Options: Plugging Nigeria's Perennial Revenue Gap through Diaspora Taxation

Thought Leadership by:

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> The FG And SG's Domestic Debt Portfolio As At 31 March 2019 Stood At US$42.7 Billion And US$12.9 Billion Respectively, With Nigeria's External Debt At US$21 Billion

In recent memory, the Federal Government (FG) and State Governments (SGs) have been grappling with budget deficits, calling in aid domestic and external debt financing to complement public revenue sources, especially taxation. According to the Debt Management Office, the FG and SG's domestic debt portfolio as at 31 March 2019 stood at US$42.7 billion and US$12.9 billion respectively, with Nigeria's external debt at US$21 billion.[2] The under par contribution of tax to public revenues has underpinned calls to address Nigeria's low tax to Gross Domestic Product (GDP) ratio[3] and the need to prioritise human capital development.[4]

The foregoing further underscores the need to raise additional revenue to finance public projects. Whilst recently, some FG functionaries flew the kite of increasing the current 5% Value Added Tax (VAT) rate, the move was widely opposed.[5] It is therefore pertinent to examine potential revenue sources given governments' ardent financing needs, whilst mindful that Nigerians are averse to increased tax liability and concerns of unsustainable debt financing of Nigeria's budget. It has been

1 The author acknowledges the helpful comments and critique of ***Afolabi Elebiju, Esq., Principal, LeLaw Barristers & Solicitors*** (a.elebiju@lelawlegal.com) to the drafts of this article. However, the author takes full responsibility for all the views expressed herein.
2 *Debt Management Office*, ***'Nigeria's Total Public Debt Portfolio as at 31.03.2019'***: https://www.dmo.gov.ng/debt-profile/total-public-debts/2849-nigeria-s-total-public-debt-portfolio-as-at-march-31-2019/file (accessed 11.07.2019).
3 *M. Gbadeyanka*, ***'Nigeria's Tax to GDP Ration Rises to 7%'***, *Business Day, 25.01.2019*: https://businesspost.ng/2019/01/24/nigerias-tax-revenue-to-gdp-ratio-rises-to-7/ (accessed 23.04.2019).
4 *See, S. Ebulu, N. Chiejina, & C. Nweze*, ***'How to Boost Human Capital by World Bank'***, *The Nation, 20.04.2018*: https://thenationonlineng.net/how-to-boost-human-capital-by-world-bank/ (accessed 23.05. 2019).
5 *T. Agboola*, ***'Why Labour, OPS Won't Embrace Tax Increase'***, *The Nation, 19.04.2019*: https://thenationonlineng.net/why-labour-ops-wont-embrace-tax-increase/ (accessed 20.05.2019).

argued and rightly so, that the FG should consider expanding its tax net rather than increasing tax liability on existing taxpayers.[6]

Nigeria and many African countries have continually experienced and much affected by 'brain drain' especially as economic conditions worsened.[7] This exodus of mostly specialist human capital to 'greener grasses' in other developed countries, creating gaps in their home countries must also be considered against the fact that many had been beneficiaries of subsidised or free education, healthcare etc.[9] In the event, non-resident Nigerians across the globe are directly contributing their substantial quota to the economies of their developed host countries.[10]

As at October 2017, it was estimated that Nigeria had more than 17 million citizens in the diaspora.[11] Their host countries' gain is Nigeria's loss; albeit it is not a totally grim picture: in 2018 alone, diaspora remittances accounted for more than US$25.1 billion dollars - more than the country's revenue from its principal export, crude sales.[12]

The continued call for increased diaspora representation and the recent establishment of the Nigerian Diaspora Commission (NDC) are evident recognition of the influence of the Nigerian diaspora population in shaping the polity as well as contribute to the growth and sustainable development of Nigeria.[13] Thus, this article seeks to examine the feasibility of a diaspora income taxation as a panacea to shore up Nigeria's dwindling revenue through an expansive extra-territorial tax net and increase in the country's abysmally low tax to GDP ratio.

Dissecting the Issues: Citizen-Based Taxation – Pathway to Funding Development Projects?

Oliver Wendell Holmes, Jr. a famous American Supreme Court judge in ***Compañía General de Tabacos de Filipinas v. Collector of Internal Revenue***[14] was reputed to have said *"taxes are what we pay for [a] civilised society…."* This underscores the significance of taxes in providing essential services which cannot be overemphasised. More so, taxation has an intrinsic function of creating a balanced economy and wealth redistribution.[15]

Taxation is regarded as an exertion of sovereignty by the State. Hence, its application is often limited to jurisdictions within the authority of the sovereign. Consequently, this gives rise to the sharp distinction between legislative and enforcement jurisdiction of tax. Whilst a government is free to enact tax legislations within its territory, same cannot be enforced in another country without the latter's consent.[16] Hence the development of mutual cooperation agreements among countries in the enforcement of cross-border tax obligations.[17]

A country in a bid to ensure that its citizens contribute their fair share of taxes regardless of

6 *P. Egwuatu, N. Nnorom, et al*, ***'IMF on Tax in Nigeria: Expand Tax Net Rather Than Tax Rate, Man, LCCI, other Stakeholders Tell FG'***, *Vanguard, 25.10.2018*: https://www.vanguardngr.com/2018/10/imf-on-tax-in-nigeria-expand-tax-net-rather-than-tax-rate-man-lcci-other-stakeholders-tell-fg/ (accessed 23.05.2019).

7 See, *A. Nwakanma*, ***'The Brain Drain on Nigeria's Health Sector Spells Crisis'***, *The Nerve Africa, 29.08.2018*: https://thenerveafrica.com/21483/the-brain-drain-on-nigerias-health-sector-spells-imminent-crisis/ (accessed 23.04.2019).

8 *Ibid*

9 For instance, a graduate from a subsidised public institution with very low tuition (as was the case in the 1960s to 1990s) relocates to the US or Canada where an average graduate has a huge debt obligation. Where they are put on equal salary, he stands to benefit more due largely to the African government's investment.

10 *New American Economy*, ***'Power of the Purse: How Sub-Saharan Africans Contribute to the U.S Economy'***, *Partnership for a New American Economy Research Fund, 02.2018*: http://research.newamericaneconomy.org/wp-content/uploads/sites/2/2018/01/NAE_African_V6.pdf (accessed 23.05.2019); See also, *D. Kosten*, ***'Immigrants as Economic Contributors: Immigrant Tax Contributions and Spending Power'***, *National Immigration Forum, 6.09.2018*: https://immigrationforum.org/article/immigrants-as-economic-contributors-immigrant-tax-contributions-and-spending-power/ (accessed 23.05.2019).

11 *M. Fidelis*, ***'17 Million Nigerians Living Abroad, Says Government'***, *Guardian 20.10.2017* https://guardian.ng/news/17-million-nigerians-living-abroad-says-government/ (accessed 19.06.2019)

12 *I. Chioke.*, ***'Anyí Aga Ato na Mmehie? - Envisioning New Paradigms for Investment in Nigeria n'Ala Igbo'***, https://www.afrinvest.com/wp-content/uploads/2019/04/Envisioning-New-Paradigms-for-Investment-nAla-Igbo_FINAL.pdf (accessed 20.05.2019).

13 See, the ***'Draft National Policy on Diaspora Matters, 2016'***: http://diaspora.gov.ng/final-draft-national-policy-on-diaspora-matters.pdf (accessed 23.05.2019). Before the establishment of the NDC, there had been several attempts at coordinating the affairs of Nigerians in diaspora with the administration of former President Olusegun Obasanjo and subsequent administrations after that under different aegis including; Nigerians in the Diaspora Organization (NIDO) and the Nigerian National Volunteer Service (NNVS). See *W. Sharkdam, A. et al*, ***'The Nigerian Diaspora and National Development: Contributions, Challenges, and Lessons from other Countries'***, *Kritika Kultura 23 (2014): –342*: http://kritikakultura.ateneo.net (accessed 21.06.2019).

14 ***275 US 87 (1927).***

15 *A. Ipaye*, ***'Nigerian Tax Law and Administration – A Critical Review'***, *Asco Prime Publishers, 2014, p.6.*

16 ***Government of India v. Taylor [1955] AC 491.***

17 Usually countries sign the Avoidance of Double Taxation Agreement (ADTA) to regulate the enforcement of a country's tax laws in another. The Organisation for Economic Co-operation and Development (OECD) in a bid to coordinate mutual exchange of information and enforcement of tax laws came up with the ***Convention on Mutual Administrative Assistance in Tax Matters*** in 1988 and amended by a protocol in 2010 (opened for signature in 2011). As at date, 128 jurisdictions participate in the Convention including 17 jurisdictions covered by territorial extension. See, Convention on Mutual Administrative Assistance in Tax Matters, OECD April, 2019: https://www.oecd.org/ctp/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm (accessed 23.05.2019).

> IT IS HIGH TIME NIGERIA CONSIDERED ALL OTHER VIABLE FUNDING OPTIONS FOR THE COUNTRY'S DEVELOPMENT PROGRAMS CONSIDERING PROJECTIONS OF HIGH POPULATION GROWTH AND DEEPENING LEVEL OF POVERTY

residence, may practice what is termed taxation of worldwide income: irrespective of where income is earned, the country imposes an income tax liability on its citizens. This tax principle was first enunciated in the famous case of ***Cook v. Tait***[18] where the income of Mr. Cook, a US citizen and resident of Mexico was assessed to income tax by Tait, the revenue collector for the US government. Although the taxpayer partly complied with the assessment, he brought an action for the recovery of the taxes paid arguing that since the income generating property was not within the territory of the US, such income ought not to be subject to US income taxes. However, the government argued otherwise.

The US Supreme Court rejected the argument of the taxpayer whilst holding that the power and scope to impose income taxes on the worldwide income of a citizen is based on the presumption that government by its very nature benefits the citizen and his property wherever found. According to the Court, *the power to impose taxes is essential to make citizenship complete.*[19] This perhaps underscores the benefit Americans enjoy wherever they live as successive US governments have sought to protect the lives and properties of Americans globally.[20]

With the enactment of the ***Foreign Account Tax Compliance Act (FATCA)*** in 2010, financial institutions are now mandated to notify the Internal Revenue Service (IRS) of the financial assets and interests of US citizens and companies with substantial US interests. This invariably ensure that all US citizens irrespective of country of residence comply with US tax filing requirements.[21]

Although some have argued about the impracticability of regularly filing income taxes from abroad, giving increasing compliance cost and renunciation of citizenship as possible downsides,[22] the system has continued to be regarded as a veritable revenue source for the US government.[23]

Similar to the practice in the US, Eritrea also imposes a 2% diaspora income tax often referred to as *Recovery and Rehabilitation Tax* on its citizens. Although, the legal basis for the imposition of this tax is fraught with controversies,[24] it is nonetheless enforced.

Undoubtedly, it is high time Nigeria considered all other viable funding options for the country's development programs considering projections of high population growth and deepening level of poverty.[25]

18 ***(1924) 265 U.S 47, 44 SUP Ct. 444.***
19 *Ibid*
20 See, ***'Protection of American Lives and Property Abroad'***, *CQ Researcher, 14.05.1931*: https://library.cqpress.com/cqresearcher/document.php?id=cqresrre1931051400 (accessed 23.05.2019).
21 *See Internal Revenue Service (IRS),* ***'Summary of FATCA Reporting for U.S. Taxpayers'***: https://www.irs.gov/businesses/corporations/summary-of-fatca-reporting-for-us-taxpayers (accessed 21.06.2019)
22 *R. Newlove,* ***'Why Expat Americans are Giving Up their Passports'***, *BBC News, 9.02.2016*: https://www.bbc.com/news/35383435 (accessed 23.05.2019); See also, *A. Semotiuk*, ***'New Tax Headache for U.S. Citizens Abroad'***, *Forbes 2.04.2018*: https://www.forbes.com/sites/andyjsemotiuk/2018/04/02/new-tax-headaches-for-u-s-citizens-abroad/#3b8b98f721e3 (accessed 23.05.2019).
23 In 2017, according to the data from the IRS, the individual income tax withheld and FICA tax was ***$5.2billion***, individual income tax payment and SECA tax stood at ***$3.9billion*** whilst ***$11.5billion*** was the total Internal Revenue collections for taxes filed outside the United States. See, Internal Revenue Service Data Book, 2017 (October 1, 2016 – September 30, 2017): https://www.irs.gov/pub/irs-soi/17databk.pdf (accessed 20.05.2019). It must also be noted that technology has made filing compliance cost less daunting as citizens living outside the US can employ the services of specialised tax consultants without traveling back to the US.
24 See ***'The 2% Tax for Eritreans in the Diaspora: Facts, Figures and Experiences in Seven European Countries'*** DSP-groep BV & Tilburg School of Humanities, Department of Culture studies, 2017: https://www.dsp-groep.eu/wp-content/uploads/The-2-Tax-for-Eritreans-in-the-diaspora_30-august-1.pdf (accessed 21.06.2019)
25 *M. Ismail, et al,* ***'Nigeria Worries Over Population Explosion'***, *Daily Trust, 25.10.2018*: https://www.dailytrust.com.ng/nigeria-worries-over-population-explosion.html (accessed 23.05.2019).

According to ***section 2 Personal Income Tax Act (PITA) (as amended),***[26] a person resident outside Nigeria is only taxed on the income or profit derived from Nigeria. Although ***section 3(1) PITA*** provides *"subject to the provisions of this Act, tax shall be payable for each year of assessment on the aggregate amounts each of which is the income of **every taxable person**, for the year, from a **source inside or outside Nigeria….**"* this is only applicable to residents of Nigeria.

In defining a taxable person, ***section 107 PITA*** reads *"… any individual or body or individuals … having any income which is chargeable with tax under the provisions of this Act."* It is therefore prescient to note that non-resident Nigerians are not subject to income taxes under ***PITA*** except such income was derived from Nigeria and where such is not within the 183 day rule of residency in cases of foreign employment pursuant to ***section 10 PITA***. Invariably, remittances received in Nigeria enjoy tax exempt status by the combined interpretation of ***section 19*** and ***Third Schedule PITA.*** **For example, returns on investment received in Nigeria are exempt provided they are brought in through Nigerian banks: *Para. 30, Third Schedule PITA.***[27]

Nonetheless, the imposition of taxes on the income of Nigerians living in diaspora could provide the much needed relief as an integral part of income stream diversification for the country. Whilst historic corruption and mismanagement of public finances are not positive factors to encourage citizens' tax compliance,[28] following the general principles of taxation, the payment of tax is not conditional on a contemporaneous or proportionate benefit from the government.[29] Nonetheless, provision of essential services, accountability and transparency further engenders compliance.[30]

Another school of thought believes the remittances from Nigerians in diaspora have been instrumental in fostering economic growth and thus any attempt at imposing an additional burden would witness a sharp decline in remittances.[31] According to *Afrinvest Research*, 70% of the remittances from 2018 was spent on consumption such as: education, health, marriages, funerals, etc. whilst 30% was invested in real estate development, savings, loans, etc.[32] *Granted that these remittance inflows had helped stabilize the economy, however is their tax exempt status not depriving the government its legitimate share?* Perhaps, such remittances could be classified as an income chargeable under ***section 3(1)(f) PITA*** which provides, *'any profit, gain or **other payment** not falling within paragraphs (a) to (e) inclusive of this subsection.'* However, the ambit of such is unclear. It is therefore prescient to have an amendment of the section to proffer more clarity and thus make such remittances subject to tax in the hand of the recipients in Nigeria.

In the light of this, the official channels of remittance could be used as a withholding agent of the Revenue. This again calls for efficient tax administration in monitoring and compliance to ensure that the recipients of the remittances discharge their tax obligation. Given that the personal income tax is within the remit of States' Internal Revenue Service (SIRS), the Joint Tax Board (JTB) may come up with shared arrangements for enforcement of income tax on remittances received by Nigerians.

26 ***Personal Income Tax Act, Cap. P8 LFN, 2004***
27 For a more detailed discussion, see *A. Elebiju and G. Fatokunbo*, ***'Remittances: Legal Regulatory and Commercial Issues in Diaspora Transactions'***, *LeLaw Thought Leadership Insights, 08.2019*: .
28 It has been reported that countries with higher corruption are associated with lower tax revenue and expenditure as a % of GDP. It was reported that corruption in Nigerian amongst others has encouraged tax avoidance with its attendance impact on the level of revenue generated by government. See, PwC's ***'Impact of Corruption on Nigeria's Economy'*** Report: https://www.pwc.com/ng/en/press.../impact-of-corruption-on-nigeria-s-economy.html *(accessed 02.07.2019).*
29 See *O. Akanle*, ***'The Government, the Constitution and the Taxpayer'***, in *Akanle O., (ed)*. ***'Tax Law and Tax Administration in Nigeria'***, *Nigeria Institute of Advanced Legal Studies*, Lagos, 1991: p.1.
30 K. Amaeshi, ***'Tax Accountability Matters'***, *Premium Times, 12.11.2018*: https://opinion.premiumtimesng.com/2018/11/12/tax-accountability-matters-by-kenneth-amaeshi/ (accessed 21.05.2019); See also, *Gga Nigeria*, ***'Nigeria: Mainstreaming Good Governance into Nigeria Tax Reform'***, *All Africa 20.09. 2017*: https://allafrica.com/stories/201709200932.html (accessed 20.05.2019).
31 They also argue that it is incumbent for government to first improve its record of accountability of taxes collected before seeking to expand its tax net abroad.
32 See note 12.

Another provision worthy of consideration is ***Para 30, Third Schedule PITA*** that: *"Income from dividend, interest, rent, royalties, fee, commission earned from abroad and brought into Nigeria by a Nigerian resident is exempt from tax, provided that such income is brought in convertible currency and paid into a domiciliary account in a bank approved by the Government."* This could also form part of remittances provided that the taxable person is resident in Nigeria. Although this provision is essentially to promote capital repatriation by Nigerian residents, same have been utilised by shrewd tax planners to avoid Nigerian income tax liability.

Should this provision be amended – deleted or qualified? In line with the **Nigerian Tax Policy, 2017**,[33] which is focused on increasing Nigeria's tax to GDP ratio and diversifying the country's revenue base, the FG should consider all measures to achieve its tax policy objective by qualifying the blanket exemption (repatriation tax holiday) under the said provision. The exemption should be categorized with capital repatriation threshold i.e. high volume capital repatriation to enjoy more favourable exemption rate.[34]

Imposition and Enforcement of Diaspora Income Tax - Legal Regime for Implementation

With increasing call for reduced income tax rate on individual and companies to spur in-country investment and economic growth,[35] could the introduction of diaspora income tax be justifiable?

It is widely acknowledged that there can be *'no taxation without representation'*, given the renewed call for diaspora voting and the establishment of NDC all in a bid to foster a sense of collective ownership in the Nigerian project, it is therefore prescient that same be introduced to shore up Nigeria's dwindling revenue base.

Nonetheless, some have argued that the introduction of this class of taxes would constitute double taxation on the income of Nigerians in diaspora having presumably already discharged their tax obligation in their host countries.[36] This is more so that not all such countries have double taxation treaties (DTTs) with Nigeria, thereby potentially penalising Nigerians in host countries without DTTs with Nigeria.[37] However, such narrow DTT universe could provide the FG the ample motivation to expand the country's treaty network. More so, these DTTs need urgent review to align with current realities and realisation of Nigeria's tax policy.

Another essential element to implement this arrangement is the cooperation of countries where Nigerians are resident in enforcing Nigeria's tax laws. It could be argued and rightly so that there is no incentive for foreign countries to implement this arrangement should Nigeria impose this class of taxes given that they would bear the

33 The foreword to the **Nigerian Tax Policy, 2017** provides: *"This administration is committed to diversifying the sources of government revenues by significantly increasing tax to Gross Domestic Product (GDP) ratio, among other things. The attainment of this laudable objective will require an overhaul of our tax policy which is a key function of the Ministry of Finance. Businesses react to tax policy…."*

34 Although this may arguably lead to a reduction in corporate inflows from dividends abroad into Nigeria, many countries including the United States have all sought to increase their revenue base by incentivising corporate repatriation of funds held offshore – reduction of tax rate from 35% to 15.5% on repatriated income. In Nigeria's case, the exemption is merely being qualified and as such the shock effect may be minimal. If this is implemented, the short term effect could slow down capital repatriation into the country. However, in the long run, the country would have shored up its revenue based to provide essential amenities for its citizens thereby increasing its revenue – GDP ratio. See, *B. Borzykowski, **'Apple's plan to repatriate $285 billion in cash to the US could be a big boost for investors'** CNBC, 30.04.2018* https://www.cnbc.com/2018/04/30/apples-plan-to-repatriate-285-billion-could-be-a-boost-for-investors.html (accessed 11.07.2019).

35 *W. Gale, and A. Samwick, **'Effects of Income Tax Changes on Economic Growth'**, Brookings, 01.02.2016:* https://www.brookings.edu/research/effects-of-income-tax-changes-on-economic-growth/ (accessed 21.05.2019).

36 See note 23.

37 Nigeria has signed DTT with 13 different countries including; Canada (1992), Pakistan (1989), Belgium (1989), France (1990), Romania (1992), Netherlands (1991), United Kingdom (1987), China (2005), South Africa (2000), Italy (1976), Philippines (1987), Czech (1989) and Slovakia (1989). See, *Tax Treaties and Related Matters, Federal Inland Revenue Authority (FIRS):* https://www.firs.gov.ng/TaxResources/TaxTreaties (accessed 11.07.2019)

enforcement and compliance cost. These could be factored into the amended or new DTTs to ensure that incentives are guaranteed for implementing countries.

In the same vein, recourse could be made to the provision of the ***OECD Convention on Mutual Administrative Assistance in Tax Matters*, 1988 (OECD Convention)** which Nigeria ratified in 2015. The ***OECD Convention*** pursuant to ***Article 11*** provides *"at the request of the applicant State, the requested State shall, subject to the provisions of Articles 14 and 15, take the necessary steps to recover tax claims of the first-mentioned State as if they were its own tax claims."* Thus, the FG leveraging the provisions of the **OECD Convention** can enforce tax claims against evading Nigerians in their country of residence provided that the country has ratified the **OECD Convention**.

Another question is: *Could this lead to massive renunciation of Nigerian citizenship by Nigerians in diaspora?* Possibly so. Considering the upsides - ability to vote and have diaspora representation at all levels of government including more FG protection of citizens abroad - could provide the needed impetus for the implementation of this tax regime. As earlier noted, the representation and input of Nigerians in diaspora is germane to secure their buy-in in the formulation of tax policies of this nature before implementation.

Conclusion

Human by nature are tax averse as no one would 'voluntarily' comply with payment of tax without the conferment of an inherent 'benefit'. For years, Nigerians in diaspora have constantly called for more representation in the Nigerian government which has led to the establishment of the Nigerian Diaspora Commission. Their contribution through the payment of income taxes to the Nigerian government will further amplify their claim and demand for good governance and can demand accountability of its taxes. Nonetheless, the Nigerian government must however show some level of 'good faith' in the management of tax revenue before seeking to impose taxes on Nigerian in diaspora. Perhaps, aggregating all potential sources of revenue and given the country's growing population could be Nigeria's lifeline post-crude era. As the popular saying goes, *'he who comes into equity must come with clean hands'*, is the Nigerian government ready to entrench probity in its public finance to give it the 'moral justification' to impose incomes taxes on non-resident Nigerians? Time will tell.

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