



Tax Planning:

Walking the Thin Line Between Tax Avoidance and Tax Evasion

Thought Leadership | By Ayooluwatunwase Fadeyi (Originally published in *BDLegal Business*, 29. 03. 2018, p.26)



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Introduction

Tax is mandatory financial charges imposed on taxpayers by the Government as required by statute or other basis, irrespective of whether services are provided to taxpayers. Tax is not voluntary but mandatory, failure or any resistance to payment of tax is considered a punishable offence.¹ Nonchalant attitude towards provision of basic infrastructural amenities or lack of accountability by Government in public spending do not constitute a lawful justification for non-payment of tax. The best a taxpayer can do is to postpone or reduce their tax liabilities by arranging their affairs to enable them pay the minimal tax possible. This is possible through tax planning, a process of forecasting tax liabilities, formulating ways and identifying opportunities to reduce tax liabilities within the law.²

Tax planning is permissible under the law: “it is now firmly established that a party may embark on a tax planning exercise so as to limit its tax incidence.”³ Also in *Inland Revenue Commissioners v. Duke of Westminster [1936] 19 T.C. 490* Lord Tomlin stated that “every man is entitled if he can 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 tax-payers may be of his ingenuity, he cannot be compelled to pay an increased tax.”

This implies that taxpayers can manage their affairs in order to pay the lowest tax validly possible and cannot be compelled to pay anything more. Tax planning should however be done with caution, so that whilst trying to avoid tax, one does not cross 'the criminal threshold' by evading it.

The End Justifies the Means: Tax Avoidance and Tax Evasion

Tax avoidance and tax evasion are two different concepts which most people find confusing. These two words, although sometimes used interchangeably, do not bear the

same meaning, I will attempt to further illustrate the difference in meaning. The consequence of an act determines whether such act is tax evasion or avoidance. Acts which lead to penalty are considered to be acts of tax evasion, tax avoidance on the other hand has no punitive consequences.

Schemes of tax avoidance are most times set aside and the Revenue would make necessary adjustments taxing transactions accordingly and does not lead to penalty or imprisonment. But often tax evasion leads to civil tax disputes where the Court will be called upon to decide on whether there is, or the quantum of, tax liability. In the course of adjudicating over one of such dispute, the Court of Appeal, per *Ogunwumiju JCA* stated in *FBIR v. IDS Ltd*: “since tax law is deemed to be a debt recoverable by action, I do not agree that interest and penalty imposed on such a debt constitute an inhuman interpretation of the law” justifies penalties attached to tax evasion.

When the word “evade” is mentioned, what comes to mind is something of criminal connotation as the word is often associated with crime: “evading arrest” “evading a traffic stop”, “evading police”, etc. The word “evading” means to escape especially by cleverness or deceit. However, avoidance could mean to prevent something from happening or not to allow yourself to do something, the act of avoidance mostly is not criminal unlike evasion. From this illustration, it will be precise to say that the act of tax evasion is criminal while that of tax avoidance is not, this is the major differences between tax avoidance and tax evasion.



Tax evasion is an illegal and deliberate act of a taxpayer to pay less tax than he ought to pay which gives rise to penalties and in some cases imprisonment.⁵ *Kabiru Mashi* in his article, “*Fighting Tax Evasion in Nigeria*” relied on the definition of tax evasion by the Canadian Department of National Revenue: “the omission or commission of an act knowingly with intent to deceive so that the tax reported by the taxpayer is less than the tax payable under the law, or a conspiracy to commit such an offence.”⁶ Tax evasion includes acts such as deliberate

¹ See section 28 Value Added Tax Act (VATA) Cap V1 LFN, 2004; section 92 Companies Income Tax Act (CITA) Cap C21 LFN, 2004.

² “No man in this country is under the smallest obligation, moral or other, so to arrange his legal relation to his business or 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 mean by the Revenue”: *Ayrshire Pullman Motor Services & Ritchie v. CIR [1929] 14 T.C 754*.

³ Per Idris, J. in *JGC v. FIRS (2016) 22 TLRN 37* at 93.

⁴ *FBIR v. IDS Ltd. [2009] 8 NWLR (Pt. 1144), 615* at 637.

⁵ *7Up Bottling Co. Plc v. LSIRB [2000] 3 NWLR (Pt. 650), 565* at 591.

⁶ <http://thenationonlineng.net/fighting-tax-evasion-in-nigeria/>, last visited on 25/01/2018.



omission/non recognition of revenue when necessary for tax purpose, claim of fictitious expenses, false claim of contribution to a pension scheme, deliberate misrepresentation of material facts, non-disclosure of relevant documents, non-maintenance of complete records of all transactions, filing fraudulent tax returns, etc.

Tax Avoidance as a Form of Tax Planning

Payment of tax should not be a burden; however, this often is the case with most taxpayers. According to Professor C.S. Ola:

*"To some, tax is the shepherd they did not want;
It maketh them lie down in great anxiety;
It leadth them beside the still factories;
It disturbeth their souls on the path of financial destruction;
Yea, though they walk through the valley of depression;
They anticipate no recovery, for taxes are with them;
Tax officials and their offices, they frighten them;
Their expenses runneth over..."*

In order to reduce tax burden, taxpayers can plan their tax liabilities through tax avoidance. Being a form of tax planning allowable under the law, tax planning is a legal means of reducing tax liability, often after seeking professional advice. Means of tax avoidance includes but not limited to:

i. **Optimal Transaction Structuring:** Structuring of investments/acquisitions and asset sales; in addition to taking advantage of all applicable tax

incentives, credits and allowances, as well as use of offshore vehicles in tax havens or jurisdictions having tax treaties with Nigeria.⁸ In this wise, given recent "Panama Papers" and "Paradise Papers" leaks, it is important to stress that Nigerian law not only permit foreign investment by its citizens (evidenced by absence of any prohibition against such foreign investment), it actually does encourage offshore investment. This can be gleaned from **sections 11 and 23(1)k Personal Income Tax Act, Cap P8 LFN, 2004 (PITA)** and **CITA**, respectively. They provide that, proceeds from foreign investment brought into Nigeria through approved channels (Nigerian banks) are exempted from tax in Nigeria.

ii. **Locations that has Double Taxation Agreements (DTAs) with Nigeria:** This affords non-resident companies the privilege of suffering WHT on dividends and interest at the preferential rate of 7.5% instead of 10%. Countries having DTAs with Nigeria include: Netherlands, Canada, South Africa, China, Philippines, Pakistan, Romania, Belgium, France, Mauritius, South-Korea, Spain and Italy. Long term financing loans may also confer full or partial WHT exemption pursuant to **section 24 CITA**.

iii. **Utilizing Tax Incentives:** Incentives such as pioneer status governed by **Industrial Development Income Tax Relief Act, Cap. 17, LFN 2004 (IDITRA)**, **Pioneer Status Incentives Regulations, 2014 (the Regulations)** modified by the

Federal Ministry of Industry, Trade and Investment (FMITI) Pioneer List released on 7th August, 2017⁹; rural investment allowance under **sections 34 CITA**; income tax profit exemptions and accelerated capital allowances (e.g. under gas utilisation incentives of **sections 39 CITA** and **11 PPTA**, and tax incentive regime for solid minerals pursuant to **Minerals and Mining Act, Cap. M12, LFN 2004**; export processing zone operations that confers exemption from Nigerian taxes, subject to exceptions under **Nigerian Export Processing Zone Act, Cap. N107, LFN 2004 (NEPZA)**, **Oil and Gas Free Trade Zone Authority Act (OGEFZA) Cap. O5, LFN 2004**; the **Companies Income Tax (Exemption of Profits) Order, 2012** which was for a limited period enacted specifically to promote investments and encourage employment of young graduate. There are also other reliefs contained in the *Compendium of Incentives in Nigeria* by Nigerian Investment Promotion Commission (NIPC) and Federal Inland Revenue Service (FIRS)¹⁰ and others permitted by Law.

iv. **Recognizing and Maximizing Tax Loopholes:** Loopholes in tax laws can be used to minimise tax liabilities. It is permissible for taxpayers to take advantage of the shortcomings contained in tax laws to reduce their tax liability. Given that tax laws are amended and re-enacted not to stop persons who employ legal and permissible devices to minimise tax liability, but to: avoid the escape of taxable subjects as has been the case in Nigeria between 1961 till date; meet new developments; and plug loopholes.¹¹ Some of these loopholes includes the tax benefits associated with mergers, loss carried forwards, the principle of election, deferred tax assets, structuring long term loan, etc.

These loopholes are also boosted by the principle of interpretation of tax provisions that ambiguities or conflicting provisions are resolved in favour of the taxpayer, rather than the Revenue.¹² An example is the provision that subjects share transactions pursuant to mergers to capital gains tax (CGT) whilst **section 30 CGT Act** totally exempts disposals of shares and stocks from CGT.

⁷ C.S. Ola, 'Tax Planning and Auditing in Nigeria' (UPL, 1985), Pg. 1.

⁸ See Idris J, in *JGC Corporation v. FIRS supra* (at Pg. 93) that "it is now firmly established that a party may embark on a tax planning exercise so as to limit its tax incidence."

⁹ <https://www.invest-nigeria.com/pioneer-status-incentives-document/>.

¹⁰ <https://www.invest-nigeria.com/nipc-firs-unveil-investment-incentives-compendium/>.

¹¹ *7up Bottling Co. Plc v. LSIRB (supra)* at Pg. 2.

¹² *FBIR v. IDS Limited [2009] 8 NWLR (Pt. 11440), 615@ 638*, the Court of Appeal reiterated that "taxpayers are not to be taxed unless the language of the statute clearly imposes the obligation, such 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."

- v. **Donations to Not-for-Profit Organizations/Causes (Fifth Schedule CITA):** Donations to not for profit organizations, educational institutions, research institutions and public health organizations as contained in **Fifth Schedule CITA** will be deductible expenses by some donors, whilst also helping donor taxpayers achieve their corporate social responsibility, marketing and reputation management goals.
- vi. **Investing In ‘Preferential Sectors’:** Focusing on preferential sectors brings benefits that are generally not available. An example is the agricultural sector (agricultural produce are VAT exempted (**First Schedule VAT Act**), tax exemption on interest income on agricultural or agribusiness loans (**section 19(7)(a) PITA**), and investment in other sectors that enjoy the preferential benefits such as pioneer status and other incentives.

The role of tax experts in tax planning can never be overemphasized. Tax experts have comprehensive knowledge of various tax laws. And from their considerable experience they also have the ability to identify all the loopholes in tax laws which can legally be to the advantage of taxpayers. Taxpayers in any dilemma are advised to seek the help of tax experts to resolve their tax issues and not resort to self-help. Self-help may be a form of tax evasion which is illegal with attendant criminal, financial and reputation consequences.

Conclusion

With tax planning, taxpayers need to put into consideration some of the following: where to invest, the applicable taxes and levies, critical dates of remittance of all applicable taxes, current applicable tax incentives. Taxpayers should ensure that transactions done in order to avoid tax are genuine (have substantive business reasons) and not a sham. *Per Denning in Griffiths v. J.P Harrison (Watford) Ltd*¹³: “a transaction which by the acts done is of the nature of a trading transaction and is a genuine transaction not a sham does not cease, in the absence of any statutory enactment so providing, to be a trading transaction for the purpose of income tax merely because it was entered into with the fiscal object of recovering tax from the Revenue.” But where a transaction has pre-arranged artificial steps that serves no commercial purpose other than to save tax, the proper approach is to tax the effect of the transaction.¹⁴

¹³ [1962] 40 T.C. 281 at 292.

¹⁴ *W. T. Ramsay Ltd. v. Inland Revenue Commissioners* [1982] A.C. 300.

¹⁵ Tax offences as specified in Nigeria's tax laws offences includes: non-filing of tax return, late filing of tax return, non-payment of tax, late payment of tax, failure to withhold tax, fraudulent issuance or forgery of Tax Clearance Certificates (TCCs) as contained in sections 74, 76(4), 94, 95, 96 and 97 PITA, sections 25-37 VATA, section 82 CITA.

Tax evasion has remained one of the major problems of the Nigerian tax system, taxpayers find tax avoidance delightful, but it is a threat to the government's revenue base. In order to mitigate this threat, Government has amongst other actions enacted the **Transfer Pricing Regulations 2012** as part of its General Anti-Avoidance Rule (GAAR) strategy to strike down impermissible practices carried out in a manner which undermines the intention of the tax law. The much disliked Excess Dividend Tax (EDT) provision of **sections 19/21 CITA** and deemed dividend distribution provision of **section 20 CITA** are also examples of GAAR rules.

Government should in addition practice transparency and accountable in its dealings. This will encourage tax remittance with the assurance that tax paid will be adequately utilized. Provision of incentives by Government which will encourage investment, profitability and in the long term, more tax revenues whilst encouraging compliance by taxpayer investors.

Strict enforcement of penalties for tax offences¹⁵ on defaulters to tax laws which includes: imprisonment (**section 92 CITA**), financial penalties including payment of interest (**section 35 VATA**) and the expressed intention to bring the full weight of the law to bear on non-compliance taxpayers that fail to take advantage of the Voluntary Assets and Income Declaration Scheme (VAIDS) to regularize their tax status by 30th June, 2018. This will reduce if not eliminate, tax evasion.

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