

# CHAPTER SEVENTEEN

## THE LEGAL REGIME OF TAX CONSULTANCY IN NIGERIA

BY  
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### Introduction

The proper organ of government to administer tax in Nigeria is the Federal Inland Revenue Service<sup>1</sup> especially when the tax relates to Companies Income Tax, Value Added Tax and other federally controlled taxes under the Constitution<sup>2</sup> except Customs and Excise Duties whose responsibility for collection is vested in the Nigeria Customs Services.

At the state level the proper organ vested with the power to administer tax is the State Board of Internal Revenue while the Local Government Revenue Committee collects tax at the Local Government Level.<sup>3</sup>

However, owing to many and persistent administrative bottlenecks and outright inefficiency these organs of tax administration have performed below expectation,<sup>4</sup> thereby necessitating the use of additional hands otherwise known as tax consultants, tax contractors or tax experts to administer tax in Nigeria.

This chapter will x-ray the genesis of the use of tax consultants in tax administration in Nigeria, appraise their efficiency and advantages and will conclude by advocating for an enabling law that will regulate tax administration by tax experts and consultants in conjunction with the appropriate tax

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<sup>1</sup> Section 1 of Companies Income Tax Act 1990.

<sup>2</sup> See up pursuant to various state laws.

<sup>3</sup> Set up pursuant to Section 7 of the 1999 Constitution and Fourth Schedule of the Constitution.

<sup>4</sup> Kolapo Yemi and Faloseyi Michael, Widening and Optimizing Nigeria's tax revenue base. The Punch of September 25, 2006 p.34. Omoigui and the Tax Burden, in Nigerian Tribune Editorial of 28<sup>th</sup> March 2007 p.8.

authorities, that is, a law that will allow for a kind of public private partnership in the spirit of privatization, commercialization and deregulation that form the core of the ongoing reform in Nigeria. This will no doubt increase the internally generated revenue of each tier of government and also reduce over dependence of the economy on the oil revenue.

More importantly, all that the government will do is to make an enabling law that will set out the modus operandi for the tax consultants and will also regulate their conduct and sanction any erring tax consultant in order to promote probity, accountability, transparency and global best practice in their operation.

### **Tax Administration in Nigeria**

Tax administration includes tax assessment, audit, investigation, collection, computerization and litigation. It also includes tax management, planning and research and this extends to supervision, control and monitoring of the collection process which is a vital aspect of tax administration.<sup>5</sup>

The Federal Government established the Federal Board of Inland Revenue as a supervisory body to the Federal Inland Revenue Service charged with the responsibility of administering and coordinating collection of taxes in compliance with various laws.<sup>6</sup> While the State Government has State Boards of Internal Revenue collecting taxes for the states and sometimes also acting as agents of collection for the Federal Government. The Local Government being the third tier of government in Nigeria also collects revenue through Revenue Officers who are supervised by the Local Government Revenue Committee.

However, collection of taxes by the Federal, State and Local Revenue Officers has been fraught with many difficulties in Nigeria. These difficulties stem from the fact that some revenue officers saddled with the responsibilities of assessment, collection,

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<sup>5</sup> Section 2(1) of CITA 1990.

<sup>6</sup> Section 2(2) of CITA 1990.

auditing and administration of taxes are not well trained tax experts, lack of the wherewithal to do the job, under assess or some time the tax collected are either embezzled, diverted or misappropriated.<sup>7</sup> There is also the problem of collusion on the part of revenue officers with taxpayers with a view to aiding and abetting tax evasion or illegal avoidance. Hence the prosecution and dismissal of some revenue officers in some states and even the Federal Inland Revenue Service recently.<sup>8</sup>

In recent time, apart from complicity on the part of revenue officers, illegal tax avoidance and tax evasion is much more prevalent<sup>9</sup> because tax collection is not directly connected with the salaries and allowances of revenue officers since the government at all levels give subvention to ministries, departments, agencies and parastatals of government for capital and recurrent expenditure on an annual basis. This situation has made the Federal, State and Local Governments to rely heavily on the monthly statutory allocation from the Federal Account. Thus, there was little or no internally generated revenue both by the states and local government because the federation account was a sure banker for both every month. This is a dangerous trend because the oil revenue is dependent on the internally oil market which is beyond the control of Nigeria apart from the fact that the oil reserve in Nigeria which is 22 billion barrels has been projected to be exhaustible in the next 27 years.<sup>10</sup>

Before going further on this topic, I will first of all expose and comment on other views on the use of tax consultancy before rounding up with my view and suggested measures to sustain the

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<sup>7</sup> Abifarin Olufemi, *Constitutional Trends in Tax Administration and Imposition in Nigeria*, Essays on Constitutional and Administrative Law, Vol.II Achievers Wisdom Publication, Ilorin 2001, p.180.

<sup>8</sup> FIRS Sacks 200 Staff over Fraud, Daily Independent of 20<sup>th</sup> February 2007 p.C4.

<sup>9</sup> Akwa Ibol sues Mobile over N4 Billion Tax Evasion, Financial Standard, 15<sup>th</sup> April 2007 p.14.

<sup>10</sup> Alamieyeseigha D.S.P. *Thoughts on Federalism South-South and Resource Control* Treasure Books, Ibadan 2005 p.64.

system if Nigeria is to increase its internally generated revenue especially the oil tax.

Regulation, however, Section CITA prescribes a penalty of a fine of 200% of the tax not deducted plus interest at the prevailing commercial rate. Shutting down or sealing up a company is the hallmark of military rule.

The provisions of Section 81 of the Personal Income Tax Decree 1993 No.104 provides penalties where companies default under PAYE provisions. It states from the provisions, the proper course of action against a company under the PAYE provisions is to use the company for debt due. In the case of LSIRB v. 7Up Bottling Company Plc, the company has an outstanding PAYE of N56,229.73 and withholding tax liabilities. 7Up was sealed up and the contention was that the transaction was not liable to withholding tax. The court stated that the proper action for failure to deduct or remit deducted taxes should be a simple action for liquidated damages or action for a debt owed by 7Up to the Revenue.

### **The Use of Private Consultants in Revenue Generation**

According to Yerokun,<sup>11</sup> many experts in taxation have written on the use of private consultant in the Nigerian tax system trying to justify, condemn or rationalize the need for various reasons.<sup>12</sup> Governments all over the world had used and continued to use consultants in all spheres of human endeavours: engineering, medicine, law, accounting, revenue collection. Consultants are experts in their various fields, professionally skilled and trained in a drive to produce quick and pungent results.

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<sup>11</sup> Yerokun Olusegun, Taxation of Insurance Business, Essays in Honour of Professor D.A. Ijalaiye, Popoola Ademola ed. Unife Press, Ile-Ife, 2002.

<sup>12</sup> Ola C.S., A Critical Analysis of the Nigerian Tax System; Current Development in Nigerian Commercial Law, Sagay I. ed. p.254. Olujide Olusesan, Appraisal of Tax Consultancy under ARGP in Nigeria p.279. Nnama Meshack Umemwekem, he rationalized and concluded that that consultancy is illegal in his paper titled "Delegation of Tax Collection and Administration by Government to Tax Consultants and Agents", The Legality, MPJHL Vol.10 No.5122 p.286.

They adopt orthodox and unorthodox, legal and economic means to produce results to justify their appointments.

The introduction of tax consultants came during the military era in particular with appointment of a firm Chartered Accountants under Accelerated Revenue Generating programme of most State and Local Governments. It is a common knowledge that many Nigerians – whether corporate or individuals – either avoid or evade the payment of tax. The corporate are in addition guilty of deducting money from their workers and refusing to pay to tax authorities as evidence in many cases prosecuted.<sup>13</sup> The situation then was rightly captured by many tax experts. Ade Ipaye rightly painted the general picture of tax administration and public response to tax payment:

The Nigerian Governments at all levels have become disenchanted with the tax administrators. There were complaints of inefficiency and corruption. Above all, governments found it difficult to achieve their revenue targets and that precipitated major crises across the country. In many states and local governments, public servants remained unpaid for several months due to lack of funds.<sup>14</sup>

Another tax administrator in justifying the appointments stated that consultants are necessary agents in tax administration and that the existence of tax consultants has boosted states revenue by leaps and bounds.<sup>15</sup> Prof. Ola stated what predicated the use of consultants:

As deficient tax collection machinery coupled with a poor tax payment culture as a major characteristic feature of the economy of Nigeria, millions of

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<sup>13</sup> Multipurpose Ventures Ltd & 57 Others v. Attorney-General of Rivers State 3 Ors.(1997) 1 NRLR (pt.1) p.122, Toyin Bookshop Ltd v. Olalere Oni & Others (1997) 1 NRLR (pt.1) p.143.

<sup>14</sup> Ade Ipaye, Contemporary Issues in Corporate Taxation, p.318.

<sup>15</sup> Amina O., Guardian of 25<sup>th</sup> April 1997.

arrears of tax will certainly have negative effect on the government of Nigeria if it is indeed, desirous of having a buoyant economy for the benefit of the common man of this country. Thus, the new revenue generation drive is welcome.<sup>16</sup>

The appointment of tax consultant has been justified under the Constitution in the collection of taxes and administration of laws relating to such taxes as the preserve of state governments or other authority of a state. It is primarily the state tax authority which has power to appoint persons capable of performing tax functions. Similarly, the appointment of private consultants to generate revenue for government and the exercise of the powers conferred on it has been justified under Personal Income Tax Decree. It was clearly proved that there is no Section of Personal Income Tax Decree that outlaws the use of consultants in each state. All the state of the Federation can enter into any contract and it follows from this that a state can appoint anybody on consultant basis. At the Federal level, consultants were appointed to administer import duties and the payment of VAT at banks.

The criticisms of the appointment of private consultants should not be used for total condemnation. The rationality of an appointment can be judged on the merits and demerits as long as the appointment is not predicated on illegality. Experts have commented and justified the legality of appointment of consultants. The problem is with the modus operandi of tax consultants, regarded in some quarters as oppressive, tyrannical, and antithetical to norms of assessment.<sup>17</sup> ARGP was born in the military era, and the appointment of consultants became a feature of military operation using ‘iron’ hand operation; in other words, using military officers to enforce tax payment instead of using ‘strong’ hand of the Police for enforcement of tax payment. It is

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<sup>16</sup> Ola C.S. *supra*.

<sup>17</sup> Arogundade J.A., *Nigerian Income Tax and International Dimension*, Spectrum Books Ltd, Ibadan 2005.

noted that when a situation get so bad, even in this democratic dispensation, the government invites military to take charge.<sup>18</sup> The tax evasion was so bad for administration of taxes that the military had to use the power of Section 2(2) of Decree 107 of 1993 which allowed the military administrators to make laws with respect to any matter included in the Concurrent List an for the peace, order and good government of the states.<sup>19</sup>

Since the introduction of private consultants, and ARGP, records indicate that 25 states adopted the programme between 1994-1998. These states noticed great improvement in terms of revenue generation e.g. Lagos state can use project internally generated revenue of N143 billion in 2008 budget.

The Accelerated Revenue Generation Programme employed accountants as tax consultants instead of tax officers used by Inland Revenue Board for conducting tax audit, assessment and collection. Through detailed scrutiny of companies, the consultants detected the lapses that the assessment did not reflect the true earnings. Companies were forced to pay taxes which they are deemed to have withheld, and the premises of companies which failed to pay were sealed up with the assistance of policemen and armed soldiers. Big companies were forced to remit legitimate large sums of money withheld to the states.<sup>20</sup> With the methodology adopted by the programme, arguments arose as to the legality of employing private tax consultants, which has successfully taken over the functions of Inland Revenue Boards.

With the provisions of the laws, the Board is empowered to distraint upon any land premises from the owner and recover the amount of tax due by sale of anything so distrainted. The form of warrant and authority to levy distress is contained in Schedule

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<sup>18</sup> Examples are joint Tax Force in the Niger Delta and Joint Military/Police during the 2007 General Election.

<sup>19</sup> *Multipurpose Ventures Ltd v. Attorney General of Rivers*, supra, where such Edict was challenged in court.

<sup>20</sup> *Toyin Bookshops Ltd v. Olalere Oni & Others*, supra.

4 of CITA. It confers authority on the officer levying the distress to obtain assistance where necessary and to break open any building or place in the day time to carry out the assignment. Goods distrained may be, if the tax and incidental costs of levying the distress are not paid within 14 days of seizure.

In the midst of these, two fundamental issues have been raised and declaration sought in the Court for determination. The first issue was the power of military administrator to legislate on tax matters and secondly, the legality of the appointment of consultants for revenue generation. The Constitution (Suspension and Modification) Decree of 1997 empowered then the military administrator of a State to make laws with respect to any matter in the concurrent list with the prior consent of the Federal Military Government. It was in pursuant to this provision that some states actually promulgated Edicts to appoint tax consultants. The judiciary, from records of judgments submitted, approved the validity of such Edicts.<sup>21</sup>

With all said, the Finance Miscellaneous Taxation Provisions Decree provides for the establishment of State Board of Internal Revenue as the tax authority of a State. Again, Decree 21 of 1998 provides: notwithstanding anything contained in the Constitution or in any other law, no person, other than the appropriate tax authority, shall assess, or collect on behalf of the Government, any tax levy listed in the schedule of the Decree. A new twist has been introduced into the issue of private tax consultancy. This may be limited to tax, not revenue collections as customs.

Evaluating Decree 21 of 1998, a tax expert stated that the argument concerning the legality of the use of tax consultants have now been put to rest, that this law has come down decisively against the practice.<sup>22</sup> The alternative, he proffered is to do away with private consultants and for the governments to insist that

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<sup>21</sup> Ibid.

<sup>22</sup> Arogundade J.A. *supra*.

state and local governments should improve their legally constituted tax administrative bodies and that is better than a situation in which a parallel body of consultants is set up. Definitely, ARGP constituted not only a parallel body but a daring initiative of monumental success that boost internally generated revenue and enable them to 'keep alive'.

The establishment of ARGP is not illegal; it is predicated on a solid memorandum of understanding rested on contractual basis. If a programme is acclaimed to be successful in its main objective and goals simply put, revenue generation, should it be abandoned or jettisoned? The main criticism is in the enforcement of tax collection and sealing up of premises. The programme proved to some states that the internally generated funds can make them to be completely independent. A good way should be sound of integrating the programme as to be part of the 'taxing authority'. The programme can be integrated under the ambit of Section 4(6) of the Decree 21 of 1998 which defines taxing authority as a Ministry, Government department or any other government body charged with responsibility for assessing or collecting the particular tax. Many states are shouting of lack of funds, many cannot pay salaries as at when due and the problem of tax evasion, tax default and avoidance constitute a big chunk of lost internally generated funds and no capable human machineries to recover this fund. The ARGP should be appraised, and adopting the system and process minimize leaks within the State and Local Government tax administration.

Summarizing the opinions of tax experts they believe that tax consultancy has proved tremendously useful to government in the area of revenue generation. It is also the general view that the poor tax payment culture in developing countries, the acquisitive tendencies of Nigerians, the non-enforcement of some punitive sections of the law, the corruption regime affected the internally generated revenue. We all agree that the use of tax consultancy is an aberration and is a result of ineptitude and corruption in our tax

system. If consultancy is necessary development where the normal system fails, the question we should then ask is whether the appointment of consultants can be integrated into the democratic system.

This can simply be answered in the affirmative as justified by the recent appointment by Federal Government of Chief Olusola Adekanola as a consultant. The use of this part of the system and the operation of tax consultants can be brought within democratic process to achieve similar results. The press reactions to the issue are sometimes limited to the aspects of enforcement and blow a good situation out of proportion. Concentrating on the excesses of the enforcement tax consultancy can be modernized, democratized and used to achieve good revenue collection. It can be made to function within the enforcement provided by the law.

Even since the advent of this democratic administration in 1999, the modus operandi of tax consultants have changed significantly, as they have resulted to dialogue, arbitration and litigation as last resort in resolving dispute on tax matters. Tax consultants have experts knowledge in the field and they have the resources and wherewithal to meet up with challenges on the field. The situation complained of between 1994 and 1998 do no longer exist as it was borne out by the exigency of the time.

In order to check the excess of these tax consultants and ensure probity and transparency, the Money Laundering Prohibition Act 2004 attempted to regulate the activities and operations of tax consultants. The Act described tax consultants as designated non-financial institution, vests some duties and obligations on them and imposes penalty on any tax consultant that violated any section of that law in the course of their duty.<sup>23</sup>

## **Conclusion**

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<sup>23</sup> Section 2,3,4,5,6,7 and 10 of Money Laundering (prohibition) Act 2004. See also Section 24 which defines designated non-financial institution to include tax consultants inter alia.

The reform agenda of the Federal Government is anchored on privatization and commercialization to achieve results, public private partnership is another part of the reform package. Against these backgrounds, collection of tax by consultants at various level of governance is not negating these objectives. If all the stakeholders in taxation matters in Nigeria have been adequately consulted, tax reforms embarked upon by the Federal Government ought to make elaborate provisions for the role and duties of tax consultants or tax practitioners in the reform agenda in order to boost revenue of all the tiers of government in Nigeria. The government should also make a Code of Conduct for tax practitioners or tax consultants so that when they erred or live below expectation, they could be prosecuted in addition to whatever disciplinary measure their professional bodies could take against them. The role of tax consultants in improving internally generated revenue cannot be overemphasized as the chairman of FIRS have also stressed at different fora that the FIRS will enlist the use of consultants such as Accountants, Geologists, Engineers, etc. in tax administration in order to assist the FIRS on professionalized and special areas where the staff of the service has no expertise or knowledge.<sup>24</sup>

Since the reform agenda of the FIRS is an ongoing process, all stakeholders should henceforth be involved in tax planning and administration in Nigeria. This will not only increase revenue yields of government it will also encourage voluntary tax compliance by the taxpayers.

The FIRS should continue with the enlightenment and sensitization programme it has started throughout the country<sup>25</sup> while government at all level in Nigeria should also be transparent and prudent in the arrangement of revenue accruing from the tax

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<sup>24</sup> Enlisting the service of a good consultant could ease the burden of taxation – The Punch of 21<sup>st</sup> December 2006 p.4; Osasami Lolade Payment of Tax and Concept of Voluntary Compliance Financial Standard of 17<sup>th</sup> July 2006 p.10.

<sup>25</sup> Musa Yusuf Amazah, Expectations of FIRS' Tax Collection Reform X-rayed, New Sentina 19<sup>th</sup> November, 2006 p.40.

process.<sup>26</sup> Thus, the EFCC, ICPC, FIU etc. should be involved in tracking fraud and trial of fraudulent staff of FIRS.<sup>27</sup> Tax consultants should also be used in training of tax inspectors and other categories staff of FIRS in line with modern technology. The tax consultants are also advised to extend their tentacle outside Nigeria to other countries in Africa because of the huge impact they have made on tax administration in Nigeria.

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<sup>26</sup> Okpareke Catherine, Information gap as a barrier to effective tax system. The Guardian of 28<sup>th</sup> February 2007 p.28. Aron Saye Stanley, Developing Nation's Economy through Effective Tax System. Financial Standard of 15<sup>th</sup> January 2007 p.21.

<sup>27</sup> CITN, EFCC Collaborate on Anti-Tax Crime Campaign – The Punch 23<sup>rd</sup> July 2007, p.20.