

**TAX PLANNING POSSIBILITIES
IN THE NEW PERSONAL INCOME TAX
(AMENDMENT) ACT, 2011**

PAPER

PRESENTED BY:

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AT

NATIONAL WORKSHOP

ON

**2012 TAX UPDATE
THEME
PRACTICAL APPROACH TO THE
NEW PERSONAL INCOME TAX
(AMENDMENT) ACT 2011**

**ALL STAKEHOLDERS' PERSPECTIVE
ORGANIZED BY
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OUTLINE

Protocol & Pleasantries

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1. PREAMBLE

Tax is an intensely hated word. In those days, as students, we used to crack jokes and riddles thus, I am a word of four letters, very much loved particularly by students but when the last letter is removed I am hated by everybody, particularly my parents, what am I? Simple, I am a taxi and remove the last letter and I am tax. I wonder whether taxi is still loved by everybody in this one chance era, but tax is still the old hated bitch, that never dies.

This is true irrespective of the fact that we encounter the good dividends of taxation almost always in our daily lives. Take the case of this adapted story of a farmer from the United States, "who rode free to public schools, on free buses, studied agriculture with Federal Government Scholarship, bought his home with government free loan programme, got his power through Rural Electrification Scheme lines, sent his children to government colleges on government subsidized loans. He made it big in farming business but became highly disgusted and irritated by his high taxes. He wrote to his Senator thus: "I believe in rugged individualism, people should stand on their own feet, not expect government aid. I stand on my own two feet. I oppose all those socialistic friends **you have** been voting for and I demand return to the free enterprise system of our forefather". Really?

It is apparent from the above story, that many people do not object when they receive government services free or below the market price, but they do object when others are on the receiving line and when they have to pay taxes to support government.

Unfortunately, the bitch called tax, has come to stay with us because as one American President, Benjamin Franklin (1706 - 1798) said "in this world nothing can be said to be certain except death and taxes". Thus as we search and struggle to implement strategies to reduce sickness and postpone death, so also we have continued to perfect strategies to, at least, mitigate the harsh effect of taxation.

Taxation has been since its introduction by the Romans in the early centuries, a thorn in man's flesh both as an individual and in business. This is so because payment of taxation is by coercion, that is payment by force. It is however, inevitable.

This is reasonable. Take the case of flood control equipment that would help to control next flood that may come to ravage M

community. There are three options to the community to possess such equipment⁽²⁾ viz:

1. **Voluntary Collections**: By inhabitants of M; but what about people who may refuse to pay their voluntary share? – Every body's business is no body's business.
2. **Voluntary Donation**: By one or a few people who may undertake to provide their money for this as a help to the community. This is an isolated event and cannot be relied on for future needs of the community M.
3. **Coercion**: If neither 1 or 2 works, the only other option is to base the purchase of the flood control equipment on some kind of coercion⁽²⁾. That is, the provision of the flood equipment will be financed by forced contribution. This is taxation in its simplest form and the nature of public goods and public power which are the domain of taxation.

If this example is applied to communities, governments at Local, State and National level, we can now appreciate why taxation is as certain as death, if people and community in organized state must survive.

Taxation has become a cost centre to both individuals, organizations and governments which like all cost centers should be planned and controlled within the provisions of tax and constitutional laws.

Our duty here is to introduce these issues and discuss how they affect the individual persons and hopefully stir up discussions on it.

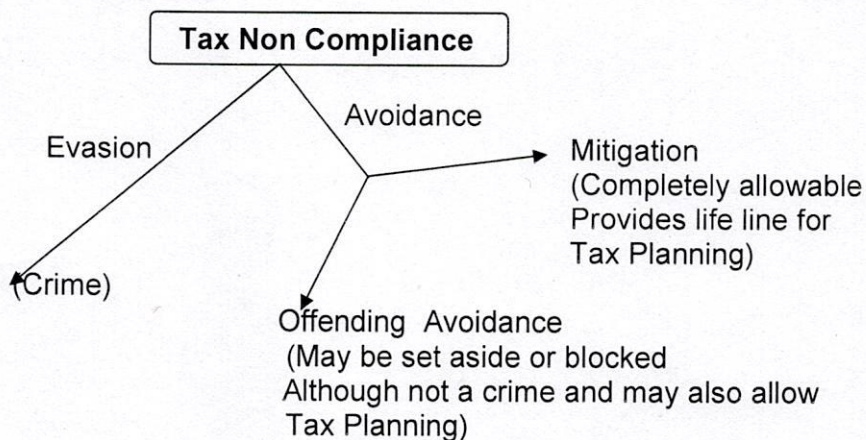
The next step is to look at actions taken by tax payers to brush taxation off their backs or at least minimize their effects. Such actions cause tax not to be collected and are popularly grouped under Tax Evasion or Tax Avoidance. Avoidance usually provide the leeway for Tax planning and we discuss how government plot to stamp out avoidance. Surprisingly, tax avoidance and by implication tax planning somehow have continued to survive government and judicial onslaught, and we discuss it here under paragraphs two and three. Finally, we will look at the Income Tax Amendment Act and discuss the planning possibilities it offers.

2. TAX EVASION/AVOIDANCE

Historically, it has not been easy to draw a bold dividing line between these words which constitute tax non compliance. While Tax Avoidance refers to reducing taxes by legal means, Tax Evasion on the other hand refers to the criminal non-payment of tax liabilities” as we know them in Nigeria.

There is however a further distinction between Tax Avoidance and Tax Mitigation developed by courts and economists. Tax Avoidance in this context is a course of action designed to conflict with or defeat the intention of parliament by utilizing loopholes not foreseen by legislators. Such loopholes when discovered, are usually blocked by the government through future amendment to the law.

Tax Mitigation on the other hand again, is defined as a conduct which reduces Tax liabilities without going contrary to the intention of parliament. Situations giving rise to tax mitigation are known to governments but are untouchable because some how they have been accepted as part of the system. These are pictorially summarized below.



- The importance of this distinction lies in the fact that it helps us understand the Zig-zag approaches of the courts in this all important area of taxation.
- It is well established that tax evasion is a crime in almost all the countries of the world but tax avoidance is subjective and the decisions in this area depends on the circumstances in each jurisdiction and the disposition of the judges.
- The development of avoidance/evasion divide started from 1860 (could be earlier), in England when Justice Turner⁽⁴⁾ suggested evasion/contravention divide where evasion stood

for the lawful side while contravention was the illegal side of the divide.

- However in 1901⁽⁵⁾, Turner's distinction was noted as two meanings of same word evade.
- However in a United States of America case in 1916⁽⁶⁾, Oliver Wendell Holmes used the word Avoidance/Evasion (legal/illegal), for the first time and from that date remained the accepted nomenclature.

This was not fully accepted in the U.K until the 1980s⁽⁷⁾. Before then, there was conflicting interpretation of which one was illegal and the other legal.

We can call this era the era of nomenclature establishment (1860 – 1984).

The era of complete legality of tax avoidance started in 1926 after Lord Clyde⁽⁸⁾, declared that: "No man in this country is under the smallest obligation, moral or other, 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".

Again in 1936, Lord Tomlin⁽⁹⁾ declared:

"Every man is entitled if he can put 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 Commissioner of Internal revenue or his fellow tax payers may be of his ingenuity, he cannot be compelled to pay an increased tax".

In 1984 however, Lord Templeman⁽¹⁰⁾ turned the tide against tax avoidance when he declared that he regarded tax avoidance scheme as no better than attempts to cheat the Revenue. In this case Templeman, convinced the house of Lords to reject a scheme to avoid Capital Gains Tax.

However, in 1988, this position was reversed⁽¹¹⁾ in *Graven V White and Related Appeals* (1988)3 ALL ER 495 when majority of the Lords rejected *Furnish V Dawson* and restored the right of a taxpayer to strive through tax avoidance to reduce his tax burden.

The fight goes on but on the balance, it would appear, tax avoidance as a scheme to mitigate or escape tax lawfully has come to stay, reinforced by its twin leg Mitigation.

3. **TAX PLANNING: Where does it fit in?**

With the attempt worldwide to block all legal loopholes perceived to aid tax avoidance which are claimed to go against the intention of the legislature, any hope left for tax planning? The answer is of course yes.

What is required is KNOWLEDGE and DILIGENCE of the following factors

- i) The taxpayer must have up to date knowledge of tax laws and changes therein and have knowledge of himself, his circumstances and his future aspirations.
- ii) The Tax Payer in his individual per individual capacity wishing to pay less tax must focus on his tax brackets using schedule 6 to PITA as amended.
- iii) The Tax Payer in business would want to know:
 - (a) which type of organization is suitable to use in order to gain tax advantage e.g. Incorporated Company or Unincorporated company including partnership.
 - (b) What strategies are available to gain cash flow advantages e.g. commencement years claims, Capital Allowances etc.
 - (c) Whether tax jurisdictions matter for siting his business.
- iv) As detailed under Appendices 1 & 2 the tax payer would like to know what factors can cause non – compliance (evasion and avoidance) and bring tax payers into conflict with the Revenue.
- v) He must diligently do what the laws require of him. No one person is all knowing, so it is recommended here that each tax payer should engage his personal or family tax adviser in the wake of the current TAX AWAKENING in Nigeria and worldwide.

vi) He must understand some of the impediments to Tax Planning which are used by Courts and Revenue kill a well packaged avoidance scheme. They include but not limited to:

a) **Judicial Doctrines:**

The business purpose doctrine to ensure that tax planning adheres not only to the letters of the Law but also to its spirits.

Under this doctrine the revenue will disregard the tax, results of transaction held to have no substantial business or commercial purpose other than tax avoidance.

b) **Substance Over Form Doctrine:**

Allow the revenue to look through the legal form of a transaction to discover its true economic substance and tax the parties involved in accordance with that substance – Court holding Company (1945) 324 US331

c) **Step Transaction Doctrine:**

Allows revenue to collapse a series of intermediate transactions into a single transaction to determine the resulting tax consequences. E.g. when it is clear, the transaction would not have taken off initially if they don't believe, that the entire series would take place. Helvering v Alatama Aquatic Limestone Co. 315 US179 (1942).

d) **Morality Issue:**

The moral issue of tax avoidance as a tax planning weapon has generated bitter controversies over the years. Templeman in all his judgments had always harped on the cheating inherent in tax avoidance⁽¹²⁾, and would have, if he so had his way, closed the window on tax avoidance and subsequently on tax planning. His views on this issue were strongly supported by notable tourists⁽¹²⁾ such as Lord Greene (1943) when he referred to the battle of manoure between the legislature and those who are minded to throw the burden of taxation off their own shoulders to those of their fellow subjects? Viscount Simon in Latillia v IR Commissioners and even in South African

where Macdonald J.P. concluded that tax avoidance is an evil.

e) **Lack of Arms Length Transaction (i.e. Related Party Transaction):**

Here the right of the Revenue to substitute arms-length or open market price is usually exercised, as permitted by the laws S. 17, of the Principal Act.

Despite all the fury, those supporting tax avoidance/tax planning are still in majority see Barclays Mercantile Business Finance Ltd v Mawson (2005) concerning a series of transactions involving a sale and leaseback, no commercial purpose, where the judges said realistically viewed, moral judgment ought not to enter the exercise. It is purely a matter of statutory construction majority of the judges have concluded.

vii. **Methodology:**

The tax payer/advisers must know the objective of Tax Planning in all situations which is to achieve minimal tax liability without offending the law. This is usually achieved through any or all of the following:

- Reducing income tax consequences of a transaction or arrangement
- Shifting the timing of a taxable event
- Shifting income to another person or organization
- Individuals can also move into tax free zones or what in many countries are called tax havens. However, some countries such as the US, tax their citizens, permanent residents, and companies are taxed on all their worldwide income, so this device no longer helps to avoid tax. In Nigeria PITA is a Federal Tax Law and JTB provides uniform interpretation throughout all the state in Nigeria.

4. **ANYTHING NEW?**

Good Question

The answer ofcourse is yes. There are definitely new possibilities for tax planning in the Personal Income Tax (Amendment) Act 2011.

They include but not limited to:

1. **The controversy of commencement date of the Amendment Act:**

The Act was signed into law on 14th June 2011 which is its effective date but Revenue said that for administrative convenience full implementation begins 1st April, 2012. Somewhere in this workshop, I believe more competent resource persons would have dealt with the issue. However in tax planning context, tax payers will suffer losses, unless implementation is backdated to take off on June 14. This will give rise to over payment refunds, which tax payers should exploit.

2. **Determination of Tax Liability:**

The first approach to personal income tax planning is to focus on a standard structure of computation of liability and relate it to the objective of tax planning mentioned above viz:

	N	
Gross Income	XXX	
<u>Less: Non Taxable Income</u>	<u>(XX)</u>	
	XXX	
Adjustment for Deductions (+ or -)	<u>X</u>	
Total Income	XXX	
Less Consolidated Reliefs etc.	<u>XXX</u>	
Taxable Income	<u>XXX</u>	
Schedule 6 or 1% Minimum Tax	(XX)	
<u>Less: Tax Credits</u>		
Withholding Tax	XX	
Overpaid Tax	<u>X</u>	
		<u>X</u>
Net Tax Liability		<u><u>X</u></u>

New:

- (a) Non taxable income:
 - Pension (private or public)
- (b) New Deductions
 - Contribution to Pension
 - Contribution to National Housing Fund
 - National Health Insurance Scheme
 - Life Assurance

- (c) Consolidated Relief: Is there any controversy over what is in consolidated relief 33(1) or the entire S. 33 of the Principal Act?
3. Contribute more money into Pension Funds NHF, NHIS and Life Assurance and get tax free deductions. Urge States to Implement NHF & NHIS and Life Assurance (is S. 33 (3) (d & e) subsumed in the consolidated.
 4. File a self assessment and make payments within 90 days and get 1% bonus of the tax payable.
 5. Invest more money in quoted company stocks and suffer only withholding tax at 10%.
 6. Avoid Presumptive Assessment (BOJ) by meeting the target dates.
 7. Invest in Bonds issued by Federal, State and Local Governments and their agencies and enjoy free interest.
 8. Invest also in bonds issued by corporate bodies including supra – nationals etc.
 9. S. 20 of the Amendment Act amends S. 81 of the Principal Act by providing as follows: New S. 81(2-4)
 - Penalties for late filing (Avoid late filing).
 - Refund of over payment under S. 69, 70, 71 and 72 to be refunded under 90 days by the relevant Tax Authority (exploit the opportunity, but note that Act is silent on Interest on overpaid tax even when it is carried forward as a credit to the payer.
 10. Increase Private Pension

Needless to re-emphasize all the benefits in the Principal Act which Continue under the amendment Act e.g.

- interest on Residential Property Loan
- other investment schemes etc.

5. **ANTI AVOIDANCE PROVISION IN THE NIGERIA PERSONAL INCOME TAX ACT 1993 AND 2011**

As is common with the maneuvers between government and tax payers, the tax payers continue to seek loopholes through which they can reduce or escape tax, the government on its part continues to amend the laws to counter tax payers' evasion strategies and more importantly to make the laws adaptable to suit its programmes.

- a) Presented under appendix 3 is a table summarizing some of the anti avoidance provisions of the Personal Income Tax (Amendment) Act, 2011 which each tax payer and advisers ought to take grasp of in order to aid successful tax planning.

Others include:

- (b) S. 6(b) of the Amended Act also provided for presumptive Tax Regime when it said; notwithstanding any of the provisions of this Act, where for all practical purposes the income of the tax payer can not be ascertained or records are not kept in such a manner as would enable proper assessment of income, then such taxpayer would be assessed on such terms and conditions that would be prescribed by the Minister in a Regulation by order of gazette under a presumptive tax regime.
- (c) Minimum tax has been raised to 1% of the total income.
- (d) A new Taxpayer Identification Number (TIN) now legalized as a control measure to aid taxpayer database.
- (e) Double Taxation Agreements now to be signed by the National Assembly etc.

6. CONCLUSIONS

This paper has surveyed the nature of taxation and attempts to avoid it. There is always the urge not to comply with tax laws but the consequences on one side is bitter (evasion) but on the other hand is sweet when successful avoidance scheme is hatched and it succeeds.

In order to avoid falling into the bitter evasion trap and, on the other hand enjoy minimization of tax an individual engages in tax planning. Each tax contains both death traps and lifeline loopholes to be exploited. This is why tax planning and tax avoidance have continued to survive despite all the onslaught by Government and Courts.

We have gone through the Income Tax Amendment Act 2011, and noted the planning opportunities that can be exploited from it which when added to existing planning opportunities in the Principal Act, makes PITA a little bit tax payer friendly.

Thank you

References

1. William Raspberry in "American Way, O.K. for the other Guy" Tuka World, Section A, B, (Feb 16, 1989) as quoted by Leftwich & Sharp: Economic of social Issues 6th Edition; Pg 367.
2. Christopher Hood; Administrative Analysis (An introduction to Rules, Enforcement and Organisation) Wheatsheat Books, Sussex, 1986.
3. Diagram by author to aid understanding.
4. Fisher V Briely (1860)
5. Bullivant V.A.G. AC 196 England, 1901
6. Bulletin V Winsconsin, 240 US 625 (1916) 630
7. Graven V White 1988 62 TC 1 at 197.
8. Ayrshire Pullman Motor Services and Ritche v IRC (1926) 14 TC 754.
9. IRC Commrs V Duke of Westminster (1936) TC 490, ACI.
10. Furniss (Inspector of Taxes) V Dawson, 1984 1 ALL ER 530 (HL).
11. Ibid
12. Jurists referred to here were taken from TAX AVOIDANCE, MORALITY AND THE DEVILS SERMON ON SIN – SALT ANNUAL CONFERENCE, by Prof. Henry Voister, Pg 77
13. C.I. EDE is an Executive Member of CITN and Commissioner, Tax Appeal Tribunal South West, Ibadan. He is also practising as Chartered Accountant and Tax Practitioner. He has served as Executive Chairman, State Internal Revenue Service Board and Accountant General, all in Enugu State.
14. Appendices III and IV where taking from Inland Revenue document titled "Highlights on Personal Income Tax Amendment Act 2011 as presented to the Press in 2012.

APPENDIX I

WHAT ARE THE CAUSES OF TAX EVASION AND AVOIDANCE?

BD Kiabel & N.G. Nwokah (2009) concluded that there is 95% publicity that the causes include some or all of the following:

- No public enlightenment campaign
- Illiteracy
- High tax rates
- Non-existence of an efficient and equitable tax system
- Lack of trained personnel
- Poor method of accounting
- Lack of adequate tax incentives
- Poor relationship between payers and tax authority
- Lack of adequate enforcement for default
- Poverty
- Non-provision of social services
- Inter-district mobility
- Absence of tax conscience
- Proliferation of taxes
- Loopholes in the tax laws

They singled out no public enlightenment campaign. High tax rates, lack of adequate tax incentives and poverty as the most causes of tax evasion and avoidance.

1. Bariyima D. Kiabel & N. Gladson Nwokah in their article. "Curbing Tax Evasion and Avoidance in personal income Tax Administration. A study of the South-South States of Nigeria". Published in European Journal of Economic, Finance and Administration Sciences 2009.

APPENDIX II

The authors (2) concluded further that Tax Evasion and avoidance are perpetuated through the following ways:

- Omission of Taxable Income
- Failure to keep adequate records
- Inflating expenses and setting of expenses against the increased profits
- Submission of false accounts
- Artificial disposition
- Improper characterization of income or expenses
- Interference with revenue Authority through bribery and corruption
- Fleeing the country to avoid tax
- Claiming of fictitious deductions
- Failure is pay over to the revenue the amounts deducted from employee's wages (and contractors)
- (Failure to deduct from employees and contractors)
- Concealment of profits
- Purchase of more fixed assets exempted from tax
- (Transfer of goods and property to related persons at less than arm strength prices)

Again the three leading causes were pinpointed as failure to keep adequate records, claiming of fictitious deductions and concealment of profit.

2. Ibid
3. Items in bracket are my own word.

APPENDIX III

Offences, Penalties and Sections: Various penalty provisions for offences committed in the Act have been increased upwards as detailed below:

APPEDIX IV			
Section	Offences	Old Penalty	New Penalty
S.47(3)	A person who engages in banking business who fails to render returns, books documents and Information on demand within 7 days	N5,000 for Corporate body N5,000 for Individual	N500,000 for Corporate N50,000 for Individual
S.49(3)	A person who engages in banking business who fails to render information about new customers within 7 days of the next following month	For Corporate Body N5,000 For Individual N500	For Corporate Body N500,000 For Individual N50,000
S.52(1)(a)	Failure to keep Book of Accounts		For Individual N50,000 For Corporate Body N500,000
S.74(1)	Failure to deduct / remit tax	10% of taxes not deducted or N5,000 whichever is higher	10% of tax not deducted/remitted plus interest at CBN Monetary Policy rate
S.81(a) 3	Failure to file returns by Employers	-	N500,000 (Company) N50,000 (Individual)
S.85(9)	Failure to demand and verify TCC	-	N5,000,000 OR 3 years jail or both
S.94	Failure to comply with any provision where there is no specific penalty	N200 in the 1 st instance N40 for everyday	N5,000 in the 1 st instance N100 for every day
S.95(1)	Making incorrect returns	10% of the correct tax	N20,000
S.96(1)(b)	Making false statements and returns	N5,000 or 5 years imprisonment	N500,000 for Corporate body, N50,000 for individuals and imprisonment of 6 months
S.96(1)	False statement by person in relation to tax payable or repayable	N1,000 or 5 years imprisonment	N10,000 or imprisonment nor more than 6 months
S.97	Offences by Authorized and unauthorized persons	N1,000 or 3 years imprisonment or both	N100,000 or 3 years imprisonment or both

APPENDIX IV

Tax Table

First	N300,000	@	7%
Next	N300,000	@	11%
Next	N500,000	@	15%
Next	N500,000	@	19%
Next	N1,600,000	@	21%
Above	N3,200,000	@	24%

Example of Pay-As-You-Earn (PAYE) Computation under the Personal Income Tax (Amendment) Act, 2011

	N	N
GL 1/1 Consolidated Salaries		226,800.00
Less: Consolidated Relief (N200,000 + 20% x 226,800)		245,360.00
Pension Contribution (7.5% x 226,800)		<u>17,010.00</u>
NHF (2.5% x 226,800)		<u>5,670.00</u>
Total Relief <u>(268,040.00)</u>		
Taxable Income		<u>(41,240.00)</u>
Minimum Tax (Annual) 1% of 226,800.00		<u>2,268.00</u>
Monthly Tax 2268/12		<u>189.00</u>

	N	N
GL 16/3 Consolidated Salaries		2,373,301.00
Less: Consolidated Relief (N200,000 + 20% x 2,373,301)		674,660.20
Pension Contribution (7.5% x 2,373,301)		177,997.57
NHF (2.5% x 2,373,301)		<u>59,332.53</u>
Total Relief		<u>(911,990.30)</u>
Taxable Income		<u>1,461,310.70</u>
1 st 300,000 @ 7%		21,000.00
Next 300,000.00 @ 11%		33,000.00
Next 500,000.00 @ 15%		75,000.00
Balance of 361,310.70 @ 19%		<u>68,649.03</u>
Annual Tax		<u>197,649.03</u>
Monthly Tax		<u>16,470.75</u>