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AN APPRAISAL OF NIGERIAN TAX SYSTEM AND THE IMPLICATIONS OF ELECTRONIC-COMMERCE TAXATION

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ABSTRACT

The Nigerian government commitment to diversify its sources of revenue by increasing tax to Gross Domestic Product makes it imperative to subject our tax policy to constant review. Towards this end the tax system has witnessed various policy changes geared at a more effective and efficient system of tax administration. Notable among the reforms are the introduction of the Treasury Single Account, the 2017 National Tax Policy, Bank Verification Number, the Taxpayer's Identification Number (TIN), the automated tax system and e-payment system procedures. These reforms appear cosmetic and is yet to address the potential liability in response to both income tax and tax on goods and services that can arise for non-residents conducting electronic commerce targeting the Nigerian market. This is a veritable avenue to expand our tax base and explore the potentials of electronic taxation in the country. This paper examines the Nigeria Tax System and proffers strategies that would enable the nation benefit from the phenomena of globalization and technological advancement through electronic commerce taxation.

INTRODUCTION

Modern taxation in Nigeria has a chequered history and dates back to the pre-colonial period Admittedly, Government needs money to function and a country tax system often reflects its political structures and values. A number of considerations including political and economic needs and aspirations always provide the impetus for tax reforms. Recently, the need to shift emphasis from oil revenues and increase non-oil tax on a sustainable basis has been the overriding consideration. The dwindling oil revenue coupled with increasing demands on government has made the need to review our tax system and consider the prospect of electronic commerce taxation a necessity and more urgent.

Taxes are the principal source of revenue that governments use to finance public expenditures that promote economic growth, stability and equitable income distribution. A tax system provides a framework for a sustainable system that ensures reliable sources of revenue to government and support the economic development of the nation. It is a dynamic tool for economic development, wealth creation and employment. Tax is a mandatory financial charge or some other type of levy imposed on a taxpayer whether persons or other legal entities by the government in order to generate revenue. According to the National Tax Policy 2017, tax is any compulsory payment to government imposed by law without direct benefit imposed by law without direct benefit or return of value or a service whether it is called a tax or not. Professor Akanle defines taxation as a compulsory levy imposed on a subject or upon his property by the government having authority over him[1]. Black's law Dictionary[2] defines tax as monetary charge imposed by the government on persons, entities, transactions, or property to yield public revenue. It embraces all governmental imposition on the person, property, privileges, occupation and enjoyment of the purpose and includes duties, imports and excises.

A tax system should therefore maximize economic welfare and make it convenient for its citizens to discharge their constitutional duty. It is in this regard that Adam Smith stated: "Good taxes meet four major criteria; They are (i) proportionate to incomes or abilities to pay (2) certain rather that arbitrary (3) payable at times and in ways convenient to the taxpayers and (4) cheap to administer and collect"[3].

These four canons of a good tax system have been adopted and entrenched as the guiding principles of Nigerian tax system[4]. Of the two types of taxes, the direct and the indirect taxes, the focus of Nigeria's tax system is more on indirect taxation as they are easier to administer and not easily evaded.

CONCEPT OF ELECTRONIC TRANSACTION (E-COMMERCE)

E-commerce is a new way of conducting commerce that has revolutionized the way in which businesses are organized globally .E-commerce as generally defined covers transactions involving offer and acceptance on networks. Mode of delivery and payment may be in digitized form or in traditional manner.[5] The term 'electronic commerce' simply means conducting business online. In

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[1] Akanle,O.,"'The Government, the Constitution & the Taxpayer" in Akanle,O.,(ed).tax Law and Tax Administration in Nigeria ,(Nigeria institute of Advanced Legal Studies: Lagos,1991)

[2] 8th edition page 1498

[3] Smith, A., An Inquiry into the Nature and Causes of the Wealth of Nations (W.Shahon and T. Cadell Publishers: London, 1776).

[4] S.24(f) of the 1999 Constitution enjoins every citizen to declare his income honestly to appropriate and lawful agencies and pay his tax promptly.

[5] Arnold, B. J. & McIntyre, M. J. *International Tax Primer*. (Kluwer Law International, 1995), p. 23

1996, the Office of Tax Policy of the U.S. Treasury Department issued a report on the policy implications of global electronic commerce[6] that defined the term as "the ability to perform transactions involving the exchange of goods or services between two or more parties using electronic tools and techniques."[7] Treasury Report definition has a broad scope which seems to include traditional forms of electronic commerce such as telemarketing, mail order sales, and television sales.[8] Similarly, The United Nations Commission on International Trade Law (UNCITRAL) defines electronic commerce as "commercial activities conducted through an exchange of information generated, stored, or communicated by electronic, optical, or analogous means".[9]

A more narrow definition might be: "the use of computer networks to facilitate transactions conducted involving the production, distribution, and sale and delivery of goods and services in the marketplace."[10] Hereafter, the term 'electronic commerce' is used in this narrow meaning.

While the concept of communicating through electronic means for business purposes is not new, the Internet has expanded the potential reach for these transactions, providing the infrastructure to link millions of computers together and allowing information to easily and instantly travel throughout the world.[11] Thus, through the commercial transactions facilitated by the Internet often resemble traditional business transactions, several features of the Internet alter the taxable character of these commercial transactions. First, electronic communications via computer networks are much faster than all previously known means of communication.[12] Second, electronic communications can be instantly interactive. Third, the Internet is decentralized, has no physical location and is largely unconstrained by national boundaries.[13] Fourth, in a phenomenon known as “disintermediation”, the Internet allows sellers to have direct contact with consumers without the use of a middleman. In fact, as the system of electronic payments and electronic money develop, the middleman in the financial world may become obsolete altogether.[14] Fifth, Internet domain names are not necessarily

[6] Office of Tax Policy, U.S. Dep't of the Treasury, *Selected Tax Policy implications of Global Electronic Commerce* (1996) <http://www.ustreas.gov/ taxpolicy/internet.html> (Accessed on 7/08/2017) [hereinafter “Treasury Report”].

[7] Ibid. p. 8, para. 3.2.1.

[8] A commentator states that "(t)here are currently six different mediums of electronic commerce (e-commerce): telephone, fax, television, electronic payment and money transfer systems" Panagariya, A. “E-commerce, WTO and Developing Countries”, *International Trade* (2003) p. 1

[9] Hill, R. & Walden, I. “The Draft UNCITRAL Model Law for Electronic Commerce: Issues and Solutions”, 3 *Computer Law* (1996) p. 18

[10] Andersen, K. F. *Cybertaxation: The Taxation of E-Commerce*. (New York: Commerce Clearing House, 2000), p. 45

[11] Abrams, H. E. & Doernberg, R. L. “How Electronic Commerce Works”. (1997) 14 *Tax Notes International* 1573 at p. 1574

[12] Levenson, A. “*Taxation of Cross Border Payments for Computer Software”*, (1998) 17 *Tax Notes International* 1723 at p. 1729

[13] Lejune, I. “E-Business Tax: A Strategic Weapon in the Digital Age, Tax Planning” *International: e-commerce*, Vol. 2. No. 6, June 2000. p. 24

[14] Winn, J. K. “Clash of the Titans: Regulating the Competition between Established and Emerging Electronic Payment Systems”. (1999) 14 *Berkeley Technology Law Journal* 675

tied to a physical location.[15] For instance, country suffixes do not always correlate with the location of a physical computer carrying the address. Finally, it can be impossible to detect the physical location of an Internet User if he or she is using an Internet site from a remote location.

TYPES OF ELECTRONIC COMMERCE

Electronic commerce over the Internet currently includes a wide variety of tangible and intangible offerings. Books, computers, and flowers are examples of popular tangible merchandise offered over the Internet. After the sales stage, concluded electronically, those products are delivered by ordinary methods like postal services or couriers. This type of commerce can be called 'indirect electronic commerce'.[16]Computer software, digitalized music and digitalized art are examples of intangible products (digitalized products) offered over the Internet. Services like consultancy services, travel services, and banking are also available on the Internet. Some examples of the services offered over the Internet are electronic publishing. Website design and management, customer call centers, medical record management, hotel and rental car reservations, credit card authorizations, remote secretarial services, technical online support, research and technical writing, and indexing and abstracting services.[17] According to McLure. Jr:

"The distinguishing feature of this type of commerce is that all communication-advertising, selecting, purchasing (including payment), and especially delivery of the product occurs (or can occur) on-line, perhaps in real time."[18]

This type of commerce can be called 'direct electronic commerce'[19] since the intangible goods and services are delivered directly over the Internet. Although the most familiar examples of electronic commerce are transactıons between businesses and customers, the largest amounts of profits are actually made in business-to-business commerce, where corporations buy and sell among themselves.[20]

One of the greatest potential impediments to the future of e-commerce is the debate and uncertainty over taxation.[21] The rise of electronic commerce raises fundamental questions on tax policy. Most fundamentally, should electronic commerce be taxed? Is the answer the same in the

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[15] Johnson, D. R. & Post, D. G. “Law and Borders - the Rise of Law in Cyberspace” (1996) 48 *Stanford Law Review* 1367.
[16] Cockfield, A. J. “Balancing National Interests in the Taxation of Electronic Commerce Business Profits”, (1999) 74 *Tulscan Law Review* 133 at p. 151.
[17] For definitions of several types of transactions that might be concluded over the Internet, see Treaty Characterisation and Issues Arising from E-Commerce, http://www.oecd.org/daf/fa/e_com/ec_2_TREATY_CHAR_Eng.pdf (Accessed on 07/12/2017).
[18] McLure. Jr., C. E. “Taxation of Electronic Commerce: Economic Objectıves, Technological Constraints, and Tax Laws”, 52 *Tax Law Review* 269 at 304 (1997).
[19] Cockfield, A. J. *op. cit.* p. 151
[20] Chan, C. W. “Taxation of Global E-Commerce on the Internet: The Underlying Issues and Proposed Plans,” 9 *Minnesota Journal of Global* (2000) 233 at 248
[21] Famulak, D. and Sieker, S., “Taxation of Electronic Commerce: Asia-Pacific”, *Annual Asia Pacific Tax Conference*, 1999.

short-term as in the long term? How about arguments that electronic commerce should not be taxed during its infancy? How would the exemption of electronic commerce affect small business units as well as Multinational Enterprises (MNEs)? What are the implications for tax revenues of exempting electronic commerce? For the distribution of income?

Whether a decision is made that electronic commerce should be taxed or should not be, additional questions arise. If electronic commerce is to be taxed, how should it be done? Can electronic commerce actually be taxed as it should be? What are the technological, legal, and political impediments to taxing electronic commerce? What simplifications of tax laws and administration are required for taxation of electronic commerce? Are there "technological fixes" for the problems?

If it is decided that electronic commerce should not be taxed, what technique should be used to effect the exemption? How is electronic commerce defined? How can the benefits of an exemption be limited to the intended beneficiaries?

There are also questions of relationships between governments. What are the implications for fiscal federalism of exempting electronic commerce? For international fiscal relations?

Electronic Commerce tends to bring up the thorny issue of cross-border taxation which is one of the major challenges facing international taxation and business practices. Many countries throughout the world tax their residents (individuals and business entities) on their worldwide profits (i.e., any profits realized in any country). Nigeria is one such country[22]. Situations often arise where two or more countries both try to tax the worldwide profits of resident multinational firms, which give rise to the potential for double taxation of the same economic activity during the same period. As problematic as the taxation of residents who never venture physically or economically outside a jurisdiction may be, it pales in comparison with the taxation of more venturesome persons and entities, for two major reasons. First, it is relatively easy for the taxing authority to find a purely domestic taxpayer, grab him by the ankles, and shake out whatever money is due. Enforcement jurisdiction is easily had. Taxpayers residing abroad and who have few assets within the jurisdiction are harder to nab[23]. Second, it is easier to measure the income of a purely domestic taxpayer. There is no need to parse the income or to account for taxes that the taxpayer might have paid to other sovereigns[24].

[22] This is provided in *Section 3*, Personal Income Tax Act, P8, Laws of the Federation of Nigeria, 2011 (hereinafter referred to as "PITA") and *Sections 8 and 11*, Companies Income Tax Act, C22, Laws of the Federation of Nigeria, 2004 (hereinafter referred to as "CITA").

[23] Desai, M. A. and Hines, J. R. Jr. "Evaluating International Tax Reform." *National Tax Journal*, September 2003, Vol. 56 No. 3, 487-502. p. 487.

[24] Ibid.

Residents pay tax on their worldwide income but are allowed a credit for taxes paid to foreign jurisdictions on their foreign source income. By virtue of *section 23* of the **Companies Income Tax Act** (hereinafter referred to as "CITA"), deductions based taxes on income or profits levied in Nigeria or elsewhere, except tax levied outside Nigeria on profits chargeable to tax in Nigeria where there is no relief from double taxation in Nigeria, are specifically prohibited in computing of taxable profits.

Here we run into similar problems. For individual taxpayers, residency might be determined based on the number of days spent in the jurisdiction[25]. Alternatively, residence may be where the heart is. For corporations, residence may be the place of incorporation, or more substantively, where the business is managed and controlled. The Nigerian rule is the place of incorporation[26], while the rule in some foreign jurisdictions is the place from which the corporation is managed and controlled[27].

Finally, from a general standpoint the debate on the implications of e-commerce on tax revenues seem to be inconclusive. However, there seem to be some consensus on two concepts. Firstly, that tax planning, policy and administration will have to evolve with changing business technology to cater for new uncertainty inherent in changing business processes that may have tax implication. Secondly, there seem to be agreement that e-commerce is likely to affect (negatively) tax revenues of goods and services that can be digitized. Otherwise e-commerce will act to facilitate international trade and transactions.

JURISDICTION TO TAX

Business income is usually taxable somewhere. Under traditional principles of taxation, when a business is conducted within a country, normally that country has jurisdiction to tax the business' income. For income from international transactions, the ability to tax requires some extra steps of analysis. Countries generally follow two approaches: 'source-based taxation' (also referred as 'territorial taxation principle')[28] and 'residence based taxation'.[29]

Income derived by a person may be taxed by a country because of a connection between the country and the income derived by that person (source jurisdiction). The 'source' concept in taxation refers to the (normally geographical) origin, rather than the fund from which the income is derived. Source-based taxation entitles the source country to tax any income that arises within its boundaries, regardless of whether the recipient is a resident of that country or has a permanent

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[25] Para. 1 of the First Schedule to the PITA, which provides that a resident would be qualified as a taxpayer if he has been resident at a place for either 183 days or a 12-month period.
[26] Section 84, COMPANIES INCOME TAX ACT 2004
[27] Hufbauer, G. *U.S. Taxation of International Income: Blueprint for Reform*, Washington, DC, Institute for International Economics, 1992. p. 33
[28] McLure, Jr., C. "U.S. Tax Laws and Capital Flight from Latin America", 20 *University of Miami Inter-American Law Review* (1989) 321, 324
[29] Other criteria such as citizenship, domicile, center of economic interest, may also be used as a basis for tax liability.

establishment there.[30] The basic policy idea behind source-based taxation is that income should be sourced, and therefore taxed in the country with which it has substantial economic connection.[31] Income may have substantial connections with more than one country, in which case it may be appropriate to determine the source by apportioning the income between countries.

Countries may also tax income (wherever derived) because the person earning the income is a resident of that country (residence jurisdiction). A country's justification for residence-based taxation may be seen to rest on the need to finance its public goods and social infrastructure and the nexus between consumption of such public goods and social infrastructure by persons who are residents, having an over-all capacity to pay.[32]

Residence-based taxation entitles the country of residence to assert tax on the worldwide income of its residents without regard to the source of income. Residence establishes a relationship between a country and a taxpayer and this relationship provides the jurisdiction to impose tax to that taxpayer. A person is a resident of a country if the person has close economic and personal ties to the country. It is possible for a person to be a resident of more than one country and therefore to be subject to taxes in several countries under residence-based taxation approach. The residency concept applies to both legal entities and natural persons for taxation purposes.

To fully appreciate a country's jurisdiction to tax, it is necessary to know the nature of income made and taxed, since different types of income are subject to different sourcing rules, as well as different tax regimes (income tax vs. withholding taxes). Under the OECD Model Treaty the source country is entitled to tax the business income of a non-resident corporation, provided the income is earned by a permanent establishment (PE) located in the taxing state. In addition, the source country ordinarily levies withholding taxes on dividends, which may be reduced by treaty.[33] By comparison, only the residence country normally taxes royalties, unless they are related to a permanent establishment in the source country.[34]

Many countries throughout the world tax their residents (individuals and business entities) on their worldwide profits (i.e., any profits realized in any country). Nigeria is one such country.[35] Situations often arise where two or more countries both try to tax the worldwide profits of resident

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[30] Vann, R. J. "International Aspects of income Tax*", Tax Law Design and Drafting* (Victor Thuronyi ed.) (New York: International Monetary Fund, 2000). 734-49 at p. 735

[31] Ibid. p. 736

[32] Levine, H. J. & Weintraub, D. A. "Tax Management Memorandum: When Does E-Commerce Result in a Permanent Establishment? The OECD's Response", Volume 1, Number 9, September 18, 2000, *E-Commerce Tax Report*, page 337,

[33] OECD Model Treaty, Article 7; under the Parent-Subsidiary Directive, no withholding tax is levied on intra-EU dividends a subsidiary pays to a parent.

[34] OECD Model Treaty, Article 12

[35] Section 9, Companies Income Tax Act, Cap C23, Laws of the Federation of Nigeria 2004; Section 3, Personal Income Tax Act, Cap. P8 Laws of the Federation of Nigeria 2004

multinational firms, which gives rise to the potential for double taxation of the same economic activity during the same period. In order to avoid this circumstance, countries often grant foreign tax credits, which permit the resident to offset the foreign taxes paid against the domestic taxes that would otherwise be payable.[36] Most countries limit the foreign tax credit so that it cannot exceed the amount of domestic taxes that would be paid on the business activity in question;[37] this ensures that the treasury of the residence country does not subsidize the higher tax rates of foreign countries.

Countries that tax worldwide income on the basis of residency, however, generally do not tax profits in source countries unless and until they are repatriated to the residence country. This permits resident companies to defer residence-country taxation until profits are brought back to the home (or residence) country. This deferral opportunity, however, is often restricted by "controlled foreign corporation" rules that permit the residence country to tax certain profits (typically passive investment activity profits such as interest or royalties) on an accrual basis (i.e., whether or not the profits are actually distributed back to the home country).[38] Controlled foreign corporation rules are becoming more prevalent throughout the world as countries strive to curtail excessive tax avoidance and tax evasion; sixteen OECD countries had adopted controlled foreign corporation rules by 1997.[39] Other countries, such as France, do not tax their residents on a worldwide basis.[40] Rather, these countries simply exempt most foreign income from domestic tax. This approach is often called an *exemption or territorial system*. Still other countries have adopted some form of hybrid approach in which active business income in foreign countries is exempt from taxation while passive investment income is often taxed on an accrual basis.[41] Nations have also enacted tax rules to determine whether a nonresident's business activity has a sufficient *nexus* to bring it within the country's tax jurisdiction. The EU member states have the Goods and Services Tax framework ,India has VAT while others like the United States of America have retail taxation structure

Almost all nations and states tax non-residents on their income from sources within the jurisdiction. Simply because a potential taxpayer has income that is sourced to a jurisdiction, however, does not

[36] Marc M. Levey, *International Tax Issues for Cyberspace Transactions*, Presented for the International Fiscal Association, JuneT 12, 1997, http://www.bakernet.com. P. 7

[37] Ibid. p. 9

[38] Bureau of National Affairs, “International Developments: Current Tax Framework May Not Work in E-Commerce Economy”, Volume 1, Number 10, October 2, 2000, *E-Commerce Tax Report*, http://www.bnatax.com. p. 22

[39] Organisation for Economic Co-operation and Development. *Harmful Tax Competition: An Emerging Global Issue*. (New York: OECD, 1998)

[40] Pierre-Yves, *France: Taxation of Electronic Commerce*, May 1999, Baker & McKenzie webpage www.bakerinfo.com p. 6

[41] For example, Canada taxes its residents on a worldwide basis but exempts from taxation in most circumstances any dividends paid from foreign affiliates if the income was generated in a tax treaty partner country. The exemption, however, only applies to active business income, certain capital gains and inter-affiliate dividends. See Income Tax Act, R.S.C., ch. 1, § 95(1) (1985 & Supp. 5) (Can.).

mean that the jurisdiction will have the practical or legal power to enforce a tax against the person earning the income. For foreign persons earning passive income, this problem is solved by the expedient of imposing a tax obligations on their income derived or accrued in Nigeria under the various tax laws.

For instance, *Paragraph 7* of the First Schedule to the PITA empowers the tax authorities to impose taxes on income of non-resident individuals where this income is derived from sources in Nigeria. Also, *Paragraph 9* of the First Schedule to the PITA provides that income derived or accrued in Nigeria by companies not resident or incorporate in Nigeria are subject to the imposition, assessment and collection of tax by the relevant tax authorities.

Additionally, Nigeria has entered into bilateral tax treaties with most of its trading partners, raising the threshold for enforcement jurisdiction even higher[42]. These treaties require a person who is a resident of a signatory state to have a "permanent establishment" in the foreign jurisdiction before the foreign jurisdiction may impose an income tax[43]. Though permanent establishment can be an elusive concept, it is clearly a higher threshold than carrying on a trade or business. For example, it is expressly defined to exclude both facilities used solely for the storage, display, or delivery of goods belonging to the enterprise, as well as a fixed place of business used solely for the purpose of purchasing goods.

Nevertheless, technology and economic integration are putting severe strains on the traditional permanent establishment test, and there are calls for reform from many quarters, all alluding to the now commonplace observation that modern technology allows national markets to be penetrated and exploited without a physical presence to a far greater extent than ever before[44]. Thus, more and more income escapes taxation at the source because of the resilience of the now quaint notion that physical presence is a reasonable proxy for identifying substantial economic presence.

TAXATION OF ELECTRONIC COMMERCE IN NIGERIA

Nigeria has a fairly developed taxation structure. The tax system in Nigeria is mainly a three tier system which is based on the Central, State and local governments. Under the 1999 Constitution of Nigeria, the government has the right to levy taxes on individuals and organizations.[45] Whatever tax is being charged has to be backed by the law passed by the legislature .[46]

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[42] For example, Double Taxation Relief (Between the Federal Republic of Nigeria and the Government of the French Republic) Order [S.I. 15 of 1997.]
[43] Article 5, Ibid.
[44] Levinsohn, J. and Slemrod, J. *Op. Cit.* p. 101.
[45] Sections 4 & 150; item D of Part II of the Second Schedule to the Constitution of the Federal Republic of Nigeria 1999 empowers the National Assembly to impose tax on any matters in the Exclusive and Concurrent Lists
[46] *Attorney-General, Ogun State v. Aberuagba* (2009) 1 T.L.R.N 82

In 1998, the Federal Government enacted a law on Approved List of Taxes and Levies collectible by the three tiers of Government[47]. The objective is to ensure that there is no duplication of taxes or conflict among the three levels of Government, and to avoid multiple taxation.

The applicable taxes in Nigeria can be classified as follows:

(A) Direct Taxes: A Direct tax is a kind of charge, which is imposed directly on the taxpayer and paid directly to the government by the persons (juristic or natural) on whom it is imposed. A direct tax is one that cannot be shifted by the taxpayer to someone else.

i. Corporate Income Tax: The Companies Income Tax Act (CITA)[48] is the enabling legislation on taxation of profits of any company (other than oil exploration and production companies) accruing in, derived from, brought into, or received in, Nigeria.[49] Any company incorporated in Nigeria is liable to tax on its worldwide income. For a non-Nigerian company, however, the concept of "residence" is the key factor in determining its exposure to corporate income tax in Nigeria.

A non-Nigerian company is deemed to be resident in Nigeria for tax purposes if it satisfies any of the following conditions:

- if the company has a fixed base of business in Nigeria, to the extent that profit is attributable to the fixed place;
- if it does not have such a fixed place of business in Nigeria, but habitually operates a trade or business through a dependent agent;
- if that trade or business or activity involves a single contract for surveys, deliveries, installation or construction; or
- where the trade or business or activity is between the company and another person (for company) controlled by it or which has controlling interest in it such that the transactions between them are deemed to be artificial or fictitious.[50]

ii. Education Tax: The Education Tax Act[51] requires every company incorporated in Nigeria to pay 2% of its assessable profit as Education Tax.[52] In the case of oil companies, the tax is deductible for the purpose of computing Petroleum Profits Tax.[53]

[47] Taxes and Levies (Approved List for Collection) Decree No. 21 of 1998.
[48] Cap C21, Laws of the Federation of Nigeria, 2004
[49] Section 9, Companies Income Tax Act, Cap C21, Laws of the Federation of Nigeria, 2004 [hereinafter referred to as "CITA"]
[50] Section 13(2), Companies Income Tax Act 2004
[51] Cap E4, Laws of the Federation of Nigeria, 2004
[52] Section 1(2), Education Tax Act
[53] Section 1(3), Ibid.

iii. **Personal Income Tax:** The legal basis for the imposition of personal income tax is the Personal Income Tax Act (PITA).[54] Every taxpayer in Nigeria is liable to pay tax on the aggregate amount of his income whether derived from within or outside Nigeria, the salaries, wages, fees, allowances, and other gains or benefits, given or granted to an employee are chargeable to tax.[55] The Pay-As-You-Earn (PAYE) is a system whereby employers of labour are deemed to be the agent of the tax authority for the purpose of remitting the taxes deducted from the salaries due to their employees.[56]

The concept of residence determines the extent of a taxpayer's liability to tax in Nigeria. It is also critical in determining the relevant tax authority for the purpose of assessing and collecting taxes.[57]

iv. **Capital Gains Tax:** Capital gains tax (CGT) is chargeable under the *Capital Gains Tax Act of 1967*[58] with effect from 1 April 1967. The tax is applicable to all companies, including pioneer companies and all individuals and non-corporate bodies.[59] The rate of tax is currently 10% and is chargeable on an actual year basis.[60] The tax is levied on capital gains accruing on disposal of assets, irrespective of whether the asset is situated in Nigeria or not.[61] For the purpose of the Act, a disposal of assets will arise where any capital sum is derived from a sale, lease, transfer, assignment or any other disposal of assets, notwithstanding that the person making the capital sum acquires no asset.[62]

However, capital gains accruing outside Nigeria to a non-resident company or individual are subject to Capital Gains Tax only on the amount received or brought into Nigeria.[63]

v. **Petroleum Profits Tax:** Companies engaged in petroleum operations, defined as the winning or obtaining and transportation of petroleum, are subject to tax[64] under the Petroleum Profits Tax Act (PPT).[65] The taxable income of a petroleum company is subject to tax at 85%.[66] The applicable rate for companies that are still within the first five years of operation is 65.75%.[67]

[54] Cap P8, Laws of the Federation of Nigeria, 2004
[55] Section 3, Personal Income Tax Act 2004
[56] Section 80(6), Ibid.
[57] Ibid.
[58] now Cap C1, Laws Of The Federation Of Nigeria 2004
[59] Section 1(1), Capital Gains Tax Act
[60] Section 2(1), Ibid.
[61] Section 3, Ibid.
[62] Section 6, Ibid.
[63] Section 4, Ibid.
[64] Section 8, Petroleum Profits Tax Act 2004
[65] Cap P13, Laws Of The Federation Of Nigeria 2004
[66] Section 21(1), Petroleum Profits Tax Act 2004
[67] Section 21(2), Ibid.

However, where an oil producing company is involved in a production sharing contract (PSC), the applicable PPT rate is 50%.[68]

vi. **Withholding Tax:** The Nigerian tax laws provide that where any payment on which withholding tax should be deducted is due from one person to another, the person making the payment is expected to deduct tax at the applicable rate and remit the tax deducted to the relevant tax authority within a reasonable period, not later than 30 days after deduction.[69] Withholding tax deducted at source from non-resident companies in respect of interest, rent, dividend and royalty is the final tax liability due from these companies.

(B) Indirect Taxes: An indirect tax is a tax collected by an intermediary (such as a retail store) from the person who bears the ultimate economic burden of the tax (such as the customer). An indirect tax is one that can be shifted by the taxpayer to someone else. An indirect tax may increase the price of a good so that consumers are actually paying the tax by paying more for the products.

i. **Value Added Tax:** VAT is imposed "on the supply of all goods and services other than those goods and services listed in the First Schedule to this Act".[70] VAT is charged at a flat rate of 5%.[71] VAT is a consumption tax, which is levied at each stage of the consumption chain and is borne by the final consumer. Tax paid by businesses on purchases, known as input tax, is recovered from VAT charged on the company's sales, known as output tax.[72] The excess of a company's output tax over its input tax is payable to the FIRS through designated banks. The taxpayer is, however, entitled to a refund from the FIRS, if the reverse is the case.[73] The VAT Act applies to all individuals, entities and companies (known as Taxable persons) in Nigeria engaged in the provision of services and/or goods to consumers.[74] Taxable persons are obliged to register under the VAT Act. Furthermore, Nonresident companies, which transact business in Nigeria, are also required to register for VAT and render VAT returns using the address of the company in Nigeria with whom they have subsisting contract.[75]

[68] Section 22(2), Ibid.
[69] Sections 69 to 74 of the Personal Income Tax Act; Sections 78 to 82 of the Companies Income Tax Act; and Section 56 of the Petroleum Profits Tax Act.
[70] Section 2, VAT Act, Cap. V1, Laws Of The Federation Of Nigeria 2004
[71] Section 4, Ibid.
[72] Section 17, Ibid.
[73] Section 18, Ibid. Section 23, Federal Inland Revenue Service (Establishment) Act Cap. F36, Laws of the Federation of Nigeria
[74] Section 8, Ibid.
[75] Section 10, Ibid.

ii. **Custom and Excise Duties:** The Customs and Excise Management Act[76] was formulated in 1959 to prevent illegal imports and exports of goods. Besides, all imports are sought to be subject to a duty with a view to affording protection to indigenous industries as well as to keep the imports to the minimum in the interests of securing the exchange rate of Nigerian currency.[77] Duties of customs are levied on goods imported or exported from Nigeria at the rate specified under the Act as amended from time to time or any other law for the time being in force.

iii. **Stamp Duty:** Stamp duty is tax on documents evidencing transactions between persons. All instruments relating to an act to be performed in Nigeria must be stamped, except such instrument is specifically exempted. Stamp duty is chargeable either at fixed rates or *ad valorem* (i.e., in proportion to the value of the consideration) depending on the class of instrument.

As stated earlier, countries generally follow two approaches: 'source-based taxation' (also referred as 'territorial taxation principle') and 'residence based taxation'. Nigeria also adopts this model for its tax system especially on income taxes of individuals and companies. We shall be examining the two principles as provided under the Nigerian Tax legislation.

RESIDENCE

The concept of residence determines the extent to which the income of a taxpayer is liable to tax under a tax jurisdiction. In Nigeria, a resident person (individual or corporate) is assessable on the global income. This means that the taxpayer is liable to tax on the income or profits "accruing, derived from, brought into, or received in, Nigeria".[78] It also determines the scope of deductions that may be allowed for the purpose of computing an individual's chargeable income.

INDIVIDUAL RESIDENCE

The implication of a world in which tax is imposed based solely on citizenship can better be imagined than described. In such a world, the thorny problem of the sourcing of income could be avoided, although where citizenship rules are inconsistent, the risk of overtaxation and undertaxation would still exist. This is not the world in which we live for two major reasons. First, as an empirical matter, jurisdictions will inevitably seek to tax income arising from within regardless of the nationality of the person engaged in the income-producing activity[79]. Second, and of greater importance to the discussion that follows, the temptation to establish a tax haven nationality would be too great under a nationality based system. For this reason, all nations have expanded the concept of nationality to

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[76] Cap. C45, Laws Of The Federation Of Nigeria 2004
[77] Section 37, Customs and Excise Management Act, Cap. C45 Laws Of The Federation Of Nigeria 2004
[78] Section 9, Companies Income Tax Act, Cap C23, Laws of the Federation of Nigeria 2011; Section 3, Personal Income Tax Act, Cap. P8 Laws of the Federation of Nigeria 2004
[79] Devereux, M. P. and Glenn, H. R. "Taxing Multinationals." *International Tax and Public Finance*, August 2003, 10 (4), 469-487. p. 475.

encompass residency as well. Thus, a citizen of the Niger Republic who spends a sufficient amount of time in Nigeria during the tax year will be treated as a Nigerian taxpayer taxable on her worldwide income regardless of the person's (presumably) strong political allegiance to the Niger Republic.

Nigerian citizens and residents in Nigeria are taxed on the basis of their worldwide income for federal income tax purposes[80]. Residence means living in a particular locality and it is possible that a person may have two places of residence. Residence therefore connotes the idea of remaining and settling in a place for a fairly long period[81]. It is for this reason that residence is used to determine liability to personal income tax[82].

A place of residence is defined under **para. 1 of the First Schedule to the PITA** in relation to an individual to mean "a place available for his domestic use in Nigeria on a relevant day, and does not include any hotel, rest-house or other places at which he is temporarily lodging unless no more permanent place is available for his use on that day". The phrase "principal place of residence" in relation to an individual with two or more places of residence on a relevant day not being within a State means[83]:

In the case of an individual with no source of earned income, other than a pension in Nigeria, that place or those places in which he usually resides;

In the case of an individual who has a source of earned income other than a pension in Nigeria, that place or those places which on a relevant day is nearest to usual place of work;

In the case of an individual who has a source or sources of unearned income in Nigeria, that place or those places in which he usually resides.

As shown above, under the PITA, an individual is resident or deemed to be resident in a State if on the 1st January in a year of assessment, he has a place or principal place of residence in that State. A person is deemed resident in Nigeria if he resides in Nigeria for 183 days in any 12-month period, expatriates holding residence permits are liable to tax in Nigeria even if they reside in the country for less than 183 days in any 12-month period. Once residence can be established, the relevant tax authority of the territory is the tax Authority in which the taxpayer has his place of residence or principal place of business.

The definition of the term "residence" differs from one country to the other. For instance, in Nigeria, the length of stay to qualify a taxpayer as a resident is reckoned within a 12-month period. In some countries, this is reckoned within an assessment year - allowing for the qualifying period of stay to

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80 Section 3, PITA
81 *Levene v. I.R.C.* [1928] A.C. 234 at p. 248.
82 Section 2(2), PITA
83 Para. 1 of the First Schedule to the PITA

split over two years of assessment. In some other countries (e.g. the USA), the citizen is regarded as resident in the home country whatever the length of stay abroad[84]. This creates the problem of dual residence for the individual who is regarded as resident in more than one country. For example, he is regarded as resident at the same time in country A where nationality is the basis of residence, in country B where he has stayed for more than 183 days in a 12-month period and, maybe, in his home country where he is away for the less than 183 days in that assessment year.

CORPORATE RESIDENCE

A company is resident in Nigeria if it is registered or incorporated in Nigeria. Under the old law, the determining factor was the "place of management".[85] This is a company or corporation that is not registered or incorporated in Nigeria but which derives income or profits from Nigeria. It is to be mentioned here, for the sake of emphasis, that exemption from incorporation does not confer exemption from payment of tax on any company. Every company, resident and non-resident, is liable to tax in Nigeria if its income is liable to tax under the provisions of the Companies Incomes Tax Act[86]. It is also to be pointed out that the Nigerian tax laws do not exempt the income of a branch from tax. A corporation may have dual or multiple residence status.

A corporation may also have the problem of dual residence. For instance, the definition of the residence of a corporation in Nigeria is the place of incorporation[87]. In some other countries, the relevant criterion may be the "place of management" or the "place of residence of the directors". In this instance, the Nigerian tax authority would treat the corporation as resident in Nigeria on the basis of the place of incorporation while the tax authority of the other country would regard the same corporation as resident in that other country on the basis of "place of management."

The tax laws of some countries regard a branch as resident, for tax purposes, in the same country as the parent company and therefore exempt the income of branches from tax[88]. There is no such provision in the Nigerian tax law. A Nigeria branch of a foreign company is treated as a corporate entity under the law of the land and any income or profit derived by it from Nigeria is taxable here. The only two conditions where a branch may not be so treated are: (i) if the branch is used solely for storage or display of goods or merchandise; and (ii) if the branch is used solely for the collection of information.

[84] Para. 1 of the First Schedule of the PITA
[85] Ayua, A. *Nigerian Tax Law.* Ibadan: Spectrum Law Publishing, 1996. p. 70.
[86] Section 11, CITA 2004
[87] Para. 9 of the First Schedule of the PITA
[88] Levinsohn, J. and Slemrod, J. "Taxes, Tariffs, and the Global Corporation." *Journal of Public Economics* Vol. 51 No. 1 (May, 1993): 97-116. p. 99.

Thus, if a non-resident corporation has a "fixed base" from which it carries on its business or trade in Nigeria, the profits from such activities would be deemed to be derived from Nigeria. The term "fixed base" implies that the place must be easily identifiable and must possess some degree of permanence. It includes;

a) facilities such as a factory, an office, a branch, a mine, gas or oil well, etc.;

b) activities such as building, construction, assembly or installation; and

c) furnishing of services in connection with the activities mentioned above.

A subsidiary is expected to incorporate in Nigeria and therefore to operate as a separate legal entity from the parent. The foreign equity-participation may now, in certain circumstances, be 100% but such equity-ownership or the control will not affect the residence status in Nigeria once the company incorporates. However, the claim to the contrary by the other country may raise the problem of dual residence. Article 4 of the Nigerian Model Double Taxation Agreement[89] spells out the mode of resolving the problem of dual residence between Nigeria and a treaty-country. The Agreement provides for the criterion of "place of incorporation" as basis of resolving dual residence of companies. Where this fails, the question is to be resolved by "mutual agreement".

SOURCES OF INCOME

In a fast changing world in which taxpayers conduct business across borders, it is necessary for income tax regimes to adopt sourcing rules unless they choose collectively to adopt a pure residence-based system worldwide. As previously noted, adoption of a pure residence-based system is unlikely if for no other reason than foreigners are convenient to tax. In Nigeria, the various tax legislations include a hodgepodge of sourcing rules for various types of income. Some of the rules are formalistic: Dividends and interest are sourced to the residence of the payer (regardless of where the underlying assets are located)[90]; capital gains (other than from real estate) are sourced to the residence of the seller (regardless where the underlying assets are employed)[91]; and the sale of inventory is sourced where title passes (an easily manipulated legal formality). Other rules are more substantive: Royalty income is sourced to where the intangible asset is used, and services are sourced to where performed[92]. The advantage of formal rules is that they are easier to administer, but they are also easier to manipulate. The advantage of substantive rules is that they more closely

[89] The Nigerian Model Double Taxation Agreement include all the Double Taxation Relief Orders contained in the Seventh Schedule of the PITA and CITA.
[90] Section 57(b), Companies Income Tax Act
[91] Section 6, Capital Gains Act, C1, Laws of the Federation of Nigeria, 2004.
[92] Section 3(c), PITA

track economic reality and are more difficult to avoid, but they also can increase administrative and compliance burdens[93].

The provisions in the PITA and CITA enable the income of an individual or a company from any of the aforestated sources to be assessed to tax if it arises in Nigeria or wherever it has been made, whether or not it is brought into or received in Nigeria. According to Ayua, the provisions of the law suggest that the income of an individual or a company resident in Nigeria that arises abroad and is not remitted or brought into Nigeria legally, can be charged to tax in Nigeria[94]. In other words, it does not follow that the foreign income of Nigerians is taxed on remittance basis only. For the general principle of taxation is that the global income of the resident individuals or corporate entities of a country are usually taxed, hence the emergence of the idea of double taxation agreements between countries. Thus to Ayua, it should therefore be immaterial whether or not all, or any part of, the foreign income of a Nigerian resident company or individual is brought into or received in Nigeria. Such income should be deemed to accrue in Nigeria and accordingly be taxable[95]. However, this opinion is not shared or supported by other jurists notably by Richman and Oakland in their respective works[96].

This was the focal issue in the case of *G. N. Everitt v. FBIR*[97]. The question arose if a United Kingdom resident (individual) be subject to Nigerian tax for income received in the United Kingdom under an agreement made with a Nigerian Corporation in respect of certain services which the United Kingdom resident performed in Nigeria. The Body of Appeal Commissioners held that where an individual performs certain services in Nigeria and derives income from the performance of such services, the individual will be subject to Nigerian Tax irrespective of the fact that the individual does not reside in Nigeria.

TAX ADMINISTRATION AND COMPLIANCE

Taxation and Tax administration in Nigeria are purely constitutional and statutory matters. The regime has been somewhat delineated by the various provisions contained in the 1999 Constitution as amended and the various legislations regulating tax matters.

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93 Altshuler, R. and Grubert, H. "Repatriation Taxes, Repatriation Strategies and Multinational Financial Policy." *Journal of Public Economics* 87 No. 1 (January, 2003): 73-107.p. 100.

94 Ayua, A. *Op. Cit.* p. 71.

95 Ibid.

96 Oakland, W. H. and Yongsheng X., "Double Taxation and Tax Deduction: A Comparison", *International Tax and Public Finance*, January 1996, 3 (1), 45-56. p. 47; Richman, P. B. *Taxation of Foreign Investment Income: An Economic Analysis*. (Baltimore, MD: Johns Hopkins Press, 1963) p. 63.

97 (2010) 3 T.L.R.N 158

Conceptually, taxing power in Nigeria yields at two levels:[98] the one as to authorization to impose by legislating a tax and prescribing rules as to collection and administration of the tax by a government, and the other as to authorization to merely collect a tax with no legislating powers. This latter authorization is purely executive or administrative as evidenced by the **Taxes and Levies (Approved List for Collection) Decree No. 21 of 1998.** This Decree merely authorizes the collection of taxes, it does not permit legislating.

Tax administration is the implementation of tax laws in assessment and collection of taxes while a Tax administering body is an organization designed and empowered by law to enable government in the various tiers to economically, efficiently and effectively collect revenue from tax payers. It is therefore the duty of the administering bodies to apply the laws enacted by the legislature effectively and to determine the reasonable meaning of various legal provisions in light of the legislative purpose in enacting them; and to perform this work in a fair and impartial manner, with neither a government nor a taxpayer point of view.

In recent times, Tax administration in the Nigeria is divided into three main authorities to take care of the three-tiers of Government namely the Federal, the State and the Local Government.

The Tax Authorities derive their creation from the Federal Tax Laws and they include:

(a) The Federal Inland Revenue Service[99]:

(b) The State Board of Internal Revenue[100]

(c) The Local Government Tax Revenue Committee[101].

The Federal Government has jurisdiction over Corporate Income Tax, Education Tax, Personal Income Tax, Capital Gains Tax, Value Added Tax and Petroleum Profits Tax. In respect of Personal Income Tax, the authority of the Federal Government is restricted to the following:

1) persons employed in the Nigeria Army, Navy, Air Force, Police other than in a civilian capacity;

2) officers of the Nigeria foreign service;

3) residents of the Federal Capital Territory, Abuja; and

4) any other non-resident who derives income or profit from Nigeria.

The States have responsibility for the assessment and collection of personal income tax payable on the income of individuals resident in their States. They also collect capital gains tax on the profits

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[98] Sanni, A. – "Division of Taxing Powers" in M.T. Abdulrazaq (ed.) – *CITN Nigerian Tax Guide and Statutes* (The Chartered Institute of Taxation of Nigeria: Lagos) 2002, at p. 651.

[99] Section 25(1), Federal Inland Revenue Service Establishment Act 2007

[100] Section 87, Personal Income Tax Act Cap. P8, Laws of the Federation of Nigeria, 2004

[101] Section 90, Ibid.

derived by individuals from disposal of assets located in their jurisdiction. The Local Governments are responsible for miscellaneous taxes, such as tenement rates.

IMPACT OF E-COMMERCE TRANSACTIONS

As earlier analyzed in most of Nigerian Tax Laws, resident test with respect to place of incorporation is a determinant factor for liability of a Company to tax in Nigeria (especially a company incorporated and resident in Nigeria) as well as place of residence for an individual. On a non-resident company, it must have a fixed base/permanent establishment in Nigeria to be liable to tax in respect of its profits from business operations in Nigeria. This is not applicable to a non-resident foreigner for purposes of personal income tax. In this latter case, the foreigner must have been resident in Nigeria for the stipulated period of time stated in the Personal Income Tax for he/she to be liable to income tax on his/her income within that period.

Furthermore, the provisions of the Value Added Tax Act somewhat dispenses with the need of a company to “physically” reside in Nigeria for the purposes of the VAT collection and payment. By virtue of **section 10** of the Value Added Tax Act, the non-resident company carrying out any business transactions, whether e-commerce or traditional, should register with the FIRS using the address of the resident contracting party for the purpose of the Tax. The Act is however silent whether the same obligations would or ought to be imposed on a non-resident individual/person.

Similarly, Capital gains accruing outside Nigeria to a non-resident company or individual are subject to Capital Gains Tax only on the amount received or brought into Nigeria.[102] Therefore, the issue of residency is not paramount for this head of tax. Thus, it can be rightly said that residency is only a prerequisite for the jurisdiction of the Tax Authorities to tax income tax alone in Nigeria.

It should be further noted that the current wave of globalization and technological revolution has had a tremendous effect on the concept of residency for individual’s and companies’ income taxation. Technological advancement has today made it possible for businesses to transact substantial business activities in many countries without necessarily resident in or having a fixed base/permanent establishment in those countries. In other words while today's tax system relies on knowing where a particular economic activity is located; the internet may enable individual worker to operate in many different countries while sitting at the same desk.[103]

Considering the above observation, does it mean that e-commerce has caused a break down in the fixed base/permanent establishment concept? Has it made irrelevance of the requirement of being in a particular physical location before making profit in Nigeria? How then should such profit be

[102] Section 4, Ibid.

[103] Blatt, M. G. “Federal Taxation of Software Technology Transfers (Part I)”, *Prentice Hall Law & Business – The Computer Lawyer*, July 1995, Vol. 12, No. 7, pg. 3

assessable to income tax in Nigeria? Or if an e-merchant has a website in Nigeria and business is conducted through the website, does it satisfy the requirement of fixed base/permanent establishment? Besides, electronic-commerce is a relatively new phenomenon in Nigeria and great care must be taken in evaluating its effect on the Nigerian Tax regime.

As already pointed out, electronic commerce occurs in many forms such as: e-dividend payment (e-dividend), e-banking; e-fund transfer, e-trading, e-money etc. However, all these components of e-commerce cannot be discussed here; rather, few of them and their impacts on the concept of fixed base will be examined.

For instance the transaction of e-dividend payment which is a convenient, secure, on-line means of paying dividends directly to the shareholder's account instead of printing and mailing dividend warrants. This is achieved by making a shareholder who has a bank account (savings or current) with any company (by completing the mandate form) and has his/its dividend paid directly into that account regardless of where he/it resides. Dividends are generally taxable in the companies and shareholders' hands as part of the assessable income for the relevant year. The company pays companies' income tax as the underlying tax.[104] The shareholders pay withholding tax on the distribution from the after tax profits distributed to them as dividends.[105] The shareholder may be an individual or a corporation, and therefore could be subjected to further personal or companies income tax liability.[106]

There may not be too much problems on determination of residence/fixed base of an e-dividend receiver as tax on the dividend must have been deducted at source at the rate of 10%. Given the enabling provision of the **Federal Inland Revenue (Establishment) Act 2007**, the Tax Authority can call for books and records of banks[107] and companies involving e-payment of dividend and from the book glean the appropriate withholding tax for remittance or collection accordingly. However, **section 71 (4)** PITA provides for remittance of the tax so deducted to the relevant tax authority which authority is to be determined in accordance with the provision of section 2 of the same Act (PITA). **Section 2 (1) (a)** PITA provides that:

Tax on amount to be determined from the table set out in the sixth schedule (in this Act referred to as income tax) shall be payable for each year of assessment on the total income of the company (a)

[104] Section 19, Companies Income Tax Act 2004
[105] Section 80, Ibid.
[106] By virtue of section 2, Personal Income Tax Act 2014, income derived for dividends are chargeable to tax as part of the income of an individual within the period of assessment; while section 18, Companies Income Tax Act makes elaborate provisions for the treatment of dividends received by a Company from another Company.
[107] Section 26, Federal Inland Revenue Service (Establishment) Act 2007

every individual other than persons under paragraph (b) of this subsection or corporation sole or body of individuals deemed to be resident in the relevant state under the provisions of this Act.

The purport of the foregoing provision if read harmoniously together with **section 71 (4)** of the same Act is that dividend deducted should be remitted to the tax authority in the state where the beneficiary of the dividend is resident or has a fixed base. In a situation where such an individual is resident in UK and his/its dividend is electronically paid to him how is the relevant tax authority determined in line with his residence for remittance of tax so deducted?

In the same vein, **section 80 (4)**, Companies Income Tax Act (CITA) 2014 provides that tax deducted from the dividend of a corporate beneficiary is to be final tax due from the resident recipient of the payment. What happens to the non-resident beneficiary whose dividend may be prepared and packaged to him electronically. The foregoing constitutes some of the potential controversial issues poised by digital transactions in the face of concepts of residence/fixed base in income tax.

Traditionally, liability to tax of a non-resident (company or individual) in Nigeria is considered from three major perspectives viz:

i. trading through a branch

ii. trading through an agency

iii. trading in the country[108]

The tests to determine when a person (natural or artificial) is trading in a country are: place of conclusion of contract[109]; place of delivery[110] and place of payment[111]. In the case of *Aluminium Industries Aktien Gesellschaft vs FBIR*[112] the non-resident company granted a loan to its wholly-owned Nigerian subsidiary 'Alumaco'. The contract agreement was concluded in Switzerland and the terms were that both the principal and the interest were payable in Swiss francs in Switzerland. The Inspector of Taxes assessed the interest to tax under section 17 CITA, 1961[113] and the company went on appeal. The Supreme Court held that the right to payment was in Swiss francs in Switzerland and allowed the appeal. The Supreme Court held:

The source of the obligation was the agreement made in Zurich, between the Appellant Company and the Aluminium Manufacturing Company of Nigeria Ltd. and the obligation itself under that agreement was for Aluminium Manufacturing Company of Nigeria Ltd to repay the principal and the interest on the loan to the appellant company in Zurich Swiss currency. Hence neither the source of

[108] Section 13, Companies Income Tax Act 2004
[109] *Grainger & Sons Vs Gough* (1896) A. C 325
[110] *Macpherson & Co. Vs Moore* (1926) 6 Tax Cases 107
[111] *Wilcock Vs Pinto & Co.* (1925) 9 Tax Cases 111
[112] (1971) N.M.L.R 339
[113] Now Section 9, Companies Income Tax Act, C23 Law of the Federation of Nigeria 2004

the obligation nor the obligation itself arose in Nigeria but was in Switzerland. That been so on that ground we must decide that the claim for tax could not be brought within the first deeming provision of section 17 of the CITA, 1961 which only deems interests to be derived from Nigeria and so liable to tax if there is a right to payment of that interest in Nigeria.

It can be seen from the analysis drawn in this research that traditional rules contained in the Nigerian Tax legislations are no longer applicable as solution to some tax problems emerging from e-commerce transactions. For instance, under the Assessment procedure, it is only a tax payer that is linkable or traceable to a fixed base that can subscribe to either self-assessment procedure[114] or government assessment procedure[115]. Not only this, under enforcement procedure, the modes of litigation, search and levying of distress are only applicable to a taxpayer whose fixed base is known. It therefore presupposes that assessment, collection and enforcement procedures under the income tax in Nigeria may not be adequately applicable to e-merchants who are only traceable to their websites.

In order to identify suspicious transaction, their perpetrators and other person involved; the **Federal Inland Revenue Service (Establishment) Act** empowers the Federal Inland Revenue Service to establish and maintain a system for monitoring international dynamics of taxation.[116] This reduces the difficulties that the Tax Authority will encounter in assessment, collection and enforcement of tax due to non-traceable of e-merchant to a particular fixed base.

But, the transactions over the internet are not necessarily suspicious one. These may be legitimate business transaction which may be devoid of any criminality. The only crux is that they are unlinkable to any fixed base on which they can be held liable to pay income tax. Therefore, this section of FIRS Act 2007 does not and may not be said to envisage businesses in the course of electronic trading. It is worthy of note that the foregoing exposition is an attempt to bring forth the dilemma that a developing country like Nigeria may face with respect to the tax implications of the e-commerce, particularly if it is considered from the perspective of fixed base/permanent establishment concept under the income taxation in Nigeria.

There is the concern about the shift from paper-based records to electronic records which can easily be kept out of the reach of the tax authority. E-commerce is transacted through websites and internet. The website, on its own cannot meet the condition of geographical fidelity of a fixed base because of its intangible nature. As a result, the tax authority is weakened particularly in the areas of assessment, collection and enforcement of income tax in Nigeria.

[114] Section 53, Companies Income Tax Act
[115] Section 65, Ibid.
[116] Section 8(1)(k), Federal Inland Revenue Service (Establishment) Act 2007

CONCLUSION AND RECOMMENDATION

The main challenge of e-commerce to the Nigerian tax system is that the laws that govern direct taxes (income taxes) are presently premised on the concept of permanent establishment (PE) as presently defined in the double tax treaties. With the advent of e-commerce, the need for physical presence in the country receiving the goods or services is removed or at best diminished. This creates the problem of how to determine the right to tax profits that are derived from e-transactions. As regards indirect taxes (VAT) the major challenge is how tax authorities will track e-commerce transactions for purposes of collection. Aside from tax enforcement and administration issues (e.g., detecting whether and when an e-commerce transaction has occurred), transactions of digitized products raise unique tax concerns for both the source and resident countries.

Firstly, in transactions of digitized products, it is difficult to establish a source country's power to tax the income or consumption derived from the exchange. The Internet's current architecture allows downloaded or "imported" digitized products to bypass border checkpoints undetected[117] and to be made anywhere in the world without any determinative information regarding a customer's physical location.[118] However, under current international tax rules, accurate determination of the customer's physical location is a prerequisite to establishing a source country's jurisdiction to tax the value of the sale or revenue therefrom.[119] An alternative to source-based taxation is to base tax jurisdiction on the e-vendor's residence.[120] However, this solution would be unacceptable to countries with relatively few resident e-vendors.[121] A tax regime in which the e-vendor would be subject only to resident-state taxes would mean that countries like the United States with many resident e-vendors compared to other states, would reap the lion's share of e-commerce-derived tax revenue, and source countries that rely on consumption taxes would lose a significant portion of their tax base.[122]

Secondly, how the income from a digital transaction should be characterized has not been settled, and is therefore a meaningful inquiry for tax purposes. There is a danger that some countries may characterize income from transactions of digitized goods and services differently from their physical analogs in order to gain jurisdiction to tax a digital exchange that they otherwise would not be able

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[117] Maguire, N. "Taxation of E-Commerce: An Overview". *International Tax Review* (1999) 3-12

[118] Kobrin, S. J. *Taxing Internet Transactions*, 21 University of Pennsylvania Journal of International Economic Law. (2000) 666, p. 671.

[119] Cockfield, A. J. *op. cit.*

[120] Chan, C. W. *op. cit.*

[121] Ibid. p. 254

[122] Ibid. p. 250; Cockfield, A. J. *op. cit.* p. 159

to tax under current tax rules. For example, importing a CD generates business income, which the source country may tax only if the seller has a permanent establishment in that country.

It is beyond doubt that many people or companies would not want to pay taxes especially if the act and cost of compliance are extremely high and time consuming. Each country has its own independence and separate legal taxation framework for e-commerce as there is no single agreed framework for all the countries .Since tax on e-commerce is an extension of the current tax laws ,it behooves the Nigerian government to evolve a comprehensive legal framework and infrastructure for e-commerce so as to take advantage of her huge market .There is also an urgent need for institutions especially OECD to evolve more equitable tenets for cross-border e-commerce transactions so that all countries can enjoy equitable distribution and tax revenues .

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