



'Eating the Frog' of Multiplicity of Taxes

'Taxspectives' by Afolabi Elebiju | Originally published in *THISDAY Lawyer*, 21.10.2014, p.15



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Introduction

It is no longer news that in the *Paying Taxes 2014* survey results, Nigeria's rating slipped to 170th (out of 189 countries) from 155th (of 185 countries) in the 2013 results. *Paying Taxes*, an initiative of the World Bank and PwC, monitors total tax rate (TTR), compliance time (CT) and number of payments (NoPs) of a typical small company in the economies surveyed. While Nigeria's TTR (33.8%) beats the African average of 52.9%, she significantly lags the African CT average (956 vs 320 hours) and NoPs (47 vs 36.1). Indeed Nigeria's 47 payments is 42nd on NoPs in Africa, beating only 11 countries, none of which includes 'peer' economies like South Africa and Egypt.

That Nigeria is last in Africa (53rd position) on CT, gives real cause for concern. Having followed *Paying Taxes* for a while, I note that Nigeria's 2014 CT (956 hours) 'improved' from 1,120 hours in the 2006 survey results. Meanwhile, Cameroon with 1,300 hours CT in 2006 has leapfrogged to 630 hours in the 2014 results!

The Revenue (with necessary legislative support) has got its work cut out - to keep simplifying the tax compliance regime so 'businesses can focus on business' to improve their operating performance (and presumably, generate more taxable profits for the Revenue). Although our competitiveness in TTR has been grossly compromised by poor performance in CT and NoPs, even the TTR has room for improvement. Whilst initiatives such as online filing and TIN (Tax Identification Number) are noteworthy, our 'tax compliance burden' reform needs to assume a faster pace.

In comparison, Zambia's TTR was 22.2% in 2006; in the 2014 study, it is 15.1% (from 16.1% and 12th globally in 2011). In 2014, Nigeria's TTR (at 33.8%) is 16th in Africa, behind South Africa at 11th. From the foregoing it is clear that addressing multiplicity of taxes would not only drastically reduce NoPs, it will also

impact positively on CT, not to talk of effect on Nigeria's *Ease of Doing Business* rankings. But how is this hydra to be tamed? Nigeria's federal structure could be better leveraged to reduce NoPs, since federally collected revenue is shared amongst the 3 tiers of government. For the near to medium term, can we aim for NoPs in the lower two digits (from current 47), knowing that Morocco, South Africa and Mauritius/Tunisia have 6, 7 and 8 NoPs respectively? The global leasers (Hong Kong, China and Saudi Arabia) only have 3 NoPs.

We should buck the continental trend whereby according to *Paying Taxes 2014*, "At 36.1 Africa has the highest average number of payments of any region. The average number of payments for the region is also well above the world average, yet over nine years it has dropped by only just over two payments..."

The lack of availability of online filing and payment systems is the main reason for the number of payments sub-indicator being high. This is exacerbated by the number of different taxes and the fact that in many economies payments are made to several levels of government... 44 out of the 53 [African] economies have more payments than the world average..."

The Foreword to *Paying Taxes 2011* posits that "Governments have consistently shown great interest in the results of this study, as it enables them to make comparisons with geographic neighbours and economic peer groups. Many examples of how governments are using the study are included in this report. They show how *Paying Taxes* has helped to increase recognition of how governments are striving to improve their systems and embrace best practices, and how some are achieving results."

Tax Agenda for 2015?

As we approach 2015 elections, we should be hearing more about the "tax agenda" of politicians campaigning for elective positions. Manifestoes and electoral promises have a flip side - how will they be implemented? There can be no implementation without funding and tax is a critical part of that. The electorate should demand that our aspiring representatives articulate credible tax plans or proposals. This should be a measure of their seriousness/preparedness for office.



One should expect familiarisation with the **National Tax Policy**, and if possible (pursuant to access under FOI Act provisions), the McKinsey Report that was recently commissioned by the Federal Ministry of Finance on Nigerian tax collection optimisation strategy. And there are still so many tax related constitutional issues.

Needful politicians could also do crash courses on the Nigerian tax system to gain some basic understanding and engage tax consultants as part of their strategy teams. What proposals can reduce NoPs without unduly prejudicing Government take whilst enlightening compliance burden? What broad-based alliances are politicians prepared to form towards realizing these objectives?

These materials should not only be educative, they could provide basis for generating alternative ideas - the more enriched the tax discourse, the better the prospects of our taking tax more seriously as a mobilization tool for national development.

An Avoidable Example: Radio/Television Licence Fee

Recently, I had occasion to act for a client in respect of Radio/Television Licence Fee by an LCDA in Lagos State. Whilst acknowledging their right to assess license fees for TV and/or Radio pursuant to the **Taxes and Levies (Approved List for Collection) Act, Cap. T2 LFN 2004**, such assessments must not be arbitrary. Rather than provide basis of their N200,000 assessment, the LCDA officials insisted that the number of radios was immaterial; it was even irrelevant whether or not the client has any radio or TV on its premises! This was to render nugatory, client's offer to throw itself open to inspection (scheduled or unscheduled) in proof of assertion that they had no radios or TVs in their offices.

The LCDA's position clearly contradicts for example **section 1 Eti-Osa Local Government Radio, Television, Computer, Satellite Licence Bye-law 2009 ("the Bye Law")** which provides in part that the annual license shall be paid by "any person who owns or is in control of" radio, television and other stated items within the territorial jurisdiction of Eti-Osa Local Government.

Interestingly, **section 1, the Bye-Law** purports to extend the scope of coverage for the licence fees to "Computer, Satellite instrument or other items of the same or similar kind" in clear breach of the provisions of enabling legislation, namely: **Cap. T2 LFN 2004** and **Local Government (Approved Levies) Law No. 4, 2010 of Lagos State**. Notably, **Item 12, Schedule of LG Levies (Approved Collection) Law** is similarly worded as **Item 14, Part III, Schedule of Cap**

T2, viz: "radio and television licence fees (other than radio and television transmitter)."

The correct position is that **the Bye-Law** cannot validly extend the coverage beyond enabling provisions, given the clear intention to limit application to only radio and television by the words, "... (other than radio and television transmitter)." On that basis, we argued that the LCDA cannot validly enforce the assessment for radio/television licence against our clients because they use computers and other similar equipment.

Furthermore, under the *exclusio alterius* rule, the express mention of an item is the exclusion of what is not mentioned. Accordingly, purported reliance on constitutional provisions and the LG Law of Lagos State are unhelpful, because they clearly do not permit LGs to exceed their jurisdiction.

Another interesting provision is **section 11 LG Levies Law of Lagos** frowns at (upon pain of penal sanctions), collection of unauthorized rates or collection in improper manner. There are myriad equivalent provisions all over the country, but how well (or often) have we seen the enforcement of these provisions? In this regard, Hon. Justice Affen's recent decision in **Sun Trust Savings & Loans v. Hon. Minister, FCT & 3 Ors**, (2014) 15 TLRN 29, that Defendants cannot launch park and pay scheme, prescribe fees/charges and impose penalties for contravention without enabling subsidiary legislation (pursuant to *Road Traffic Act*), is commendable.

We contended on our client's behalf that they are not liable to pay the assessed Licence Fees because there is no valid basis for it. It is trite that tax laws are strictly construed: "the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax on him", **Russell v. Scott** [1948] 2 All ER 1 at 15, which has been wholly affirmed by Nigerian caselaw. In **Ahmadu v. Governor of Kogi State** (2009) 1TLRN 319, the CA stated (at p. 336) that "language must not be strained in order to tax a transaction which had the legislature thought of it, would have been covered by appropriate words."

That **Para 1(b), 4th Schedule, 1999 Constitution** authorizes LGCs' "collection of rates, radio and television licences" does not mean such licence fees can be collected from organizations that do not have radios or televisions. As **section 1** of the Bye-Law recognizes, it stands to reason that such licence fees can only be collected in respect actual radios and TVs. The CA in **Eti-Osa LG v. Jegede & Anor**, [2007] 10 NWLR (Pt. 1043) 537 at 557-558 held that "... the power of the Local Government to make Bye-Laws are subject to the enabling Law which gives the Local Government the power to collect taxes. Any attempt to act outside the ambit of Part III of

Taxes and Levies (Approved list for Collection) Decree No.21 of 1998 [now Cap T2 LFN 2004] will be futile."

In the more recent case of **Fastforward Sports Marketing Ltd v. Port Harcourt LG Council** (2011) 4 TLRN 45, the Court speaking on the powers of LG Councils to impose taxes and levies stated (at p.51) that such must "**be measured against the barometer set by Part III of the Schedule to the Taxes and Levies (Approved List for Collection) Act**". Also, in **Thompson & Grace v. Government of Akwa Ibom State & 2 Ors.** (2010) 3TLRN 94 at 110 it was held that "... the 1st and 2nd Respondents have no power to impose, demand and collect whatever taxes and levies outside the provisions of... Cap T2 of 2004." In the above case, the Court conceded the right to charge and collect Business Premises Levy but the Levy cannot exceed the stipulated amounts in *Cap T2*, neither can it apply to Staff Residential Quarters, not being Business Premises.

In **Attorney-General Cross River State v Ojua** (2011) 5 TLRN 1 at 19, the CA held that *Cap. T2* being existing law, has upon coming into force of the 1999 Constitution, become an Act of the National Assembly which remains valid subject to consistency with the provisions of the Constitution.

Conclusion

Socially responsible corporates take regulatory compliance seriously as an integral part of their business strategy. They are also obliged to ensure that they only pay valid taxes and levies under the law. This is in line with Government's policy initiatives towards business friendly environment that enables optimal contribution to the nation's economic development. It will help a lot if Revenue authorities focus only on enforcement of valid fees, levies and taxes. And in so doing, they should comply with due process, and rule of law to which both the Government and the governed are subject.

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