term used to describe efforts by individuals, firms, trusts and other entities to illegally reduce their tax liabilities or fail to pay tax as and when due or at all. It usually entails taxpayers' deliberate misrepresentation or concealment of the true state of affairs to the tax authorities in order to reduce tax liabilities. It particularly involves dishonest tax reporting such as declaration of less income, profits or gains or overstatement of deductions (Kwaghkehe & Samuel n.d. 160). In the face of law, tax evasion is a crime and subject to execution by way of fine, imprisonment or even both in many countries of the world.

Gurama, Mansor & Pantamee (2015) maintains that tax evasion may either by partial or full. Partial evasion occurs when individual or corporate entity under state its earnings for the purpose of tax and declare low income. Full evasion on the other hand occur when the person or corporate entity fail to register with tax authorities to enrol in the tax system or outright refusal to remit tax. "This act comprises, in specific, fraudulent tax reporting like declaring less earnings and overstressing deductions. Therefore, in a nutshell, tax evasion is representing illegal practices by taxpayer to escape his civic responsibility imposed by the law and generally accepted by the society or nation."

It is apt to note that only the provisions of S. 26 Value Added Tax Act and S. 164 Custom and Excise Management Act makes reference to an offence known as tax evasion under Nigerian statutes. The other tax statutes did not create any offence so explicitly known. On the authority of S. 36 (12) of the Constitution, a person cannot be punished for any offence not specifically provided for by an Act of the national or state houses of Assembly. It therefore mean that a person can only be prosecuted for tax evasion under the above the stated statutes. However, for the sake of convenience, tax evasion is a generic term used to describe the totality of legal provisions that prohibits or otherwise criminalises any scheme adopted to deprive the state of revenue accruable to it be way of tax. In other words, what may amount to tax evasion in country A may not be tax evasion in country B. It just depends on the provisions of the applicable laws in the various countries.

According to the findings of Obafemi (2014), in a survey carried out in Ibadan, Nigeria, the following were identified as causes of Tax evasion and Tax avoidance: corruption in public office, inadequate tax education and awareness, misappropriation of taxes collected, ignorance of the tax authority, lack of adequate enforcement for default, proliferation of taxes, loopholes in the tax laws, inequitable distribution of income, absence of 'Quid Pro Quo' i.e. governmental responsibility of providing basic social amenities, high level of illiteracy and high

tax rates. Uthman (2010) also identify high tax rate in Nigeria as partly responsible for making tax evasion more attractive. Elsewhere, growth in self employment, increase in internet transactions (globalisation), increase in multinational companies- global mergers and acquisition were identified for adding to the prevalent and increase in tax evasion.

Tax evaders in Nigeria would easily blame government irresponsibility and misappropriation of public funds as justification for their actions. While this reason may regrettably be the reality, it is not valid in view of the definition of tax as contained in the National Tax Policy (NTP) of 2017 wherein tax was defined as any compulsory payment to government imposed by law without direct benefit or return of value or a service irrespective of the name it is called. PITA defines tax as any income tax *imposed* in conformity with the provisions of the Act (italics are mine). This definition has judicial corroboration in the case of Mathew v. Chicory (1938) 60 C.L.R. 263 where tax was defined as "a *compulsory* exaction of money by a public authority for public purposes" (italics are mine). What is more, payment of tax is a constitutionally imposed duty on every citizen to declare his income honestly to appropriate and lawful agencies and pay his tax promptly (s. 24 f. 1999 Constitution). In view of the foregoing, irrespective of the fine motives of anyone, tax evasion is a criminal offence punishable according to law.

Tax may be evaded where a corporation over-bloats its cost of operations; making claims of unmerited tax allowances; financial malpractices. Profit-laundering techniques may also be employed by major corporations by the use of offshore trusts, foundations, charities, holding companies, international business corporations, special purpose vehicles, and artificial transactions.

S. 94 CITA provides for tax offences which could well be classified as tax evasion. These offences range from: any person obtaining any deduction, set-off, relief or repayment in respect of tax for any company, or who in any return, account or particulars made or furnished with reference to tax, knowingly; (a) makes false statement or false representation; or (b) aiding, abetting, assisting, counselling, inciting or inducing any other person- (i) to make or deliver any false return or statement under this Act (ii) to keep or prepare any false accounts or particulars concerning any profits on which tax is payable under this Act; or (iii) unlawfully to refuse or neglect to pay tax, shall be guilty of an offence and shall be liable on conviction to a fine of N l,000 or to imprisonment for five years, or to both such fine and imprisonment.

Similar offences are provided for in CITA. S. 94 provides for a generic offence of failure to comply with any provisions of the Act. S. 95 makes it an offence to make incorrect returns or understating any income liable to tax under the Act; or giving incorrect information in relation to a matter affecting tax liability of a person. S. 96 relates to false statements and returns or aiding and abetting commission of the substantive act. Ss. 51-59 of the Petroleum Profit Tax Act provides for offences and penalties for tax offences. For the Federal Inland Revenue Service (Establishment) Act it is contained in Ss. 40-43. Ss. 25-37 of the Value Added Tax Act provides for tax offences under the Act. S. 164 (b) Custom and Excise Management Act provides that a person who knowingly in anyway engages in fraudulent evasion of excise duty payable on any goods commits an offence liable to a fine of six times the value of the goods or two years imprisonment or both. S. 26 Value Added Tax Act prohibits a person from participating in or taking steps with the intention of evasion of the tax by him or any other person. Such offender is liable to the fine of at least N30,000 or at most three years imprisonment.

The controversy surrounding the distinction between tax avoidance and tax exemption lies in the fine point of penal liability imposed upon the latter by the applicable law in force. The judicial attitude in Nigeria to tax evasion and avoidance is summarised in the words of Bairamain JSC in the case of Akinsete Syndicate v Senior Inspector of Taxes FSC 164/ 63/ 30/10/64 (Unreported: cited in Odubunmi 2015) thus: "It is trite that a person may use lawful means to avoid tax; what he may not do is to try to evade it. What he does should be genuine…. not merely a veil to hide or dissemble the reality of things". It therefore follows that, if a particular means of tax avoidance becomes so ethically offensive that it could not be tolerated, it is left for the legislature to make a law pronouncing such act a crime. This automatically transcends such act to the realm of tax evasion.

International Response to Tax Evasion

Tax evasion thrives in seclusion of information which may be remedied by strengthening resources for enforcement, increased information sharing, and possibly, countries withholding tax on behalf of each other. Avoidance may be easily remedied by changes in the tax code to cover possible loopholes (Gravelle 2009). At the International level, tax evasion and avoidance cannot be dealt with without the cooperation of countries due to principles of domestic sovereignty of countries. Cooperation usually takes the form of multilateral reporting of interest, income and mutual information sharing treaties.

Global Fraud Survey (2016) reports increased cooperation across borders and information sharing at the level of global enforcement. This has better armed regulators about corporate misconduct than ever before. Exchange of information can either be automatic, upon request, or spontaneous. Organization for Economic Development

and Cooperation (OECD) member states are in the fore-front of this movement. Member states have an automatic and spontaneous information exchange obligation, without request. For agreements with non-member states, information sharing is based on request. As at September 2013 about 1300 information exchange agreement have been signed between OECD member states and developing countries (OECD 2014).

At the multilateral level, OECD created a Model Tax Convention which is a primary source of the international standard. Also, there is the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. As at 2012 there were 56 signatory countries to the convention. Since 2009, the OECD and G20 have continued to provide leadership role in combating tax evasion. The Global Forum on Transparency and Exchange of Information for Tax Purposes has been the major push behind the universally accepted international standards. It has continued to influence international agreements as most of those signed since 2005 comply with standards (OECD 2014).

Ordinarily, under international law a country cannot collect tax in another country outside its control. With the signing of appropriate treaties between countries, this barrier can be surpassed. Bilateral or multilateral legal framework can be put in place to obligate foreign tax authorities to assist in the collection of taxes of other countries. This approach has a deterrent effect on potential tax evaders as the due tax would still be exacted on them on behalf of the defrauded country be the other country. One of such tax collection assistance treaty is the 1972 Nordic Convention on Mutual Assistance in Tax Matters. In 2003, the OECD Council approved the inclusion in its Model Convention, optional Article 27 on assistance in tax collection. States which decides to make it obligatory on them may have to sign bilateral treaty in that regard (OECD 2014).

According to Ordu & Anele (2015) in dealing with the tax sheltering potential of tax havens, many high tax jurisdictions have enacted legislations which counter it by the use of any of the five ways:

1. Attributing the income and gains of the company or trust in the tax haven to a taxpayer in the high-tax jurisdiction on an arising basis. An example of this is controlled foreign corporation legislations.

2. Developing transfer pricing rules, especially using the standards of OECD guidelines.

3. Restrictions on deductibility or imposition of a withholding tax on payments made to offshore recipients.

4. Taxation of receipts of the entity in the tax haven, sometimes enhanced by notional interest to reflect the element of deferred payment. An example is the European Union withholding tax system.

5. Imposition of exit charges or taxing unrealised capital gains of an emigrating individual, trust or company.

Legislation are also made to empower revenue authorities to compelling forced disclosure from accountants and tax advisers to give detailed information of tax avoidance schemes adopted by corporate bodies. This gives the tax authority an idea of the loose ends in the tax codes and positions them to block those shortcomings.

Nigeria entered into tax related bilateral treaties with some countries. These treaties make arrangement for mutual exchange of information necessary for carrying out the domestic laws of contracting states concerning taxes on income and capital gains covered by the arrangements including, in particular, provisions about the prevention of fiscal evasion with respect to those taxes (S. 1 (b) Double Taxation Relief Between the Federal Republic of Nigeria and the Government of the Kingdom of Belgium Order). Bilateral agreements of this nature exist between Nigeria, on one hand, and France, Romania, Canada, Belgium and Netherlands, on the other hand. Nigeria needs to be more and more involved in the global march against tax evasion. The more bilateral and multilateral treaties signed with more countries, the better positioned in our resistance ability to tax evasion and capital flight to tax haven.

Blowing the Whistle

The term whistleblower is derived from the phrase ‘blow the whistle’, which indicates an illegal or foul infringement. The phrase was coined by a United State Civic Activist, Ralph Nader, in the early 1970. This was to avoid the derogatory connotations portrayed by similar words such as “informers’’ and “snitches” (Taiwo 2015). They have also earned “more negative labels such as informants, snitches, rats, squabbles, sneaks, or stoolies” (Bowers & Lewis, 1996).

Onodugo (2014) defines whistle-blowing as the unauthorised disclosure of Information to outsiders that are expected to take remedial actions. Obebe (n.d. p. 2) defines it as a ‘wrongdoing (an illegal, immoral, or illegitimate act) which is liable to cause harm to persons outside of the organisation from which the wrong emanates. Thus, purely internal matters would not tend to be ripe for whistle blowing’. The Central Bank of Nigeria (CBN) Guidelines for Whistle blowing in Banks and other Financial Institutions in Nigeria (2012)

defines whistle-blowing as “the reporting of alleged unethical conduct of employees, management, directors and other stakeholders of an institution by an employee or other person to appropriate authorities.”

Whistle-blowing mechanism may either be internal and external (Miceli, Near, & Schwenk 1991). This basis for this classification is the channel for reporting the wrongful act: either within or outside the organisation. Either way, it has to be reported to a higher authority. External channels include: anti-corruption or regulatory government agencies, mass media and other external parties to the organization (Taiwo 2015).

Whistleblowers could be victims of ostracism, harassment, punishment, punitive transfers, reprimands and dismissal. Officers at the top managerial level are often responsible for launching attacks on whistleblowers. Co-workers would either join in or do nothing about it due to fear that they could be victims in the future (Taiwo 2015). A study of 233 whistleblowers in a hospital in the U.S. reported that “90 percent of the whistleblowers were fired or demoted, 27 percent were sued, 26 percent had to seek psychiatric or physical care, 25 percent suffered alcohol abuse, 17 percent lost their homes, 15 percent got divorced, 10 percent attempted suicide, and 8 percent were bankrupted” (Rost, 2006). Chartered Global Management Accountant Report (2012) has it that a potential whistleblower may be influenced by any of these factors: working group/family loyalties; disinterest/sneaking admiration; fear of consequences; suspicion rather than proof.

Onodugo (2014) and Obebe (n.d. p. 2) are both at one to the effect that a whistleblower making a report against the activities of his employer is often torn between the ethical dilemma of his loyalty to his employer and his duty to act in protection of public interest. Lennane (2012 cited in Onodugo 2014) calls it a “conflict between immediate authority (client and employer) and higher authority – concepts such as ‘truth’, ‘justice’, ‘public interest’ and God.” However, for a system that lacks legislative protection for whistle blowers, their actions may just run afoul with the employment law, libel law and the general legal system. Where a whistle-blower is dismissed or sued as a result, he may not have the full resources to maintain a law suit and could be liable for defamation if the information is incorrect even if made in good faith and with reasonable belief (Teen 2007).

The risk and challenges of whistle-blowing, notwithstanding, Erin, Ogundele, & Ogundele (2016) posits that whistle-blowing becomes relevant as a response to the growing yearning and aspiration of the public for greater financial accountability, financial transparency and financial integrity in the financial reporting processes of organisations in recent times. When adopted as a business ethics and culture, whistle-blowing is capable of improving the economic stability and financial reporting process of any country. This risk factor associated with blowing the whistle calls for legislative guaranteed protection. We shall at this point evaluate the whistleblower protection available in Nigeria.

Whistleblower Protection in Nigeria

The most outstanding incident that otherwise brought the subject of whistle blowing into the front burner of public discuss was the Cadbury Nigeria PLC scandal that occurred in October, 2006. Alarm was raised of the involvement of the company in fraudulent overstatements of its accounts between 2003 and 2006 to the amount of N13bn- N15bn. A due diligence inquiry commissioned by Cadbury Schweppes UK verified the fraudulent act. Consequently, the Managing Director, and the Finance Director were dismissed and banned from holding any position in any public quoted company for life by the Security and Exchange Commission (SEC).

The reaction to the above was instantaneous as the CBN made its Code of Corporate Governance for Banks in Nigeria Post Consolidation 2006. The code, which contained guideline for whistle-blowing in the Nigerian Banking Industry, made it mandatory for the banks and other financial institutions to implement effective whistle-blowing mechanism which will guarantee the highest assurance of anonymity and confidentiality to the whistleblower (WFO Professional Services LLP n.d. p. 2). The CBN code was reviewed in 2012. Pursuance to the obligation in the CBN Code some bank formulated guidelines for whistle-blowing. Offor (2009) observations that the whistle blowing guideline is rarely implemented by Nigerian banks as only First City Monument Bank posted whistle-blowing procedures on its website. That in terms of the monthly reports required of banks to be made to CBN, most banks normally submit a nil return. However, Unity Bank also formulated the guidelines.

In 2011 SEC made a Code of Corporate Governance to regulate companies listed in the Nigeria Stock Exchange. The code also mandates public companies to implement effective whistle-blowing policy with the appropriate mechanisms for reporting illegal or unethical behavior. Pursuant to this, UAC made whistle-blowing guideline and procedure to guarantee the confidentiality of whistleblowers. The various codes of corporate governance all establish principle of disclosure and financial transparence in corporate affairs.

The Federal Ministry of Finance (2017) designed a whistle-blowing programme to encourage disclosure of information pertaining to violation of financial regulations, mismanagement of public funds and assets, financial malpractice, fraud and theft deemed to be in the interest of the public. A whistleblower who gives information

that directly leads to the voluntary return of stolen or concealed public funds or assets would be entitled to between 2.5%-5.0% of amount recovered. The information must be such that the government does not already have it or could obtain from any other publicly available source to the Government. This policy have recorded a reasonable success in so short a time as there have been record of recovered funds as a result of tip-offs by whistleblowers.

The whistleblower may be an internal stakeholder, inter-Government stakeholder, institutional stakeholder or member of the public. The policy assures confidentiality to information given by the whistleblower. A person who suffered adverse treatment in retaliation for blowing the whistle may file a formal complaint to an independent panel of inquiry which shall be set up to handle such complaint. Upon establishing the claim of the whistleblower disciplinary action may be taken against the perpetrator in accordance with the public service rules or other extant rules. The whistleblower is also entitled to restitution for loss suffered (Federal Ministry of Finance 2017). This policy also erroneously presumes that persecution could only come from within the Public Service.

The drawback of these codes is that they don't have the force of law and not binding whatsoever. They are only of persuasive import. In other words, an action cannot be maintained to enforce any of its provision. Also adequate protection is not provided for the whistleblower. The protections are limited to guarantee of the confidentiality and securing the identity of the whistleblower. In the event that their identity is exposed, the codes offer no internal mechanisms or procedures to shield the whistleblower (Adeyemo 2015). The promise of security of the whistleblower's employment presupposes that the codes do not contemplate whistleblowers other than the employees of corporations. This leaves much more to be desired.

The challenges captured above are well appreciated in view of the travails of Lamido Sanusi, the former CBN Governor who incidentally ensured the revision of the code in 2012 during the subsistence of his tenure in office. In 2014 he blew the whistle on a claim that some funds of about $20bn of petroleum revenue were missing and unaccounted for by the Nigerian National Petroleum Corporation (NNPC). The CBN Governor was later suspended by the President on the allegation of 'financial recklessness, fraud, and fiscal misconduct'. Attempt to challenge his suspension in court did not materialise in success until his tenure in office elapse while still under suspension.

Several attempts had been made by the National Assembly to enact legislation to protect whistleblower. The first of such attempt was "Whistleblower Protection Bill, 2008" (H.B. 117) sponsored by Senator Ganiyu Olanrewaju Solomon. The bill sought to create an Act to provide for the manner in which individuals may in the public interest disclose information that is related to unlawful or other illegal conduct or corrupt practices of others and to provide for the protection against victimisation of persons who make these disclosures. A whistleblower could amongst other persons make disclosure to the Federal Inland Revenue Service. A whistleblower who encounters any form of victimisation shall resort to the Commission on Human Rights and Administrative Justice. There is also availability of legal aid for the whistleblower. Unfortunately, the bill did not see the light of day.

In 2009, a similar bill titled Safeguarded Disclosure (Whistleblowers, Special Provisions, Etc.) Bill (H.B. 167) was brought before the National Assembly. This time, it was sponsored by Honourable John Halims Agoda. It sought to make provisions for the procedure in terms of which persons employed in the public and private sectors may disclose information regarding unlawful and other irregular practices and conduct in workplace and to provide protection against any occupational detriment or reprisals of a person making such disclosures. Again, we didn't get any explanation for the outcome of the bill (Sule n.d. p. 10).

In 2011, another Whistleblower Protection Bill was brought before the Senate. According to Birch (2015) the bill received limited support upon its introduction and lacked the political will necessary for its successful adoption. "The act sought to provide standards for the disclosure of information pertinent to the greater public good; to establish protections for whistleblowers; and to create a fund for those reporting misconduct. Potential whistleblowers are referred to as "patriots" throughout the text; furthering the notion that whistle-blowing is primarily for the public good".

The latest legislative attempt at whistleblower protection is the effort made by the Nigerian Senate. One the 8th June, 2017 the Senate passed the Witness Protection Programme Bill into an Act. The bill was consolidated with the Whistleblower Protection Bill. "The bill seek to promote law enforcement by facilitating the protection of persons directly or indirectly involved in providing assistance in law enforcement matter in relation to activities conducted by the Force; or activities conducted by any law enforcement agency or international criminal court or tribunal; It is to enable certain persons receive protection in relation to certain information, evidence or other assistance rendered to law enforcement agencies during enquires, investigation or prosecution" (Law Pavilion). Under the bill, the Attorney General is empowered to create a programme to enable the non-disclosure of information from witnesses and whistleblowers; relocation and changing the identity of witnesses. A

whistleblower or witness may be admitted into the programme upon the recommendation of a law enforcement agency or international criminal court and tribunal. However the bill is yet to come into force. Due to the operation of bi-cameral legislative system in Nigeria, the bill has to pass through the House of Representatives before it can be transmitted to the President for assent.

There is currently no existing law exclusively meant to cater for whistle-blowing or whistleblower protection. However, there are snippets of provisions here and there in various existing laws that touch the subject matter. We shall evaluate some of them to see how relevant they are in that regard. S. 39 (1) of the Economic Financial Crimes Commission (Establishment) Act 2004 provides that an officers of the Commission cannot be compelled to disclose the source of information or identity of their informants except by the order of the court. This is the much protection a whistleblower could get under this Act.

The provision relating to whistle-blowing in the Independent Corrupt Practices and Other Related Offences Act 2003 is contained in S. 48. It provides that "where any complaint made by any officer of the Commission states that the complaint is made in consequence of information received by the officer making the complaint, the information referred to in the complaint and the identity of the person from whom such information is received shall be secret between the officer who made the complaint and the person who gave the information, and everything contained in such information, identity of the person who gave the information and all other circumstances relating to the information, including the place where it was given, shall not be disclosed or be ordered or required to be disclosed in public but only to the trial judge and the defence lawyer in attendance in any civil, criminal or other proceedings in any court or tribunal". Sub-section (2) goes further to make it an offence punishable with a term not exceeding ten years, or fine not exceeding one hundred thousand Naira where the whistleblower gives the information knowing it to be false.

Another statute worthy of note is the Freedom of Information Act 2011. The relevant sections of Act which affects whistle-blowing are Ss. 14, 27 and 28. The Act only protects serving public officers from adverse consequences for disclosing certain kinds of official information without authorisation. S. 27. (1) protects a public officer or any person acting on behalf of a public institution from any civil or criminal proceedings for the disclosure in good faith of any information pursuant to the Act, or for any consequences that flow from that disclosure. Sub-section (2) also protects the receiver of such information from any civil or criminal proceedings for receiving or further disclosing the information. However, S. 28 limits the kind of information that can be disclosed by a public officer by creating exemptions under Ss. 11, 12, 14, 15, 16, 17, 19, 20 and 21 of the Act. In other words, where a public officer or anybody acting on behalf of the public institutions discloses information which falls within the exemptions, the protection under the Act would not be available to such officer.

The provisions of the Act has created a clog in the wheel of the fight against tax avoidance and evasion by the provision of S. 14 (1) d. and (2). On the authority of that provision, a public officer or institution is not allowed to disclose personal information of any tax payer in connection with the assessment or collection of any tax unless the disclosure is pursuant to a statutory provision or expressly permitted by the person whom the information is about.

According to Birch et al (2015) the S. 27 of the Act is criticised on the ground that it narrowly bans the legal liability against whistleblowers, but does not cover other more subtle means of reprisal that could befall those persons who disclose damaging information about various institutions or officials. Besides, implementation has also proved challenging. Federating states have disowned the law on the ground of it being a federal legislation and argued for its inapplicability to federating states. Ilegbune (2011) suggested that government should establish an action plan that transcends the application of S. 27 of the Act. For this to be realised, statutes such as the Official Secret Act, Federal Character Commission Act, Evidence Act, Penal and Criminal Code that contains provision capable of forbidding or limiting the disclosure of official information should be considered for review, amendment or repeal as the case may demand.

Role of Whistleblowing in Tax Administration

Federal Inland Revenue Service is saddled with the responsibility of tax administration in Nigeria. Various states have state Internal Revenue Service responsible for administration of tax accruable to state governments. S. 8 FIRS Act amongst other functions provides that the FIRS shall:

> (a) make, from time to time, a determination of the extent of financial loss and such other losses by Government arising from tax fraud or evasion and such other losses (or revenue foregone) arising from tax waivers and other related matters;
>
> (b) adopt measures to identify, trace, freeze, confiscate or seize proceeds derived from tax fraud or evasion;

(c) adopt measures which include compliance and regulatory actions, introduction and maintenance of investigative and control techniques on the detection and prevention of non-compliance;

(d) collaborate and facilitate rapid exchange of information with relevant national or international agencies or bodies on tax matters;

(e) establish and maintain a system for monitoring international dynamics of taxation in order to identity suspicious transactions and the perpetrators and other persons involved;

(f) provide and maintain access to up to date and adequate data and information on all taxable persons, individuals, corporate bodies or all agencies of Government involved in the collection of revenue for the purpose of efficient, effective and correct tax administration and to prevent tax evasion or fraud.

The Custom and Excise Management Board which is responsible for collection and management of excise duties is empowered under the first schedule of the Custom and Excise Management Act to take measures aimed at preventing the evasion of customs duty by means of fictitious contracts of prices.

Tax evasion is designated as an economic and financial crime under S. 46 of the Economic and Financial Commission (Establishment) Act 2004. *Ipso facto,* the Economic and Financial Crimes Commission (EFCC) is also responsible for preventing and prosecution of tax evasion (S. 42 EFCC Act). Regrettably, the EFCC have been too preoccupied with offences that deal with corruption and misappropriation of public funds. The FIRS have not been able effectively perform their mandate as captured above.

As noted earlier, tax avoidance and evasion for the benefit of tax haven thrives on secrecy. Part of the challenges faced by the tax authorities is lack of information to help them unravel the antics of tax evaders. What we simply have is a situation where the tax authorities act on suspicion rather than hard and conclusive fact. Reliance is usually had on their powers under S. 17 (1) PITA to the effect that it can disregard and make adjustments as it considers appropriate any disposition made by any person in respect to tax liability if in its opinion it is artificial or fictitious and would reduce the amount of any tax payable. Similar provision exist in S. 22 CITA and S. 15 Petroleum Profit Tax Act. The court has always treated this practice with caution. In Nigerian Breweries PLC v. Lagos State Internal Revenue Board (2001) FWLR Pt. 72, p. 1974 the Court advised that a “tax officer adopting the best judgement method must not be dishonest, vindictive or capricious. Such officer is expected to make what he honesty believes to be a fair estimate of proper figure of assessment”. In another case, Eti-Osa Local Government v. Rufus Jegede & Anor (2007) 5 CLRN, the Court of Appeal was quoted as saying: “while taxation is the life wire of government expenses from which a responsible government provides for the welfare of its people, over taxation resulting from the laissez-affaire tax doctrine could be counter-productive”.

In order to avoid this kind of experience, there is need for robust information gathering system by tax authorities to enable them exact and obtain the appropriate tax accruable to the government. The kind of intelligence work done by tax authorities requires the use of tips from information from employees, competitors, and neighbours of the taxpayers. The United States adopts this approach and fees are paid to informers to encourage continuous flow of information (Encyclopaedia Britannica 2010). The tax authorities in Nigeria can initiate similar policy by the ministry of finance to encourage whistleblowers provide useful information of tax evasion and avoidance by tax payers. Information obtained would aid the Federal Inland Revenue Service (FIRS) perform their investigative function under the S. 35 FIRS Act.

In recognition of this fact the revised NTP was approved by the Federal Executive Council of Nigeria on 1 February 2017 (Deloitte Tax and Regulatory Service 2017) to establish fundamental guiding principles to enable development of the Nigerian tax system meet its overall objectives. The NTP was first published in 2012 as a deliberate effort by government towards entrenching a robust and efficient tax system in Nigeria after many years of neglect [Oyedele, 2017]. The policy identifies lack of robust framework for the taxation of informal sector and high network individuals; fragmented database of taxpayers and weak structure for exchange of information by and with tax authorities as challenges of tax administration which result in revenue leakage. It recognises the following means to meet these objectives are:

i. Deployment of technology to aid all aspects of tax administration;

ii. The integrity and regular update of the database; and

iii. Workable and secure structure for intelligence and information gathering.

The policy further mandates tax authorities to establish administrative framework for amnesty and whistle blowing as part of the strategies for curbing evasion and widening the tax net (National Tax Policy 2017). Oyedele [2017] hails the policy as a panacea to current challenges but expresses concern as to whether it would be fully implemented.

Conclusion

This paper analysed the effect of tax haven on high tax jurisdiction, Nigeria in particular. The effect is tax avoidance, tax evasion, capital flight etc. In addressing this we have seen the role information sharing by international collaborative effort and whistleblowers can play in this regard. This then brings us to the issue of protection available for whistleblowers in Nigeria. In Nigeria, there is currently no specialised statute for the protection of whistleblowers. However, there are government policies and pockets of provision in different statutes which minutely deals with whistle-blowing.

Gannon (1997) noted with dismay that the national tax system in many developing countries are below optimal and effective functionality: its operations are incomplete, slow, and costly. This is true of the tax authorities in Nigeria. The approach of just sitting and waiting for persons to walk into a revenue house to pay tax is elusive and would hardly yield result. People hardly want to pay tax. If the tax authority lacks the capacity to give effect tax statute then little or no progress will continue to be recorded in revenue generation.

We highlighted the weaknesses in our tax code which gives room for tax payers to take advantage of in avoiding and evading tax. Also in course of this work we observed less involvement of Nigeria in international tax concerns. At the global level several efforts have been made to deal with the budding issues of tax haven and its adverse consequences. A country's failure to get involved in the scheme of affairs leaves such country losing out of the successes recorded so far. Tax avoidance and evasion cannot be dealt with, without international collaboration, hence Nigeria must get involved.

Recommendations

In view of our analysis and findings, we hereby make the following recommendations:

There is a need to review the existing tax laws to withstand contemporary antics adopted by tax payers to avoid tax. Specific anti-tax haven or controlled foreign company rules in Nigeria should be enacted and enforced in Nigeria.

Nigeria needs to continue to expand our network of international treaties with relevant jurisdictions, especially tax havens, to actively pursue international tax evasion through mutual information exchanging.

Notwithstanding the policies and rules put in place, if the tax authorities are not strengthened to perform their function then these efforts would attain little success. Hence, there is need to develop technical skill, capacity and political will.

There is need for cooperation between tax authorities and other government agencies. For instance with respect to companies income tax the FIRS should collaborate with the Corporate Affairs Commission (CAC) to obtain data base of registered companies and records of companies' annual returns to effectively determine basis for tax assessment.

Despite the existence of pockets of protection for whistleblowers, there is a need to develop a specialist statute to ensure their protection. This will encourage circulation of information to tax authorities of tax avoidance and evasion.

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