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Appraisal of Nigerian Tax Laws and their Effects on Investments in Nigeria

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ABSTRACT

The political, economic and social development of any country depends on the amount of revenue generated for the provision of the common needs of people in any given country. Taxes and investments are among the major sources of revenue generation and wealth creation in Nigeria. With respect to taxes, taxation has become one of the most reliable tools employed for the diversification of Nigerian economy, due to its huge contribution to revenue generation. Apart from revenue generation, taxation is also an economic and social control tool, used in shaping and influencing individual and economic activities, such as consumption, income redistribution, investments etc. Investment in the other hand, is an invaluable tool, for the growth of Nigerian economy and provision of employments. The problem with combining taxation and investment as sources of revenue generation is that, an inverse relationship exists between them, with the implication that an increase in taxation leads to a decrease in investments, which will in turn result to a poor growth of the economy. Due to the over-reaching socio-economic benefits of taxation, Nigeria like many other countries, have unduly over-stretched their tax revenue pursuit, to a worrisome point of making taxes an impediment to the growth of other sources of revenue such as investments. To avoid tax domination of investments, this article therefore examines the various tax laws affecting investments in Nigeria, with a view to pointing out those aspects capable of impeding investment in Nigeria.

1. Introduction

The political, economic and social development of any country depends on the amount of revenue generated for the provision of the common needs of people in any given country.[1]

Taxes and investments are among the major ways of improving revenue generation and wealth creation in Nigeria. This is because, if both means are successfully harmonized, they are sustainable sources of government revenue which neither fluctuate in price nor susceptible to finish like the crude oil source of revenue.

With respect to taxes, taxation has become one of the most reliable answers to the cry for a sustainable growth and diversification of Nigerian economy, as a result of its significant huge contribution to revenue generation.[2] Apart from revenue generation, taxation is also an economic and social control tool, used in shaping and influencing individual and economic activities, such as consumption, income redistribution, fiscal regulation, investments etc.[3] Due to the over-reaching socio-economic benefits of taxation, Nigeria like many other countries, have unduly over-stretched their tax revenue pursuit, often to a worrisome point of making taxes an impediment to the growth of other sources of revenue generation, such as investments.

Investment on the other hand, is also an acclaimed reliable source of revenue generation which has prompted Nigerian Investment Promotion Commission[4] to adopt economic openness and liberalization as its major policy, so as to attract and maintain both local and foreign investments. Investments also provide solution to Nigerian problem of unemployment.

[1]Ekpung E.G, and Okoi W.W, "The Impact of Taxation on Investment and Economic Development in Nigeria", [July 2014]*Academic Journal of Interdisciplinary Studies, (Vol. III)*, pp. 209-218.

[2] See. National Tax Policy, Federal Ministry of Finance (April 2012), page 3, available at <https://www. firs.gov.ng.> Accessed on March 12, 2017.

[3] A. Ipaye, *Nigerian Tax Law and Administration:A Critical Review*(London, United Kingdom: ASCO Prime Publications Ltd. 2014), p.6.

[4] This is a body corporate established under section .1 of the Nigerian Investments Promotion Commission Act. Cap. N117 Laws of the Federation of Nigeria, 2004, which has the functions of encouraging, promoting and co-coordinating investments in Nigeria.

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While the major underlying philosophies of Nigerian tax policy is to encourage a shift in focus from non-tax revenue to tax revenue and a total maximization of tax avenues within Nigerian jurisdiction,[5]an unguarded and extreme chase of such objectives may impact negatively on the Nigerian investment climate. And this will lead to a clash between two economic policies,[6] which will result in a negative consequence of poor growth of Nigerian economy.

With the above in mind, it would appear that the right approach towards growing a sustainable economy in Nigeria is to strike a balance between the implementation of tax policies and that of investments. This balance will be best achieved by ensuring that, those provisions of Nigeria tax laws and administration which dominate and impede investments are adjusted while those aspects of corporate tax practices which encourage investments should be adopted, promoted and brought to the awareness of prospective investors. In other words, all forms of tax related logjams which slow the growth rate of investments should be removed.

This present research has set out to review the extent to which tax laws affect investments in Nigeria, so as to suggest a balance between taxation and investment because, both economic tools are inevitably required for the purpose of attaining the common goal of improving Nigerian economy.

1.1. Definition, Nature and Basic Concepts of Taxation

1.2. Definition of Tax

The concept "tax" or "taxation" like many other legal concepts has no generally accepted definition. Tax statutes, legal dictionaries and authors have defined tax differently, though with some common features.

CITA[7] and **PITA**[8] defined tax as: "Tax" means any tax imposed in conformity with the provisions of these Acts".

Black's Law Dictionary[9] defines tax "as charge, usually monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue".

According to **OsitaAguolu**, "taxation may be defined as a compulsory levy by government through its various agencies on the income, capital or consumption of its subjects".[10]

In addition, **Akanle** defines taxation as "a compulsory levy imposed on a subject or upon his property by the government having authority over him"[11].

Taking together, these definitions reveal at least four essential characteristics of tax.

First, it is a compulsory levy and therefore expropriatory in nature. This has to do with the government divesting taxpayers of some amount of money which ordinary belong to them. In other words, tax is not a voluntary payment or donation, but an enforced and compulsory contribution, exacted pursuant to legislative authority.[12] The expropriatory nature of tax has attracted a judicial principle of interpretation which states that, tax laws should be interpreted strictly. In the case of *Cape Brandy Syndicate v. Inland Revenue Commissions*[13]**Rowlatt .J**. stated that:"In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied."

Secondly, taxes are imposed by the government, through the means of statutes. This is so because, imposition and enforcement of taxes require the exercise of sovereign power without which taxpayers will not comply. In addition to the fact that, imposition of tax must be strictly statutory, the words of the statutes must be clear. In the case of *Vesty v. Inland Revenue Commissioners*[14]. It was held that "a person cannot be taxed unless he is designated in clear terms by a taxing Act as a tax payer and the amount of his liability is clearly defined". This indicates that, the emphasis is not only on the tax statutes, but also on the wordings or language of the statutes which must be clear. Thus, in the Nigerian case of *Ahmadu v. Governor of KogiState*[15], the Court of Appeal emphatically stated that, "a subject must not be taxed unless the language of the statute clearly imposes the obligation."[16]

Thirdly, taxes are imposed by the government on its subjects and not on citizens. In other words, nationality is of little or no consequence in the field of taxation. Any person who benefits from the public services provided by the government becomes a subject for tax purposes.[17]

Fourthly, the primary purpose for imposing tax is to serve public interest. This is because; tax imposition is either to raise money for the support of government expenditures or to regulate certain economic activities or consumptions for public interest.[18]

It is apposite to add that tax is not strictly a pecuniary burden but also a civic duty. **Section 24(f)** of the **Constitution of the Federal Republic of Nigeria,1999**[19] provides that "it is the duty of every citizen to declare his income honestly to appropriate and lawful agencies and pay his tax promptly[20]. In the case of *Independent Television/Radio v. Edo State Board of Internal Revenue*[21], the Court of Appeal held that, tax payment is an obligation of

[5]See. National Tax Policy, Federal Ministry of Finance (April 2012), pages 2- 3, available at <https://www. firs.gov.ng>.Last accessed at March 12,2017.

[6]The two economic policies in this context are, the Investment policy and the Tax Policy.

[7]Section 105 of CITA.

[8]Section 108 of PITA.

[9]B.A Garner:*Black's Law Dictionary 10th edn*(U.S: ThomsonReuters: 2014) p. 1685.

[10] O. Aguolu, *Taxation and Tax Management in Nigeria*, *6th edn*, (Enugu, Nigeria: Ezu Books Ltd, 2014.)

[11] O. Akanle, *Tax Law Administration in Nigeria*, (Nigerian Institute of Advanced Legal Studies: Lagos, 1991.)

[12] F.E. Nlerum "Reflection On The Attitude Of The Courts To Tax Incentive Mechanism In Nigeria"*NIALS Journal of Business Law vol. 6*(2013). page 111. Available at *http://taxes.about.com/od/taxplanning/ a/taxplanning.htm*. Last accessed 3rd May,2017.

[13][1921] 2 KB 403.

[14] [1986] AC 1148

[15] [2002] 3 NWLR [pt. 755, 502]

[16] Many Nigerian tax statutes have failed to meet up with this threshold of simplicity and clarity.

[17] *UK Home Owners To Pay Taxes In Nigeria*, 24 April, 2017. Available at: www.nigerianeye.com/2017/04/uk-home-owners-to-pay-taxes-in-nigeria.html?m=1.

[18] A.Ipaye, *Nigerian Tax Law and Administration: A Critical Review*, (London, United Kingdom: ASCO Prime Publications Ltd. 2014), p. 6.

[19] Cap. C23, vol. 3, Laws of the Federation of Nigeria, 2004.

[20]We believe that, the word "citizen" in this constitutional provision will be construed by the court as "subject". The reason being that taxes are imposed on "subject" which is a wider term.

[21](2014) 16 TLRN 37.

a citizen, failure of which shall strip him the protection clothed him by Section 44 (1) of the 1999 constitution.

1.3. Guiding Principles of a Good Tax System.

Tax system means, the entirety of the legal process regulating the imposition, assessment and collection of taxes[22]. There are certain principles that have been generally adopted to guide the making and enforcement of tax laws in any jurisdiction. Accordingly, any tax system which substantially violates these fundamental principles will attain little or no success. And even in the present time, the merit and appropriateness of a tax system is usually determined by references to these principles.[23]

These criteria as propounded by Adams Smith[24]are as follows:

1.3.1. Equity and Universality: This principle posits that, the liability for tax should be all embracing. In other words, every individual without exceptions should be liable to tax. In addition, payments should be in proportion to their respective abilities. This is the philosophy behind Pay As You Earn tax formula, which has rightly influenced some Nigerian tax provisions.[25]

1.3.2 Certainty: The requirement of certainty suggests that, the income or property intended to be taxed, the occasion for tax payment, the rate of tax and the modalities for assessment and general administration should be clearly spelt out beforehand.[26]According to Adams Smith,[27] the fear of uncertainty is that, taxpayers are left at the mercy of the tax-collector who can unfairly increase the charge for self-gratification. Certainty also means that there should be restrictions on the discretionary powers of tax administrators.[28]

1.3.3. Convenience: The injunction here is that, the manner of payment, amount to be paid and time for payment should be convenience for the tax payers.[29]

1.3.4 Economy or Low Cost of Administration: Another key feature of a good tax system is that the cost of administration must be relatively low when compared to the benefits derived from its imposition. Cost in this context refers to both money and practices capable of discouraging individuals from engaging in certain branches of businesses which give maintenance and employment to great multitude.[30]

In other words, for a tax system to be said to be efficient, the revenue generated from taxes imposed must be relatively higher than revenue spent in collecting those taxes.

1.3.5 Flexibility: This fifth criterion, though not propounded by Adams Smith is inevitable to any tax system. It suggests that tax statutes and practices should be flexible enough to respond to the changing circumstances.[31] For instance, there should be recent tax laws in Nigeria, to respond to the growing need for investments and taxation of e-commerce.

1.4. Source of Tax Law in Nigeria.

One can hastily conclude that statute is the only source of tax law, considering the fact that; courts have held in many cases that for a tax to be valid, it must be imposed by clear words of a statute.[32] However, this is not so in that statute does not give effect to itself.

If dispute arises from the provisions of a statute, the parties go to tribunal or courts for the determination of the dispute. And the decision of the court is binding. This and other practices gave birth to subsidiary sources of taxation laws which will be discussed below:

1.4.1 Judicial decisions: This is a subsidiary source of taxation law in that, it does not impose tax, rather it gives effect to the provisions of tax statutes. The court regulates the exercise of legislative power in imposing taxes and may declare a tax statute void on the ground that it is unconstitutional. In the case of *Mama Cass v. Federal Board of Inland Revenue,*[33]the court declared the sales tax imposed by Sales Tax Law of Lagos State 1994 invalid on the ground that Value Added Tax Act, has covered the field. A tax payer can therefore, rely on judicial decisions to plan his/her business.

1.4.2. Circulars: This is a document issued by revenue authorities to the whole world. These circulars are made by virtue of tax statutes which enable either the Minister of Finance, or the President or the Board to issue same.[34] For instance **Section 61 of the FIRS Act, 2007**, provides that, "the Board may with the approval of the minister, make rules and regulations as on its opinion are necessary or expedient for giving full effect to the provisions of this Act and for the due administration of its provisions.." Circulars are only binding if they are issued by virtue of a statute enabling it.

From the above discussion, one can rightly conclude that statute, judicial decisions and circulars are all sources of taxation laws in Nigeria.

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[22] Oklahoma Policy Institute, "*Characteristics of an effective tax system*". Available at okpolicy.org > resources > revenue > an overview- of-our-tax-system/. Last accessed on 21st May,2017, at 5:03 pm.

[23]. A.Ipaye, *Nigerian Tax Law and Administration: A Critical Review*, (London, United Kingdom: ASCO Prime Publications Ltd. 2014), p. 6

[24]A. Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, (W. Shawon and T. Cadell Publishers: London, 1776) BK v Chapter II). Available at https://www.ibiblio.org>libri>SmithA- Wealth Nations. Last accessed on 20th May, 2017, at 7pm.

[25]Section.81 of PITA.

[26] See footnote 27. In addition the confidence of taxpayers can only be maintained and compliance made easy, if the tax system is simple and certain for taxpayers to understand.

[27]A. Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, (W. Shawon and T. Cadell Publishers: London, 1776) BK v Chapter II). Available at https://www.ibiblio.org >libri>SmithA- Wealth Nations. Last accessed on 20th May,2017, at 7pm.

[28]A.Ipaye, *Nigerian Tax Law and Administration: A Critical Review*, (London, United Kingdom: ASCO Prime Publications Ltd. 2014), p. 11.

[29]This principle prompted the practice of withholding taxes, where employees and others are made to pay tax at the point in time when their profits or income accrued.

[30]See footnote 30.

[31] See National Tax Policy Document. April, 2012.pp 6-7.

[32] See *Morley v. Hall*(1834) 2 dow 494 Per Taunton J at 497, *Union Trustee ltd v. Attorney-General of TheFederation* (1990) FHCLR; *Savannah Bank Nigeria ltd V. D.G Ministry of Lands* (1989) FHCLR. At 370.

[33] See 2 TLRN, March, 2010 at p.217

[34] The Central Bank of Nigeria on 15th January, 2016 issued a Circular reference CBN/GEN/DMB/02/006 to all Deposit Banks and Financial Institutions charging fifty naira per eligible transaction. Available at https://www.cbnbank.org

1.5. Defining a Company for Tax purposes

In Nigeria, "company" for tax purposes is defined based on incorporation. **Section 105 of CITA** defined company as "any company or corporation (other than corporation sole) established by or under any law in force in Nigeria or elsewhere.

However, a wider definition of company is adopted in relation to double taxation agreements between Nigeria and other countries. Under such agreements "company" means anybody corporate or any entity which is treated as a body corporate for tax purposes under the respective laws of each contracting state[35]. This definition suggest that, if a business entity is treated and taxed as a company in any foreign country which has double taxation agreement with Nigeria, such business entity will be taxed as a company in Nigeria, whether it is incorporated or not[36]. The above definition is contained in all double taxation agreement between Nigeria and other jurisdictions.

The Companies Income Tax Act, classified company into Nigerian and foreign company[37], and each has a different tax implication.

1.5.1. Nigerian Company: This means any company incorporated under the Companies and Allied Matters Act, or any enactment replaced by that Act.[38] In other words, it is only Nigerian companies incorporated under CAMA that will be chargeable to tax under CITA. There are other ways of establishing companies in Nigeria other than incorporation under CAMA. By virtue of Item 32 of the Exclusive Legislative list of 1999 Constitution, it is implied that House of Assembly of a State can establish bodies corporate which are not required to be incorporated under CAMA, therefore such companies are not subject to company income tax. By virtue of **Section 13(1) of CITA**, Nigerian companies are taxed on their world-wide income.

1.5.2. Foreign Company: Section 105 of CITA defines foreign company as "any company or corporation (other than corporation sole) established by or under any law in force in any territory or country outside Nigeria." By virtue of **Section 13(2)(a) of CITA**, a foreign company is taxed only on its profit derived from Nigeria or attributable to its fixed base in Nigeria. There are other tax privileges which foreign companies are entitled to which Nigerian company cannot enjoy. For instance, by virtue of **Section 23(1)(j) of CITA**, profits of a foreign company brought into Nigeria cannot be taxed merely because it is being brought into Nigeria.[39]

From the above discussion, it is obvious that the criterion for distinguishing between Nigerian and foreign company is incorporation. While Nigerian companies are those incorporated under CAMA, foreign companies are companies incorporated outside Nigeria. This distinction is insufficient, considering the fact that section **54 of CAMA** makes it mandatory that every foreign company intending to carry on business in Nigeria must be incorporated as a separate entity under it (CAMA).The problem is that any foreign company which complies with the provisions of CAMA, automatically becomes a Nigerian company, and therefore loses the tax privileges it previously enjoyed[40]. Another problem caused by the above distinction between Foreign and Nigerian companies is that, CITA permits what CAMA prohibits, which is that, foreign companies must not do business in Nigeria unless they are incorporated in Nigeria.[41]

1.6. Taxation of Companies' Profits or Turnover

There is a need to maintain continuity in the business of a company, and to achieve this, not all incomes of a company are subject to tax.

Section 9(1) of CITA provides that "subject to the provisions of this Act, the tax shall, for each year of assessment, be payable at the rate specified in Subsection (1) of Section 40 of this Act upon **the profits** of any company accruing in, derived from, brought into or received in Nigeria. Although, the Act did not define profit, a company's profit is arrived at after all allowable deductions are made.

In the case of *Mercy Docks and Harbour Board v. Lucas*[42] the court defined profits as "… the incomings of the concern after deducting the expenses of earning and obtaining them… after paying the current expenses and all other outgoings, the clear surplus is the profits".

Turnover becomes the basis for taxation of a company where for some reasons; it becomes difficult to ascertain the profits of a company[43].Circumstances under which a company will be taxed on a fair and reasonable percentage of its turnover are:

i.When the trade or business produces no assessable profits,
ii.When the trade or business produces assessable profits that, in the opinion of the Board of the FIRs, are less than might be expected to arise from that trade or business or
i.When the true amount of the assessable profits of the company cannot be ascertained[44].

In the case of *Addax Petroleum Services Ltd. V. Federal Inland Revenue Service*[45], it was held that, where the true amount of the assessable profits of a company cannot be readily ascertained the Board may assess and charge that company for that year of assessment on such a fair and reasonable percentage of the turnover. This decision was based on the interpretation of **Section 30 of CITA**.

One of the basic distinctions between taxation on profit and taxation on turnover is that, deduction of expenses are allowed before a company's profits is taxed, while the only

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[35] Paragraph 1(F), of Article 3 of the Double taxation agreement between Nigeria and the Kingdom of Belgium.
[36] For instance an Authorized Unit Trust by virtue of Section 17 of CITA is treated and taxed as a company in Nigeria, even though it is not a body corporate.
[37] Section 105 of CITA.
[38] *Ibid*
[39] This is not applicable to a Nigerian company, in that profit of a Nigerian company brought into Nigeria will be taxed merely because it was brought into Nigeria. See Section 13 (1) of CITA.
[40] The problem created by the provisions of CAMA and CITA with respect to incorporation of companies, will be discussed in details in the next chapter. In addition, a solution will be suggested.
[41] Section 54 of CAMA prohibits foreign companies from doing business in Nigeria unless they are incorporated in Nigeria, while Section 9 of CITA permits foreign companies to do business in Nigeria on the ground that they are incorporated outside Nigeria.
[42] 1883, 8 App Case 891.
[43] See Section 30 (1) of CITA.
[44] PWC "*Taxes on Corporate Income: Worldwide Tax Summaries*" available at taxsummaries.pwc.com/iD/ Nigeria-corporate-taxes-on-corporate on -income. Last accessed on 2 June 2017 at 6:15pm see also section 30 of CITA
[45] 2013, 9 TLRN, page 128

deduction allowed in the taxation on turnover are taxes collected on behalf of governments.[46]

1.7. Tax Authorities and Jurisdictions

Nigeria has several tax authorities responsible for the administration of tax statutes, to avoid conflicts, the law has clearly provided for taxes which each tax authority has power to collect and the tier of government which have power to impose such taxes. By virtue of **Item 1 of the Schedule to the Taxes and Levies (Approved List For Collection) Act**[47] the Federal Government through its tax authority (FIRS) has power to collect taxes from companies.

In the event of dispute between FIRS and any tax payer, the Tax Appeal Tribunal (TAT) has jurisdiction to entertain such dispute, by virtue of its powers enumerated under the Fifth Schedule to the FIRS Act. There is a controversy surrounding the constitutionality of the jurisdiction of TAT to entertain disputes relating to corporate income tax considering the fact that **Section 251(1)(b) of the 1999 Constitution** gave exclusive jurisdiction to the Federal High Court on matters pertaining to the taxation of companies.

The Court of Appeal in *Stabilini v. FBIR*[48] held that TAT lacked jurisdiction to entertain tax matters. On the contrary, the Court of Appeal in the recent case of *CNOOC exploration and Production Nigeria ltd &Anor v. Nigerian National Petroleum Corporation &Anor*[49]held that, the TAT has jurisdiction to determine tax matters, on the ground that it is an administrative bodyand not a court. As it stands now, the law on this issue is not settled until the Supreme Court makes a pronouncement on it.

1.8. Double Taxation Agreements

Double taxation agreements (DTA) are agreements between two countries designed to protect against the risk of double taxation where the same income is taxable in two countries[50]. The practice in most countries is that indigenous companies pay taxes on their global incomes while foreign companies pay taxes based on source[51]. The implication is that, a company which invests in a foreign country will have its profits taxed twice, and to guard against such double taxation, countries which intend to promote investments enter into agreement with each other whereby credit for taxes paid in a foreign country will be given to a company in its own country. Nigerian currently has up to thirteen double taxation treaties with different countries though not all are ratified.[52]

[46]See *Global Marine International Drilling Corporation v. Federal Inland Revenue Service* (2013 12 TLRN, pg 6).

[47] Cap T2, 2010 LFN

[48] (2009) 13 NWLR (pt. 1157) 200

[49]CA/1/1144/2015.

[50] M. Wright "Double Taxation Agreements: What they mean in practice" available at www.telegraph. co.uk/expat/4191621/double-taxation-agreements-what-they-mean-in-practice.html.

[51] This is also the case in Nigeria under Section 13 of CITA.

[52]Many double taxation agreement with different countries will attract more foreign investments.

2.1. Appraisal of Tax Laws Affecting Investments in Nigeria.[53]

2.2. Companies Income Tax Act[54]

Company's income tax Act (CITA) is the principal statute imposing taxes on non-petroleum companies in Nigeria[55]

a. Repeal of PART 1 OF 1961 Act.

The first noticeable feature of CITA is the repeal of PART 1 of the 1961 Act (the principal act)[56], which formerly provided for the establishment, composition and powers of the Federal Board of Inland Revenue[57]. According to AbiolaSani, the effect of this amendment is that, the establishment of FIRS and other provisions relating to the enforcement of CITA were contained under a separate statute in line with the demand for a strong and efficient administrative framework[58].

This structure which separated the substantive provisions of CITA from its administrative provisions makes for easy reference by administrators, practitioners, investors and researchers.[59]

Among the changes introduced by the amendment in 2007, is the increase in pre-operational levy.[60]**Section 29(4) of the 1961 Act**, provides that a pre-operational levy of **NGN 500** for the first year and **NGN 400** for every subsequent year is payable by companies that have failed to commence business after six months of incorporation. The amendment in 2007 increased the pre-operational levy to **NGN 20,000** and **NGN 25,000** for the first and second year respectively[61]. The rationale for this provision, let alone the increase in the pre-operational levy seems unclear as company income tax is generally payable on profits of companies. In addition, there may be a genuine delay for a company not to commence business within the first six months of incorporation[62]. Undoubtedly, a company which has not commenced business has made no profit. In other words, pre-operational levy is a charge on the capital of the company. According toAyua, taxing a company's capital amounts to killing the goose that lays the golden egg[63]. This is an excessive pursuit of revenue generation which will definitely impede investments[64].

[53] It is only the basic provisions of the relevant statutes which are capable of encouraging or impeding investments, that will be discussed in details

[54] Cap C21, Laws of the Federation of Nigeria, 2010.

[55] However, Petroleum operations companies engaged in transportation are taxed under CITA Section 14 of Petroleum profits Tax Act excluded oil companies engaged in transportation from being taxed under it (PPTA).

[56] That is company's income tax Act of 1961.

[57] These provisions are now contained in the Federal Inland Revenue Service (Establishment) Act.

[58] A. Sani, "Recent Developments in Company Income Taxation in Nigeria" *Bulletin for international Taxation, 2011(vol. 65) No. 1* page 3.

[59]*Ibid.*

[60] Pre-Operational levy is a levy imposed on companies that are yet to commence business six months after incorporation.

[61]Section 11 of the 2007 Act.

[62] See footnote 6 above.

11. A.I. Ayua, *The Nigerian Tax Law*,(Spectrum law Publishing, Ibadan 1991) page 76.

[64] The pre-operational levy is better contained in the Provisions of CAMA, which regulate incorporation and registration of companies. Such provision if contained in

b. Imposition of Tax and Profits Chargeable

A community reading of **Section 9 and Section 40(1) of CITA** imposed 30 percent tax on the profits of any company accruing in, derived from, brought into, or received in Nigeria in respect of

i. A trade or business,
ii. rent or premium,
iii. Dividends, interest, discounts, annuities etc,
iv. Profits from dealing in securities,
v. Deemed profits,
vi. Service fees, dues and allowances or
vii. Omnibus profits.[65]

Section 9 of CITA is loaded and it gives rise to a number of crucial points and issues.

The first point under section 9 is that, taxes are imposed on both Nigerian and foreign companies. This is justified by the use of the phrase "any company".

The second point is that, generally taxes are imposed only on the profits of companies and not on capital. This is in line with good tax policy and to do otherwise will amount to killing the goose that lays the golden eggs[66].

For two reasons, not all profits of a company are taxable. First, Section 9 of CITA provides for, four key qualifications used in determining when a company's profits are taxable in Nigeria[67]. Secondly, Section 23 and other provisions of CITA exempted certain profits from being taxed in Nigeria.

By virtue of **Section 13(1) (a) of CITA** all profits of a Nigerian company are deemed to accrue in Nigeria irrespective of where they are derived from[68]. The implication of this provision is that a Nigerian company is chargeable to tax on its world-wide profits or income irrespective of where they are made. But for a foreign company, only the profit accruing to it or derived by it, from Nigeria that is chargeable to Nigerian tax. This is because **Section 13(2) of CITA** in imposing taxes on the profits of foreign companies employed the words "derived from Nigeria"[69]. The court in interpreting Section 13 of CITA in the case of *Addax Petroleum Services Ltd v. Federal Inland Revenue Service*[70] stated that a foreign company is taxed on profits attributable to its fixed base in Nigeria. To strengthen the above fact, [71]**Section 23(1)(j)of CITA**, expressly exempted the profits of a foreign company brought into or received in Nigeria from being taxed.

Combine reading of **Section 13(2) and Section 23(1)(j) of CITA** is an incentive for foreign investments, in that, foreign companies are permitted to bring in their profits made outside Nigeria, to possibly re-invest in Nigeria.

Another material point under **Section 9 of CITA** which affects investments is the sources of profits that are taxable in Nigeria. Dividends and interest are among the sources of profits taxable under **Section 9 of CITA**[72].

Further provisions of CITA relating to dividends blow hot and cold towards investments. In other words, the provisions in question, promote investments on the one hand, and discourage investments on the other hand. With respect to dividends **Sections 19 and 20 of CITA** both discourage and encourage investments respectively.

Section 19 of CITA, provides that where a dividend is paid out as profits on which tax is payable due to;

a. No total profits, or

b. Total profits which are less than the amount of dividend which is paid, whether or not the recipient of the dividend is a Nigerian company, is paid by a Nigerian company, the company paying the dividend shall be charged to tax at the rate prescribed in Subsection (1) of Section 40 of this Act as if the dividend is the total profits of the company for the year of assessment to which the accounts, out of which the dividend is declared, relates.

In our view, the simplest construction of this section is that, at no time should the total profits of a company in a year of assessment be less than the aggregate amount of dividends paid to shareholders. And if otherwise, the FIRS should disregard the profit declared by the company and treat the aggregate amount of the dividends as the total profit and tax it at the rate of 30 percent. This will also apply, where the company made no profit in a current year, but decides to pay dividends from profits retained in previous years. The FIRS will tax such retained dividends irrespective of the fact that such profits had been taxed in the year it was made.

The particulars of anti-investments implications of the provisions of **Section 19 of CITA** are as follows:

(1) It impedes reserves and capitalization of companies' profits: According to Orojo[73]"A company will normally not want to distribute all of its profits, but rather, would want to reserve or retain part of it to provide for current or future liabilities or provide for reserves for a "rainy day" or some other future purposes."

In line with the need for a company to retain part of its profits, **Section 383(1) of CAMA**[74] provides that, the directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as a reserve or reserves which shall, at the discretion of the directors, be applicable for any purpose to which the profits of the company may be properly applied, and pending such application may, at the like discretion, either be employed in the business of the company or be invested in such investments (other than shares of the company) as the directors may from time to time think fit, and the directors may also without placing the same to reserve, carry forward profits which they may think prudent not to distribute.

CAMA, will discourage the practice of "Shelf companies". "Shelf Company" is a "paper company" duly incorporated by a person who do not intend to do business, but to sale it to anyone who wants to bypass the lengthy incorporation process.

[65] Omnibus profits refer to any other profit not falling under any of the above listed heads of profits.

[66] A.I. Ayua, *The Nigerian Tax Law,* (Spectrum law Publishing, Ibadan 1991) page 76

[67]The four qualifications are that, for a profit of a company to be taxed in Nigeria, it must have accrued, derived, brought into or received in Nigeria.

[68] Section 105 of CITA defined Nigerian Company as Company incorporated under CAMA.

[69] The principle of Interpretation of tax statutes is that the strict literal meaning of the statute should be followed and nothing should be implied – see cape *Brandy syndicate v. IRC*

[70]2013 9 TLRN Appeal No. TAT/L2/OIE/2011.p 129.

[71] That is, the fact that only the profit of a foreign company derived from Nigeria that is subject to Nigerian Tax.

[72] This is contained in Section 9(1)(c) of CITA.

[73] O. Orojo, *Company Law and Practice in Nigeria*, Fifth edition, (London, United Kingdom: Lexis Nexus ButherworthsTolley, WC2A. 2008) pg 328.

[74] Cap C20 Laws of the Federation of Nigeria, 2004

The summary of this provision is that, a company can retain or capitalize part of its profits made in a particular year in order to employ it in the business of the company, invest it in other companies or distribute the profits in subsequent years if the directors of the company deem it necessary to do so.

If for instance, a company retains part of its profits made in 2015, for the purpose of re-investment or to meet up with a contingent liability or to distribute it in any year in which little or no profit was made. If peradventure the company decides not to invest further or the event upon which the liability of the company was based failed to happen, then, the company is left with the option of distributing the retained profits in the year 2016. The implication of Section 19 of CITA is that, the retained profit which was taxed at the rate of 30 percent in 2015 will be subsequently taxed again at the rate of 30 percent in 2016 which is the year of its distribution. Such profit will be taxed at the rate of 60 percent.

The above scenario is a typical example of the hardship imposed on Oando Company in the case of *OandoPlc v. FIRS*[75]**.**

In that case, **OandoPlc** (the appellant) paid dividends in excess of its taxable profits in 2005, 2006 and 2007 tax year. The dividends were paid out of the company's retained earnings, which had been subjected to companies' income tax (CIT) in previous years but were not distributed to shareholders in the year in which they were made. The FIRS assessed the appellant to additional CIT for the relevant tax year based on **Section 19 of CITA**. The TAT ruled in favour of FIRS and the appellant objected. On appeal one of the issues submitted for determination is:

Whether the provisions of **Section 19 of CITA** could be applied to subject dividends, paid out of retained earnings which had been subjected to tax in prior years, to further tax.

The federal high court held that "**Section 19 of CITA** would be applicable whenever the dividend paid out by a company in a tax year exceeded the total profit for that year, regardless of the source of the dividend paid. The court added that, there is nothing in **Section 19 of CITA** mandating the tax exemption of such earnings. The decision of the court in this case, is another way of saying that companies in Nigeria should not retain or reserve profits and if it does such profits will be taxed at the rate of 60 percent in the year in which it will be distributed. In other words, companies are indirectly forced to distribute their total profits and not save for the rainy day.

2 The second anti-investment implication of **Section 19 of CITA** is that companies face the risk of being wound up. The inevitable consequence of **Section 19 of CITA** and the decision of the court in the case of *OandoPlc v. FIRS* is that companies are discouraged to save or retain part of their profits for the fear of being taxed twice.

By virtue of **Section 408(d) of CAMA**, one of the grounds upon which a company may be wound up by the court is that, the company is unable to pay its debts as at when due. And if the company does not save for the future, it may be forced to pay debt from its capital or be wound up for not being able to pay debts as at when due.

In the case of *Standard Bank of Nigeria Ltd. V. Ready Mixed Concrete Ltd*[76] it was held that the essential ingredients for a court to make an order to wind-up a company on the ground of inability to pay debt are that, (a) there must be a debt (b) the debt must be due, and (c) the company is unable to pay the debt.

In summary a company which is discouraged to save as a result of excessive taxation is by implication discouraged to make further investments and such company will not meet up with payment of its debts.

The only seemly justification of **Section 19 of CITA** is that, it is an anti-avoidance provision which seeks to curb sharp practices by companies which may try to falsify its profits. In our view, the above justification of section 19 of CITA holds no water, considering the fact that there are existing provisions of the Act, which can suitably take care of such mischief. For instance, **Section 21 of the CITA** is more direct, by providing that if a Nigerian company fails to distribute its profits, with a view to reducing the aggregate of the tax chargeable in Nigeria on its profits or income the Board may direct that any such undistributed profits of such period be treated as distributed and taxed at the rate of 10 percent[77]. The Board must however, ensure that the distribution of such profit is not detrimental to the company's business. Under **Section 21 of CITA**, it must be proved that, the reason why the company failed to distribute its profits is to reduce the aggregate of the tax chargeable and if proven, the tax rate for such undistributed or retained profits is 10 percent unlike **Section 19 of CITA** which provides 30 percent.

In addition, **Section 30 of CITA**, empowers the Board to tax a company based on turn-over, if in the opinion of the Board, a company declared profits less than expected. These two provisions will perfectly take care of any falsification of profits by companies. Therefore, section 19 of CITA is a mere surplusage and a hardship which impedes investments.

The other provision relating to dividends which encourage investment[78] is **Section 20(a) of CITA**. In summary, it provides that, if a foreign company which has no other trade or business in Nigeria is paid dividend, no tax shall be charged on it apart from the tax withheld under **Section 80 of the Act**. Section 80 provides that, deduction of tax from dividends shall be at the rate of 10 percent. This is a fertile ground for foreign investors, in that, if foreign companies invest in securities in Nigeria, their profits will be taxed at the rate of 10 percent instead of 30 percent. This should indeed attract any informed foreign investor to invest in Nigeria[79].

With respect to profits from interest on loan granted, **Section 11 of CITA** generally exempts such profits from tax subject to certain conditions[80]. This is another fertile ground for investment by both Nigerian and foreign companies.

[75] Appeal NO. TAT/L2/CIT/076/2014.

[76] 1980 FRCR 66

[77] Section 21 of CITA requires the prove of intention of tax invasion.

[78] Especially foreign investments.

[79] The only conceivable challenge to this provision is the limited number of double taxation treaties that Nigeria has. If a company from a country which has no double taxation treaty with Nigeria should invest in such securities, the profit of such company will be taxed twice. First in Nigeria, and secondly in its own country.

[80] These conditions which mostly relate to the duration of the loan and the business engaged by the borrowing company are set out in Section 11 read together with Table 1 in the Third Schedule to CITA.

Then finally, another issue arising from the provision of **Section 9 of CITA**, is the conflicting policy between it and **Section 54 of CAMA**. The conflicting policy of these two sections is that, while **Section 54 of CAMA** is trying to regulate the activities of foreign companies in Nigeria by insisting that they must be incorporated so as to prevent any activity which may be harmful to the society at large, **Section 9 of CITA** is revenue oriented and seeks to generate more revenue by imposing taxes on foreign companies irrespective of their activities or whether they are incorporated.[81]

In summary, subject to the exceptions provided in Sections 56 to 59 of CAMA,[82] Section 54 provides that "…any foreign company … having the intention of carrying on business in Nigeria shall take all steps necessary to obtain incorporation as a separate entity in Nigeria for that purpose, but until so incorporated, the foreign company shall not carry on business in Nigeria or exercise any of the powers of a registered company and shall not have a place of business in Nigeria". Failure to comply with this statutory requirement attracts both private and penal consequences[83]. First, any act of a defaulting foreign company in Nigeria is void[84]. Secondly, such a company and its officers or agents who knowingly and willfully authorized or permitted the default shall be guilty of an offence[85].

Contrary to this unambiguous mandatory requirement of CAMA**, Section 9 of CITA** permits foreign companies to have fix base and carry on business in Nigeria without being incorporated. Voluntary compliance of foreign companies to the provisions of CAMA is made more difficult by the provisions of Section 105 of CITA because, once a foreign company is incorporated under CAMA, it becomes a Nigerian company and therefore taxable on its worldwide income, and also disqualified from enjoying other privileges that foreign companies are entitled to under CITA.[86]

The problem is that under **Section 105 of CITA**, foreign company is distinguished from Nigerian company on the basis of incorporation. While Nigerian companies are companies incorporated under CAMA, Foreign Companies are companies incorporated under any law in force in any other country outside Nigeria[87].

This distinction is critical in that, while foreign companies are taxable only on their profits attributable to its fixed base in Nigeria,[88] Nigerian companies are taxable on their worldwide income[89].

In practice foreign companies try to circumvent these consequences of incorporation by using the facilities of Nigerian Companies to execute their contracts in Nigeria. An example of such arrangement is what occurred between Shell International Petroleum Maatschappij, BV and Shell Production and Development Company of Nigeria Limited which gave birth to the case of *Shell International Petroleum Maatschappij BV v. FBIR*[90]

From the above analysis, foreign companies will not willingly incorporate under CAMA in order not to be treated equally with Nigerian companies for tax purposes.

Some writers have justified taxation of foreign companies that are doing business in Nigeria without being incorporated, even when such business is deemed to be illegal for not complying with **Section 54 of CAMA**[91].

The basis for such justification is that illegality of business does not stop it from being taxed. This argument is in line with the dictum of **Lord Morrison** in the case of *Ministry of Finance v. Smith*[92], where the judge stated that "if a company carries on trade illegally and makes a profit, such profit is subject to tax". The conclusion reached by the holders of the above view is that, even though foreign companies not incorporated under CAMA, are doing illegal business, they are still subject to tax in Nigeria, therefore, incorporation of Foreign Companies as required by CAMA is immaterial for tax purposes. With due respect, we disagree with such view, reason being that, the drafters of CITA did not in any way intend foreign companies to be taxed in Nigeria as companies engaged in illegal businesses. A better option to resolving the conflict between CITA and CAMA is to reconcile both statutes through interpretation, until there is an opportunity for amendment. Such reconciliation as will be attempted in this work, must be done in such a way that will not discourage foreign investments.

Furthermore, writers like NdukaIkeyi have argued that, **Section 54 of CAMA** should be deleted, for introducing confusion in the tax treatment of foreign companies in Nigeria[93]. The reason for the above suggestion is that, the origin of **Section 54 of CAMA** in Nigeria is the Companies Act of 1968. It would seem to have been driven by the predominant ideology of the era which is economic nationalism, part of this thinking was to subject foreign companies operating in Nigeria to tax in Nigeria on the same basis as Nigerian companies.[94]

[81] D.C. John, "Corporate Taxation in Nigeria: A review*", International Journal of Advanced legal Studies, vol. 11*. (2001). No.1 p 239.

[82] The exceptions provided under these sections relates to exemption of foreign companies from being incorporated in Nigeria for the purpose of executing certain contracts.

[83] N. Ikeyi, "Shell International Petroleum Matschappij BV v. FBIR: what other implication for Technical/management Service Transactions in Nigeria?"*I. E. L. T.R. ISSUE 7, Sweet & Maxwell Limited and Contributors, 2004 page 157*

[84] S. 54(2) of CAMA.

[85] Section 55 of CAMA.

[86] Some of the privileges enjoyed by Foreign Companies under CITA includes (a) privilege of brining profits made outside Nigeria into Nigeria without being taxed. Section 23(1)(j) of CITA, (b) privilege to invest in securities in Nigeria to be taxed at the rate of 10 percent section 20(a) of CITA etc. Nigerian companies cannot enjoy these privileges .

[87] Section 105 of CITA.

[88] Section 13(2) of CITA.

[89] *Ibid.*

[90] In this case, Shell International was using the facilities of Shell Nigeria to provide technical services to the Nigerian company. It was held that Shell international has a fixed base in Nigeria for the purpose of taxation.

[91] C.Odoemenam,"Taxation-of-Foreign-companies-in-Nigeria",available-at http://www.legalnaija.com/2015/12/taxation-of-foreign-companies-in-html?m-l. Last accessed at 27 May 2017 by 1.05am.

[92] [1927] AC 193 at 193

[93] N. Ikeyi, "Shell International Petroleum Maatschappij BV v. FBIR: what other implication for Technical/management Service Transactions in Nigeria*?"I. E. L. T.R. ISSUE 7, Sweet & Maxwell Limited and Contributors, 2004 pag 157.*

[94] *Ibid*..N. Ikeyi

Holders of the view that **Section 54 of CAMA** should be deleted added that, the ideology of economic nationalism is largely spent in today's world; effective taxation of foreign companies operating in Nigeria does not necessarily require the indigenization of such companies. Local incorporation is not a requirement of doing business in many other countries[95].

We do not also agree that **Section 54 of CAMA** should be deleted, in that the ideology of **Section 54** is not to nationalize companies but to regulate the activities of foreign companies, which if not checkmated may be disastrous to the society at large.[96]**Section 54 of CAMA** is not revenue oriented and that is why it has survived all recent measures taken by government to encourage foreign investments. The only way to monitor the activities of foreign companies in a large country like Nigeria is to make incorporation of foreign companies mandatory. In so doing, the object of the foreign company will be known, their promoters, directors and shareholders will be known and their offices will equally be known. If these facts are available to the Corporate Affairs Commission (CAC), it (CAC) can easily investigate the activities of foreign companies and may wind-up such company if its activities become dangerous to the well-being of the public.

In addition, mandatory incorporation of foreign companies will also enhance the enforcement of laws imposing taxes on companies. The drafters of CITA had this in mind when they provided under **Section 10 of CITA**, that the identification of a company for the purpose of serving notices shall be the incorporation number of the company[97]**Section 10 of CITA** went further to mandate that, incorporation number of a company must be displayed by the company on all business transactions with other companies and individuals and on every document, statement, returns, audited account and correspondence with revenue authorities. This goes to prove that effective taxation of companies and public safety depends to a large extent, on incorporation[98].

In an attempt to resolve this conflict, we propounded a principle known as "**the first life principle**". This principle posits that, "a company should be regarded as indigenous of the country where it first obtained its corporate life, and must continue to be in existence in that country"[99]. The application of this principle is that, if a company was first incorporated in Nigeria, it should be treated as a Nigerian company. But if the company was first incorporate under the law of another country, such company should be treated as a foreign company, for tax purpose, irrespective of the fact that such company is to be subsequently incorporated under CAMA, in compliance with **Section 54 of CAMA**. The requirement that the company must continue to be in existence in the country where it was first incorporated, implies that, if the company is wound-up in the country where it was first incorporated, it automatically becomes indigenous of or a local company in the country where it was next incorporated and will be treated as such for tax purposes. Let say the company was first incorporated in the UK, and it decides to do business in Nigeria. If such company complies with **Section 54 of CAMA**, and is incorporated in Nigeria, it should be treated as a foreign company because it was first incorporated under the law of another country. But if the company is wound-up in the UK, it automatically becomes a Nigerian company and should be treated as such for tax purposes. The problem with CITA is how to distinguish between a Nigerian company and a foreign company even after the latter is incorporated under CAMA, considering the fact that CITA defined Nigerian company as a company incorporated under CAMA[100]. The first life principle perfectly settles this problem.

The justification of the **"first life principle**" is based on the community reading of **Section 105 of CITA** and **Section 567 of CAMA**.

Section 105 of CITA provides that "foreign company means any company or corporation established by or under any law in force in any territory or country outside Nigeria".

While section **567 of CAMA** provides that, "foreign company" means a company incorporated elsewhere than in Nigeria."

From the above provisions; it is clear that both statutes are in agreement that a foreign company was first incorporated under the law of another country. CITA went further to define Nigerian company as any company incorporated under CAMA[101]. CAMA did not define Nigerian company, but rather required that every foreign company must be incorporated under it (CAMA) before it could legally carry on business in Nigeria.[102]

The implication is that, if a foreign company complies with the **Section 54 of CAMA**, it becomes a Nigerian company by the definition of **Section 105 of CITA**.

In other to make foreign companies comply with the provisions of CAMA and yet retain a feature which will distinguish it (Foreign Company) from Nigeria Company, the combine reading of section 105 of CITA and section 567 of CAMA becomes imperative. And as have been pointed earlier, the combine reading of both sections reveals that a foreign company was first incorporated under the law of other country. This is the origin of "first life principle" which suggests that, since a foreign company was first incorporated in another country, it should not become a Nigerian company, merely because it was later incorporated in Nigeria, in compliance with **Section 54 of CAMA**.

The effect of the application of "first life principle" is that even when a foreign company is incorporated in Nigeria, it will not be taxed on its world-wide profits, but only on its

[95] *Ibid*., N. Ikeyi further referred readers to the work of Ogowewo, "The Shift from the Classical Theory of Foreign Investment: Opening up the Nigerian Market" (1995) 44) C.L.R 915 at 924, 925. For a fairy detailed argument against s. 54.

[96] The importance of regulating the activities of foreign companies in Nigeria cannot be over emphasized. Selling of unwholesome goods, and importation of unauthorized drugs are common features of the activities of foreign companies in Nigeria.

[97] Section 10 of CITA 2007 must be read together with Section 8 of CITA 1990 so as to get the intendment of the legislatures.

[98] The argument in this work is not that, there is no confusion or conflict between Section 9 of CITA and Section 54 of CAMA on the issue of incorporation. Our argument is that, the suggestion of authors that, foreign companies should be taxed as illegal business or the deletion of Section 54 of CAMA may not be the best way to resolve this conflict.

[99] To obtain corporate life in this context means; where a company was first incorporated.

[100] S. 105 of CITA.

[101] S. 105 of CITA.

[102] S. 54 of CAMA.

(foreign companies) profit attributable to Nigerian source. This will erase the fear of foreign companies complying with the provision of **Section 54 of CAMA** and will indeed encourage foreign investments.[103] It must be added that, for a prefect application of this principle, Nigeria must in line with the practice in many other countries[104], tax companies on the basis of residents. A company is deemed to be resident in a country where it has its principal place of management and control .If that becomes the case, a Nigerian resident company should be taxed on its worldwide profits, while a Nigerian non-resident company will be taxed only on its profits attributable to Nigerian source.

Another provision of CITA, which encourage investments, is the provision of **Section 23 of CITA**, which relates to profits exempted from tax. Subject to some conditions, this section listed a number of businesses that one can invest in, which attracts zero percent of tax. Some of the businesses listed under the section include:

a. Investments in a statutory company or registered friendly society.[105]

b. Investments made in any company being a body corporate established by or under any local government law or Edict in force in any State in Nigeria.

c. Investments in any company established by the law of a State for the purpose of fostering the economic development of that State.

d. Investments in small companies in the manufacturing sector in the first five years of its operation.

e. Investment in wholly export-oriented businesses.

f. Investments in any company whose supplies are exclusively inputs to the manufacturing of products for export.

g. Then lastly, investment in a unit trust[106].

Notwithstanding the exemption from taxes of profits arising from the businesses listed above, **Section 23 of CITA** introduced confusion and some conditions attached to the business of exporting goods by a Nigerian company are stringent, unnecessary and therefore impedes investments.

With respect to the confusion, **Section 23(1)(f) of CITA** provides that "there shall be exempt from the tax dividend distributed by unit trust. In addition **Section 17(5) of CITA**, provides that, profits of a unit trust paid to unit-holders shall be deemed to be dividends and the provisions of **Section 21 of the Personal Income Tax Act** shall apply to a dividend paid or payable to any member of an authorized unit trust[107].

Section 21 of PITA which **Section 17(5) of CITA** referred to, provides for deduction not allowed[108]. The confusion here is that, while **Section 23(1)(f) of CITA** provides that dividend from unit trust is exempted from tax, **Section 21 of PITA**, provides for deduction not allowed and taxes paid under any other law is not a deductible allowance. Combine reading of these three sections[109] makes it unclear as to whether or not dividends from a unit trust are tax free. The effect of this confusion on investment is that, the fate of an investor who wishes to invest in a unit trust in Nigeria is uncertain; therefore, such investor will be skeptical to invest.

As regards the stringent conditions for the exemption of profits of Nigerian company engaged in export business from tax, **Section 23(1)(q) of CITA** provides that such profit must be repatriated to Nigeria and are used exclusively for the purchase of raw materials, plant, equipment and spare parts. In our view this conditions have defeated the purpose of section 23 which intend to exempt certain profits from tax. This is because, if the profits made must be exclusively put back into the business, then such profits is better classified as capital and not profits[110]. In the case of *Olokon Pisces Ltd. V. FIRS*[111] it was held that failure to fulfill all conditions stipulated under **Section 23(1)(q) of CITA** exposes the profits of a Nigerian export company to tax liabilities. In other words, no exemption of such profits from tax.

Another problematic provision of CITA is that which relates to the basis period for computing the assessable profits of a company in its first three years of operation, known as commencement rule. This rule leads to double taxation. The general rule is that a company is taxed on preceding year basis. That is to say, the profits of the year that immediately precedes the year of assessment.[112] For instance, if the year of assessment is 2017, the profits of the company to be taxed are profits made in 2016 and not profits made in 2017.

The exception to the preceding year basis rule is the commencement rule, provided for in Section 29(3) of CITA. Under this rule, a company is taxed on its first year of business based on the profits it made from the first day it commenced business to the last day of that year. For the second year of the company's business, it is taxed on the profit of one year, from the date it commenced business. For the third year of the company's business, it is taxed based on preceding year basis rule.

Illustration of this rule, if company XYZ commences business on June 2nd 2014 the profit to be taxed in the first year of business is the profit made, from June 2nd 2014 to 31st December 2014. The profit to be taxed on the second year of business are profit made from 2nd June, 2014 to May 1st 2015, while the profit to be taxed on the third year of business i.e. 2016 is the profit made from first January 2015 to 31st December, 2015.

The implication of this rule is that, the profits of a company in its first three years of business are subjected to double taxation. This rule is technical and also discourages investment in that, at the early stage when companies are struggling to survive financially, some of their profits are taxed three times.

The solution to this problem is that the commencement rule should be abolished. Tax should be based on preceding year basis rule, which is simpler and prevents double taxation.

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[103] This is also a perfect marriage between the policies of CITA and CAMA, which are to generate revenue and regulate the activities of foreign companies respectively.

[104] Countries like the UK, US and China impose taxes on companies on the basis of resident principle.

[105](S. 23(1)(a) of CITA

[106] It is our view that, if investors are aware of these and many other tax free business sectors, they will invest. This is a clear example of how ignorance of the rich provisions of Nigerian tax statutes can impede investments. The Solution to this problem is public enlightenment.

[107] See Section 17(6) of CITA for the definitions of authorized unit trust and unit trust.

[108]i.e. expenses of an individual which are not allowed to be deducted for the purpose of computing the taxable income.

[109] Sections 23(1)(f) and 17 of CITA, and section 21 of PITA.

[110] A person to whom profits accrues to, should be allowed to use such profit according to his/her discretion.

[111] Appeal No. TAT/L22/CIT/076/2014.

[112] Section 29(1) of CITA.

Another issue under the CITA is the payment of minimum Tax. This is provided for in Section 33 of CITA under this provision, companies are required to pay a "minimum tax" even when they can prove that they made losses during the period under review[113]. The implication of this requirement is that companies are being required to pay taxes out of their capital since they did not make any profit from which taxes are normally expected to be paid from[114]. This discourages investments and increases the risk of failure for companies in periods of low profitability or losses[115].

c. Rate of Company Income Tax

This is another very important provision of CITA, which can make or mar investment opportunities in Nigeria. Section 40(1) of CITA provides that "there shall be levied and paid for each year of assessment in respect of the total profits of every company, tax at the rate of thirty Kobo for every naira". From the above provision, generally speaking, the company income tax rate in Nigeria is 30 percent. However, profits of companies registered in Nigeria are subject to some other taxes. An additional 2 percent education tax is imposed on all companies registered in Nigeria by virtue of Section 1(2) of Education Tax Act.[116]

From the foregoing, it can be concluded that, the least tax rate for a company incorporated in Nigeria is 32 percent. Nigerian companies paying dividends to shareholders are also obliged to first deduct 10 percent tax on dividends payable to shareholders[117]. To such companies, their profits must have been taxed at the rate of 43 percent, before the profits gets to the hands of investors. This tax rate is too high for companies, especially when compared with tax rates in other countries[118]. The trend in most countries is to drastically reduce the corporate income tax rate so as to attract investors. Some countries like Bahamas, Cayman Islands and Bermuda have gone to the extent of making companies income tax rate zero percent. This will definitely attract investor and indirectly increase personal income tax generated.

From the above analysis, it is obvious that Nigerian corporate tax rate is too high and therefore, is one of the key factors impeding investments in Nigeria. This can explain why most products used in Nigeria are imported, instead of foreign investors coming to Nigeria to establish their companies.

2.3. Petroleum Profits Tax Act

This is an act that imposes tax on profits of upstream petroleum operators. Upstream petroleum operations refer to exploration of petroleum products, mining and drilling. In the other hand, downstream petroleum operations refer to sale and transportation, and distribution of processed oil products by local corporations. Corporations engaged in upstream exploration are subject to Petroleum Profits Tax (PPT), while downstream corporations are subject to Companies Income Tax (CIT)[119].

By virtue of Section 9 of PPTA, the chargeable income of a company engaged in petroleum activities is the sum of the following:

i. the proceeds of all chargeable oil sold by the company in that period;

ii. The value of all chargeable oil disposed by the company in that period,

iii. All income of the company for that period incidental to and arising from any one or more of its petroleum operations.

The corporate tax rate for oil companies depends on the contractual arrangement between the oil company and the Nigerian Government or its agency[120].

By virtue of Section 21 and 22 of PPTA the rates are as follows:

(a).85 percent for Petroleum operations carried out under a joint venture arrangement with the Nigerian National Petroleum Corporation (NNPC) or any non-production sharing contract over 5 years.

(b). 65- 75% for non-production sharing contract operation in its first five years during which the company has not fully amortized all pre-production capitalized expenditure and finally,

(c).50 percent for petroleum operations under production sharing contracts with NNPC. One of the greatest challenges facing investments in the petroleum sector is that, there are other numerous laws and regulations affecting petroleum profits taxation in Nigeria. As one commentator put it "the mass of legislations and regulations in this fields is so complex and voluminous that even the most conscientious operator, or the most knowledgeable expert will be very hard-pressed to understand and comply with them… petroleum profits tax legislation is perhaps one clear source of confusion, it does appear that the more you look, the less you see[121]. Some of these other relevant laws imposing taxes and levies on oil companies includes the Petroleum Drilling and Productions of 1996. This is a subsidiary legislation made pursuant to Section 9 of Petroleum Act Statutory Instrument No. 3 of 1996, Nigerian LNG Fiscal Incentives Guarantees and Assurance Act[122], the Nigerian Export Free Zone Act,[123] the Education Tax Act[124], the Oil Terminal Dues Act[125], Bayelsa State's Pollution Compensation Law of 1998, Deep Off shores and Inland Basin Production Sharing Contracts Act[126] etc.

There is an ongoing effort to combine sixteen different Nigerian petroleum laws into a single document called the Petroleum Industry Act[127].Despite the challenges posed on

[113] This provision does not apply to, companies into agricultural business, companies within their first four years of business and companies with at least 25 percent imported equity capital.

[114] O. Oluyemi, "Business competitiveness in Nigeria: Change or insanity? Linked in, March, 13, 2016.Available at http://www.linkedin.com/pulse/business-competitiveness,nigeria-change-insanity-oluwole-oluyemi.

[115] *biId*.

[116] Cap E4 Laws of the Federation of Nigeria 2004.

[117] S. 80 of CITA.

[118] China is 25 percent, UK rate is 19 percent, South Africa 28 percent, Egypt 10 percent, Ghana 25 percent, Bahamas is 0 percent.

[119] Section 39 of CITA.

[120] Section 44(3) of 1999 CFRN and s. 1(1) of Petroleum Act.

[121] B. A. Adeyemi, "Petroleum Profits Tax Act in Nigeria: The Practice", 205. Available at http://papers.ssrn. com>delivery.cfm.Last accessed on 6 June, 2017.

[122] No. 39 of 1990

[123] No. 8 1996

[124] No. 7 of 1993.

[125] Cap 339, LFN 1990.

[126] Cap 26, LFN 1990.

[127] The Petroleum Industry Bill seeks to set out a new legal framework for the organization and operation of the entire oil industry in Nigeria as well as update the existing laws to reflect the changing dynamics of the oil and gas industry

the profits of oil Companies by these numerous laws, PPTA to an extent reduced the pecuniary burden.

Section 10(1)(l) of PPTA[128], provides that, "all sums the liability of which was incurred by the company during that period to the federal government, or local government council in Nigeria by way of duty, customs and exercise duties, stamp duties education tax (other than tax imposed by this Act) or any other rate,fee or other like charges are deductible expenses.

However, the above deduction is a partial remedy in that, in deducting the expenses, Section 20(3)of PPTA provides that, in deducting the expenses, it must be ensured that the amount of any tax chargeable on the company for that period shall not be less than 15 per cent of the tax which would be chargeable on the company for that period if no deduction were to be made. The import of this section is that in some cases all the expenses cannot be deducted, if after the deductions the chargeable profit will be less than 15 percent of the total profits before the deductions was made.

The inability to deduct all expenses before arriving at the chargeable profits is very problematic. This is because, a company can only be said to have made profits , after all expenses have been deducted, In the case of *Mersey Docks and Harbour Board v. Lucas*,[129] the court defined profits as the clear surplus after paying the current expenses and all other outgoings.

2.4 The Personal Income Tax Act.

Another problem arising from the provisions of PITA which would discourage investment is that, profits exempted from tax under CITA, are not exempted from tax under PITA if such profits are receivable by individuals. In other words, PITA imposes tax on profits which CITA had made tax free. For instance, Section 23 of CITA provides that, profits in the form of dividend distributed by unit trust are tax exempt. But the combine reading of Section 19 and paragraph 25 of the third schedule to PITA, reveals that such dividends are not exempted from tax. In other words, they will be taxed in the hands of unit holders under PITA. From the above discussion, it is obvious that, there is a need to harmonize the provisions of CITA and PITA, so as to encourage investments.

2.5. The Education Tax Act[130]

This is an Act, solely made to impose an education tax on companies registered in Nigeria and to establish an Education Fund, and a Board of Trustees to manage and administer the fund.[131]The Education Tax Act (ETA) which commenced on 1st January 1993, imposed two percent tax on the assessable profits of every company registered in Nigeria.

Section 1(1) of the Act provides that "as from the commencement of this Act, there shall be charged and payable an annual education tax which shall be assessed, collected and administered in accordance with the provisions of this Act. Subsection 2 of section 1, provides that the tax shall be at the rate of two percent

Failure of any company to comply with the provision of this Act, attracts a severe punishment of N10,000 or 3 years of imprisonment in the first year of default and N20,000 or five years imprisonment in subsequent years of default[132]

The implication of this Act to investments is that it added two percent tax on the corporate profits of companies making the general corporate tax rate 32 percent[133].

Relatively speaking, 32 percent corporate tax rate is very high, and will go a long way in driving investments away from Nigeria to other countries with lower corporate tax rate.

2.6. The Industrial Development (Income Tax Relief) Act[134]

This Act commenced on 1st April 1970, with the major objectives of granting tax relief for certain industries that may be issued with pioneer certificate by the Minister for commerce and industry (Minister). The operation of this Act is as follows: the president may for some reasons direct the minister to publish in the Gazette a list of industries and products to be known a pioneer industries and pioneer products[135]. By virtue of Section 1 of the Act, where the publication of the list is made, interesting persons or corporation may make application to the minister to obtain a pioneer certificate.

Section 1(3) of the IDA, provides that, an application for the pioneer certificates may be made by a company incorporated in Nigeria. And section 25 of the IDA, defined company to mean, "a company (other than a private company) limited by shares and incorporated and registered in Nigeria and resident in Nigeria.

The implication of the combine reading of Section 1(3) and 25 of the IDA is that only public companies limited by shares and incorporated and registered in Nigeria and resident in Nigeria can apply for pioneer certificate[136]. The effect of obtaining pioneer certificate is that, the profit of such company will be exempted from companies' income tax and the dividend distributed by that company will not be taxed in the hands of the shareholders for a period not less than three years but not exceeding five years[137].

Section 10 of the IDA, provides that the tax relief period of a pioneer company shall be three years which may be extended to more two years.

By virtue of the schedule to the industrial development (list of pioneer industries) notice of 1982, thirty-seven industries were listed.

Another very important aspect of this Act is that, it expressly stated that all profits or dividends exempted from tax under it (IDA) are automatically exempted from tax under CITA and PITA.

Section 16(1) of the IDA, is to the effect that, any profit of a pioneer company which is exempted from tax shall be

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worldwide. The bill has been under review since 2002 when it was first drafted.

[128] Which provides for the expenses to be deducted before the chargeable profits is arrived.

[129] 1883 8 App cases 891

[130] Cap E4 – laws of the federation of Nigeria, 2010.

[131] See the long title to the Act.

[132]Section 10 and 11 of the Education Act. Those can be imprisoned under these sections are directors, managers, secretary etc of the company.

[133] Read s. 40(1) of CITA together with section 1(2) of ETA.

[134] Cap 17 laws of the Federation of Nigeria, 2010.

[135] The reasons why the president may give such order are stated in section 1(1) (a) and (b) of the Act. Where it is expedient in the public interest to encourage the development or establishment of any industry in Nigeria.

[136] Another useful lesson under the definition of company under section 2 of IDA is that incorporation of company is difference from resident. Thus, the two condition of incorporation in Nigeria and resident n Nigeria must be met.

[137] The above paragraph is a summary of the provisions of section 16, 17 and 10 of the IDA.

exempted from tax under CITA. While section 1(3) of IDA provides that dividends of a pioneer company paid to shareholders shall not be taxed under PITA. This is a commendable provisions, unlike the provisions of section 23(f) of CITA, which exempted dividend distributed by a unit trust from tax without expressly providing for the exemption of such dividend from tax under PITA[138].

From the foregoing, it is seen that the provisions of Industrial Development (Income Tax Relief) Act, can attract investments, if only people are informed of its rich provisions.

2.7. Capital Gains Tax Act [139]

It is pertinent to state that there are two types of receipts to a company, income receipts and capital receipts. Income receipts are taxed under CITA while capital receipts are taxed under Capital Gain Tax Act (CGTA). CGTA is an Act which provides for the taxation of capital gains accruing on disposal of assets[140]. Generally, CGTA imposed a 10 percent tax on the capital gain accruing on disposal of assets[141]

The provision of CGTA, which discourage investments, is the provision of Section 4(c) which relates to the disposal of assets situated outside Nigeria. The section provides that if a foreign company as defined under section 105 of CITA, dispose of an assets, capital gains shall be charged on the amounts (if any) received or brought into Nigeria in respect of any chargeable gains. The implication of this provision is that if foreign companies bring in such capital gain into Nigeria to re-invest, it (capital gains) will be taxed at the rate of 10 percent. This will definitely discourage foreign investments. In addition this provision contradicts the philosophy behind CITA, which encourage foreign companies to bring in profits into Nigeria by exempting such profit brought into Nigeria from tax. Thus, section 23(1)(j) of CITA provides that profits of a foreign company brought into Nigeria would not be chargeable to tax by reason solely of their being brought into or received in Nigeria. It is obvious from the foregoing analysis that, while section 23(1)(j) of CITA promotes re-investment by foreign companies in Nigeria, section 4(c) of CGTA discourages foreign investment in Nigeria by taxing capital gains on the ground that it was merely brought into Nigeria.

3.1. The Effects of Other Tax Issues on Investments

3.2. The Effect of Multiple Taxations on Investments

Multiple taxations seem not to be an established term in the field of taxation internationally.[142] In other words, it is a term peculiar to Nigerian tax system.

According to AbiolaSani,[143] multiplicity of taxes can be said to be manifest in at least four ways. First, it refers to the various unlawful compulsory payments being collected by the Local and State governments without appropriate legal backing through intimidation and harassment of the payers. Collection of it is characterized by the use of stickers, receipts, mounting of road blocks, use of revenue agents, including Motor Park tout.[144]

Second, it refers to situations where a tax payer is faced with demands from two or more different levels of governments either for the same or similar taxes.

Third, it refers to situations where the same level of government imposes two or more taxes on the same tax base. A good example is payment of company income tax, education tax, and technology levy by the same Company[145].

Fourth, multiple taxation refers to cases whereby various government agencies “impose taxes’ in the form of fees or charges.

From the above instances, one can rightly describe multiple taxations to mean an income that is subjected to tax more than once, often by two or more different authorities in a way that may be unfair or illegal[146].

According to the 2014 World Bank report on doing business in Nigeria, up to 47 tax payments are made by companies every year, with a whopping 956 hours spent on complying, preparing, filing and paying these taxes[147]. Examples of multiple taxation which companies doing business in Nigeria are exposed to includes, companies income tax, education tax, information technology tax, industrial training tax fund, business premises tax, Nigeria social insurance trust fund levy, stamp duty, National Pension Commission, vehicle emission fees income tax (Authorized Communication) Act[148].

Many have condemned the rise of multiples taxation in Nigeria, considering its negative impacts on investments and also the elaborate provisions of Taxes and Levis (Approved list for collection) Act, which stipulates taxes which each tier of government is empowered by collect. Some of the effects of multiple taxation on investments include;

3.2.1 Increase in Cost of Doing Business

According toDangote.[149] “the manufacturing industries are confronted with multiple statutory levies and taxes which are clearly duplicate of what other tiers of government charge. Apart from the additional cost to the industries, the time spent discussing such levies constitutes a distraction to the operators of manufacturing industries in Nigeria. It also makes planning difficult since one is not sure of how many levies and taxes will be paid”.

[138] It is in doubt whether such dividend will be exempted from personal income tax considering the provisions of Section 3 (1) (d) of PITA which imposed tax on dividend, interest and discount.

[139] Cap C1 laws of the federation of Nigeria, 2010.

[140] See – the long title to the CGTA.

[141] See Section 2(1) of CGTA).

[142] This can explain why the term was not defined in the Black’s Law Dictionary.

[143] A Sani “Multiplicity of Taxes in Nigeria: Issues, Problems and Solutions”, *International Journal of Business and Social Sciences, Vol. 3 No. 17, September 2012 page 229.*

[144]See. Main report of the study Group on the Nigerian Tax system in Nigeria in: Nigeria Tax Reform in 2003 and Beyond, July 2003, pp. 286-290.

[145]*ibid*.

[146] O. Michael, “Multiple Taxation as a Bane on Business Development in Nigeria”, *Academic Journal of Interdisciplinary Studies Vol. 3 No. 1*, March, 2014. page 123).

[147]Available at www.worldwide.org>country>nigeria.Last accessed on June 3, 2017 at 2am.

[148] O. Israel, T. L. Edward and N.N. Peter, “Nigerian Tax System and Administration: Implication of Multiple Taxation on the Economy”, *European Journal of Business and Management, vol. 6, No*. 37, 2014.page 240.

[149] A. Dangote “Developing Manufacturing industries in Nigeria”, paper presented at the CBN first Annual Monetary Policy Conference on Growing the Nigerian Economy, 506 November, 2001. Available at, http://www.firs.goving/news/residents-decry-activities-of-touts-tax-agents-aspx.

3.2.2 It Makes the Tax System Uncertain

A taxpayer is entitled to know and determine in advance how much he is obliged to pay and in what circumstances. This underscores why certainty is the first principle of taxation.[150] Since maximization of profit is the target of every investment, investors must have carried out feasibility studies about the profitability of the business. To introduce taxes not backed up by law is to expose investors to risk. Multiple taxations has the propensity to reduce the profit of any company drastically, especially where such taxes are not deductible expenses. Section 27 (C) of CITA, provides that taxes on income or profits levied in Nigeria or elsewhere, are not deductible expenses.

3.2.3 Multiple Taxation Leads to Slow Growth or Death of Companies

Companies income tax properly so called is a tax imposed upon the profit of a company[151].Therefore, a company ought not to pay income tax until it is carefully determined that the company in question had made profits[152].

However, most levies and charges which forms majority of the multiple taxation are imposed on companies whether or not the company made profits. Consistent imposition of such charges will amount to imposition of tax on the company's capital, which will definitely lead to poor growth or death of the company. Therefore, multiple taxations should be fought against as they discourage investment.

3.3. The Effect of Tax Incentives

According to AbiolaSani, "internationally, tax incentives are used to give a country a competitive edge over other countries in an increasingly competitive global economy[153].

Tax incentives can be described as those special privileges, exemptions, or deductions that provide special credits, preferential tax rates or deferral of tax liability. It can take the form of tax holidays for a limited duration, current deductibility for certain types of expenditures, or reduced import tariffs or customs duties[154]. Tax incentives are usually a deliberate act of government established to reduce tax so as to encourage businesses for more investments, productions, employment, less importation, etc[155].

In Nigeria, tax incentives are provided for through two medium, which include, firstly, statutes which are basically enacted to grant tax reliefs and secondly, statutes which impose tax with a mixture of incentives. Examples of Statutes devoted to tax incentives are, Industrial

Development (Income Tax Relief) Act of 1971[156], the Nigerian Liquefied Natural Gas (Fiscal Incentives, Guarantees and Assurances) Act[157] etc. In the other hands, examples of statutes which contain a mixture of charging provisions and incentives are CITA, PPTA, etc.

Some of the various tax incentives which can stimulate both foreign and domestic investments in Nigeria are discussed below:

3.3.1.Pioneer Status

The Industrial Development (Income Tax Relief) Act makes provisions for the grant of tax relief to pioneer companies. The tax relief granted to pioneer companies may last for a period between three to five years[158]. Once a company meets the requirements under the Act, it is granted a pioneer certificate which enables it to be exempted from income tax for the period of years stated in the certificate[159]. The pioneer status is granted mainly to companies operating within certain sectors of the economy which in the opinion of the federal government of Nigeria is not being carried on a scale suitable to the country's economic requirements[160].

3.3.2. The Nigerian Liquefied Natural Gas (Fiscal Incentives, Guarantees and Assurances) Act (NLNG)

The NLNG Act declared the business undertaken by the NLNG companies and the company as pioneer products and a pioneer industry respectively. Section 2 of the NLNG Act provides for 10 year tax relief period and section 3 provides that the company shall be subject to Companies' Income Tax Act and not the PPTA after the 10 year pioneer period. The implication of this provision is that, instead of taxing the company at the rate of 85 percent under PPTA, it will be taxed at the rate of 30 percent under CITA. This is a great incentive for investment in NLNG companies. According to AbiolaSani, one of the most important tax incentives for corporate investors is a low income tax rate[161]. In addition, the Nigerian shipping policy Act, 1978 are declared inapplicable to the company and its contractor, subcontractors, customers and any shipping concern involved with the company's trade in Liquefied Natural Gas.

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[150] A. Sani. "Multiplicity of Taxes in Nigeria: Issues, Problems and Solutions", *International Journal of Business and social sciences, Vol. 3 No. 17*, September 2012 page 229

[151]This is line with section 9(1) of CITA which specifically used the words that, tax are imposed upon the profits of any company carrying on business in Nigeria.

[152] There are exceptions to the rule that taxes are imposed on companies profit – this can be seen in Sections 40 and 33 of CITA, which relates to payment of tax by a company which has not commenced business after six months of incorporation and payment of minimum tax when no profit is made.

[153] A Sani"Recent Developments in Company Income Taxation in Nigeria*",International Journal of Business and social sciences, Vol. 3 No. 17*, September 2011 page 5.Available at http://online2.16fd.org/collections/bit/html.

[154]AEasson and E.M. Zolt "Tax Incentives an overview" World Bank Institute, 2013, page 1. Available at http://www.taxcompact.net>documents.last accessed on June 2nd, 2017, at 1:15am.

[155] F.E. Nlerum, "Reflections on the Attitude of the Courts to Tax Incentive Mechanism in Nigeria" *NIALS Journal-of-Business-Law*.May-2011.-Available-at-http://taxes-about-com/od/taxplanning.a.taxplanning.html.Accessed June 1, 2017 at 5pm.

[156] Cap 17 Laws of the Federation of Nigeria, 2010.

[157] Cap N 87 LFN, 2004.

[158]Section 10 of Industrial Development (Income Tax Relief) Act of 1971).

[159]The effectiveness of tax incentives in attrActinginvestments.Evidence from developing countries".Available at https://www.cairn.info/revenue-reflects-et-perspectives-de-la-vie-economique-2012-3-page-129.html.Accessed on 30th May, 2017 at 7:31am.

[160]Section 1 of Industrial Development (Income Relief) Act, 1971. The power of granting an industry a pioneer industry is vested on the President.

[161] A. Sani. "Recent Developments in Company Income Taxation in Nigeria" *Bulletin For International Taxation, 2011 (Vol. 65),* No. 1. Available at http://online2-/bfd.org/collections/bit/htm/bit-2011-01-ng0lhtml.

The effect of this is that the company is totally exempted from all custom duties, levies, charges and imposts of a similar nature[162].

3.3.3 Incentives Under PPTA

Section 60 of PPTA of granted some protection for the income or dividends arising from any profits which had been taxed under PPTA. It provides that "no tax shall be charged under the provisions of the Personal Income Tax Act in respect of any income or dividends paid out of any profits which are taken into account under the provisions of this Act, in calculating the amount of any chargeable profits upon which tax is charged, assessed and paid under the provisions of this Act". The PPTA sets out other deductible allowances permitted under the Act. For instance Section 10 provides that education tax paid by petroleum companies is a deductible expense[163]. Other provisions of PPTA which provides for allowances include Sections 20, 11 and 12 of the Act. The essence of these incentives is to encourage investments in this sector.

Then finally, Nigerian Export Processing Zones Act of 1991 and oil and Gas Export Free Zone Act of 1996 provide incentives which designate certain areas as export free zone to encourage businesses and investments.

3.4. Effects of Double Taxation Agreements on Investment

As the name suggest, a double taxation agreement is an agreement or a contact relating to double taxation, which are usually entered into by countries which intend to promote business relationship by guarding against double taxation of the profits of investors[164]. International double taxation occurs when two or more States impose taxes on the same taxpayer for the same subject matter. This arises because most, if not all countries, tax not only domestic companies and transactions but also companies and transactions in other countries which benefits resident taxpayers, resulting in the overlap of tax claims between the affected countries[165].

In order to reduce this double taxation so as to encourage investments, countries enter into bilateral or multilateral double taxation agreements, whereby credit will be given to a taxpayer, for tax paid in another country which is a party to such agreements[166].

This arrangement promotes foreign investments because, without if the profits of an indigenous companies derived from a foreign country will be taxed in the foreign and in its own country , since most countries is not all tax resident company from its worldwide income, irrespective of where the profit was generated.

Double Taxation agreement may be bilateral or multi-lateral. For bilateral arrangement, a country enters into double taxation agreement with another individual country, but for a multi-lateral, the country adopts a double taxation agreement made under an international organization such as, commonwealth countries, European Union etc.

Presently, Nigeria is a party to both bilateral and multilateral double taxation agreement. Nigeria currently has bilateral taxation agreement with thirteen countries which include: The United Kingdom, the Netherlands, Canada, South African, China, Philippines, Pakistan, Romania, Belgium, France, Mauritius, South Korea and Italy[167].

With respect to multilateral double taxation, Nigeria has Commonwealth multilateral double taxation agreements. It can be gleaned from Section 44 of CITA that a company from any other commonwealth countries is entitled to some relief in Nigeria.

Section 45(2) of CITA further provides that if Nigeria should enter into a bilateral double taxation agreement with any commonwealth country, such bilateral agreement will supersedes the multilateral double taxation agreement. In other words, such bilateral double taxation agreement will become applicable.

It is important to state that, foreign investments in Nigeria to a large extent are limited by the double taxation agreement in existence. Other countries have gone far beyond Nigeria, to establish many double taxation agreements.

For instance the United Kingdom has extensive double taxation agreements with 125 countries, which virtually, cover all types of income[168]. Nigeria should increase its double taxation agreements, so as to attract more foreign investors from other countries.

3.5. The Effects of Tax Rates on Investments

According to AbiolaSani "internationally tax incentives are used to give a country a competitive edge over other countries in an increasingly competitive global economy, and the most important tax incentive for corporate investors is a low income tax rate[169].Every country by virtue of its legislative power is at liberty to fix its own corporate income tax rate. But how far such tax rate goes to attract or discourage investments is another crucial matter.

In the case of Nigeria, corporate income tax rates are fixed on the basis of the business carried on by the corporate body in question. For companies other than oil companies, the corporate income tax rate is set at the average of 30 percent under section 40(1) of CITA and additional 2 percent tax rate by virtue of section 1(2) of the Education Tax Act, making it 32 percent in all.

In addition, Section 40(7) of CITA provides that the profits of a small company shall be taxed at the rate of 20 percent[170].

For oil companies, the tax rate is based on the type of contract entered between the Oil Company and Nigerian Government.

162F. E. Nlerum, "Reflections on the Attitude of the Courts to Tax Incentives Mechanism in Nigeria", *NIALS Journals of Business Law.May 2911, page 119.*

163 Education tax cannot be deducted by other companies.

164K. Bogel, "Double Taxation Treaties and their Interpretation", *Berkeley Journal of International Law (vol. 4*), 1986.at page. 5 Available at https://www.schoolarsip.lawberkeley.edu>viewcontent.

165*Ibid.* Bogel-page 2.

166 A. Deloitte "Improved Double Taxation Arrangements in Nigeria: Any reason for delay. Available at https ://www2.deloitte.com >tax > articles.

167 Ibid. Deloitte.

168A.Deloitte"Taxation-and-investments-in-the-United-Kingdom-2015".Available, athttp://www2.deloitte.com/ng/en/pages/tax/articles/inside-tax-articles/improved-double-tax-arrangements.html.

169 A. Sani "Recent Developments n Company Income Taxation in Nigeria". *Bulletin for international Taxation, 2011(Vol. 65), No.1* at page 13.Available at http://online2:ibfd.org/collections/bit/htm/bit.

170 Small company is a company that has a gross sales turn-over that is below five hundred thousand naira.

There are however other numerous charges and levies imposed on companies by different levels of government in Nigeria[171]. Relatively speaking, Nigerian corporate income tax rate is among the highest in the whole world[172]. This rate is a discentive to investments considering the fact that most countries have reduced theirs, while other countries have gone to the extent of placing corporate income tax rate at zero percent.[173]

3.6. The Effects of Tax Administration on Investments

The concept of tax administration in this context, connotes, enforcement of tax laws, adjudication of tax disputes, utilization of funds generated from taxes, and tax education and enlightenment programs. In Nigeria, there are several challenges facing tax administration, ranging from use of aggressive and unorthodox methods for tax collection, multiple taxations, from different tax authorities, underutilization of funds etc[174].

In addition to taxation, infrastructure, and securities are other factors that affect investments[175]. It is through effective tax administration that, the funds generated will be used to provide the infrastructures and securities which will in turn attract investments. In addition, taxpayers confidence are built through a transparent administration and effective utilization of the fund generated[176].

The implication of poor tax administrations in Nigeria is that, other factors affecting investments, such as good roads, power, security etc, will not be adequately provided for. Therefore, investors might be discouraged to invest where these other factors are not provided for in Nigeria.

4.1. Conclusion and Recommendations

4.2. Conclusion

Tax payment is an experience fundamental to every government in the world. It is created by law and levied on persons, income, commodities and transactions to yield public revenue that affords government the opportunity to offer protection and socio-economic amenities to its subject.[177] A critical examination of Nigerian tax laws and their effect on investments formed the subject matter of this article.

The research revealed that at the present time, Nigerian tax sector is a mixture of both investments discentives[178] and incentives in a proportion that the former is seemingly greater.

With regards to investments discentives, some of the inherent problems in Nigeria corporate tax sector which are capable of crippling investments as pointed out in this work are as follows;

i. Multiple taxation by government at all levels, which has impacted negatively on the investment climate in Nigeria.
ii. Too many laws and lack of a specific policy direction for them. There are too many laws affecting investments and most of these laws contradict each other, with the effect that, there is uncertainty in the tax system and an increased burden on investors to comply with these laws.
iii. Administrative inefficiency, ranging from, poor infrastructure due to under utilization of tax revenue, poor tax education and enlightenment.
iv. Limited double taxation agreements with other countries. Nigerian double taxation agreements are too few to encourage foreign investments. Investors from countries not covered under these agreements would not likely invest in Nigeria due to double taxation on their profits.[179]
V. High corporate tax rate: Nigerian corporate tax rate is high when compared to the corporate tax rates of other jurisdiction. An average of 32 percent[180] corporate tax rate, coupled with the high cost of doing business in Nigeria makes any investment less profitable. This may drive investors away to other countries, considering the fact the sole aim of every investor is to maximize profits.These and other problems plaguing Nigeria's tax sector have not been adequately resolved, and they discourage investments.

However, irrespective of the above shortfalls, Nigerian tax laws have not completely failed in promoting investments. A lot of measures have been put in place to attract both domestic and foreign investments. There are numerous incentives in the form of allowances, pioneer industries, tax holidays and other tax reliefs contained in our tax statutes which are capable of attracting investments.[181]

From the foregoing discussion, one can rightly say that the challenges facing taxation of corporate bodies in Nigeria has gone beyond the provisions of statutes. In other words some of the problems which militate against investments in Nigeria are not found in the statute books.

4.3 Recommendations

In line with the above view, we suggest that, there should be a total reform in the existing Nigerian tax system. And during the reform, amendments of statutes should be given

[171] These other charges have been fully discussed in this chapter under the section where "the effects of multiple taxation on investments" was treated. see 3.1 of this chapter.

[172] Some of the rates in other countries are as follows UK is 19%, South Africa is 28%, Canada 26%, China 25%, Ghana 25%.

[173]For instance Bahamas, Bermula etc. see generally "Tax Rates Tool page".Published by KPMG.Available at http://home.kpmg.com/xx/en/home/services/tax/tax-rates-online/corproate-rate0table.html.

[174] See National Tax Policy, April, 2012.

[175]KabirHarunaDanga "Foreign Direct Investment and the Nigerian Economy", *American Journal of Economics* 2012.Available at http://www.article.sapub.org>.10.5923.j.economics.20120203.02.htmk. Last accessed 3rd June, 2017 at 9pm.

[176] A. Ipaye, *Nigerian Tax Law and Administration, A Critical Review*, (London, United Kingdom: ASCO Prime Publications Ltd. 2014), p.6.

[177] M.T Abdulrazag, "*Principles and Practice of Nigeria Tax Planning and Management"* (1993, Ilorin: Batay Law Publications Ltd). Available at http://taxes .about.com/od/taxplanning/a/taxplanning.htm

[178]Discentive in this context means tax factors that discourage investments

[179] Presently Nigeria has double taxation agreements with thirteen countries .These are: the United Kingdom, the United States, China, South Africa, Netherland, Canada, Romania, Belgium, France, South Africa, Italy, Mauritius and Pakistan.

[180] 32 percent was got by summing up 30 percent rate provided under Section 40 of CITA and 2 percent provided under Section 1(2) of Education Tax Act, which every company incorporated in Nigeria must pay.

[181] Some of these tax incentives have been discussed in details in the preceding chapter under the heading "the effect of tax incentives on investments". See generally 4.2 under chapter four.

special attention. Below are some specific matters, we feel should be reflected in amendments.

Reduction of the personal income and corporate tax rate to encourage investments. This because, the average corporate tax rate is at 32 percent while the maximum personal income tax rate is 24 percent.[182] The implication is that if individuals invest in securities, their profits would be first taxed at 32 percent under CITA and further 10 percent withholding tax under PITA.[183]This is a bit high considering the fact that, they pay VAT on their consumptions. It is also suggested that corporate tax rate should be taxed progressively. Progressive tax is a taxing formula whereby tax payers are charged to tax not on a flat rate but on the basis of their earnings. This is the PAYE taxing formula applicable to personal income tax. The justification of this suggestion is that, it is believed that companies which make much profits exact more burden on the social amenities and infrastructures. Therefore they should be made to pay more. In addition, this formula will encourage the growth of small companies which may not be attainable if they were to be taxed at the same rate with big companies.[184]

Resolving the conflicts between the existing tax laws, and between CITA and CAMA; some of these conflicts that need to be resolved includes, taxation of dividends from unit trust under PITA, which is exempted from tax under CITA. It should be expressly provided under CITA that any profit exempted from tax under it (CITA), should not be taxed under any other law. On the conflict between CITA and CAMA, on whether a foreign company must be incorporated in Nigeria before it could carry on business, we suggest that, the court should apply the "first life principle"[185] propounded in this work until there is an opportunity for amendment. Also Section 19 of CITA should be deleted to avoid double taxation of retained profits of a company. This is because companies need to retain some of its profits to guard against future liabilities.

There should be an increase in the number of double taxation agreements between Nigeria and other countries. For instance the United Kingdom has double taxation agreements with 125 countries, while Nigeria has only 13 double taxation agreement with other countries[186]An increase in Nigerian double taxation agreements will attract many other countries to invest in Nigeria.

Simplifying the provisions of Nigerian tax laws. At all cost, Nigerian tax statutes should be made simple. For instance the commencement rule for the taxation of newly formed companies should be abolished and the preceding year basis rule retained. This will enhance understanding and reduce the number of conflicts which usually arise as a result of differences between the taxpayers and tax authorities in the computation of tax due.

Reducing the numbers of tax statutes affecting investments in Nigeria. Nigerian tax laws should be reduced by unifying all the existing tax laws into two main Acts. This should be, Personal Income Tax Act and Companies Income Tax Act. For instance Education Tax Act, PPTA, the Industrial Development (Income Tax Relief) Act and part of CGTA that relates to companies should be subsumed into one law. Some of these laws have few sections that could be easily made a PART in a bigger law. In addition, most if not all these laws are administered by FIRS, therefore it is better that they are unified so that taxpayers can comply with them at once CAMA is a good example of such law where many different laws were merged into one law for easy reference and compliance.

And then finally, the reform should also focus on administrative issues, such as

i. Training experts to be involved in the enforcement of tax laws
ii. Massive tax education and enlightenment mechanism should be put in place.
iii. ICT based tax system.
iv. Closing the leakages, so as to ensure that revenue generated are well utilized to provide infrastructures. This will help in building the confidence of tax payers in the system, which will indirectly improve compliance.

It is our firm believe that, if all the above suggestions are implemented, there will be a balance between taxation and investments in Nigeria, which will in turn increase the level of investments and also increase the rate of revenue generated in Nigeria.

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[182] See the Sixth Schedule to the Personal Income Tax Act for personal income tax rate in Nigeria.

[183] See Section 12 of PITA.

[184] This view to an extent must have influenced the drafters of Section 40 (1) of CITA, which provides that small companies are taxed at the rate of 20 percent instead of 30 percent. We are further suggesting that progressive taxing formular should be expressly stated as it is done under PITA, considering the fact that under law companies are treated as persons, though artificial persons.

[185] See chapter Three of this work.

[186] A. deloitte" Taxation and Investments in the United Kingdom2015".Availableathttp://www2.deloitte.com/ng/en/pages/tax/rticles/insidetaxarticles/improveddoubletaxarrangements.html.