

FIGHTING TAX CRIME: A COMPARATIVE ANALYSIS*

Abstract

The importance of tax payment is fundamental to the existence of every nation. Accordingly, tax laws have enshrined the mechanism that will ensure tax compliance. However many African countries have recorded low rate of tax Compliance as a result of different degrees of tax evasion or avoidance and other forms of tax crime. The crimes continue unabated because of inefficient mechanism in compacting tax crime in most African countries and Nigeria in particular. The paper compares the Nigerian experience with other foreign jurisdictions policies and approaches in combating tax crime. This study will be relevant to tax authority and the government especially at this time Nigerian is faced with different tax bills. . The research adopted doctrinal methodology. Accordingly, reliance was placed on the study of both primary and secondary sources of law like the Constitution, Federal and State enactments, text books, journals, newspapers and internet base materials respectively. The study is focused Nigerian law; however, comparative recourse is made to foreign jurisdiction for the purpose of sustaining a persuasive argument. It is found that tax offence is poorly prosecuted in Nigeria unlike other jurisdictions. The work concludes that the penalties for tax crimes in Nigeria consist of inconsequential fines that lack sufficient deterrence mechanism to tax crimes; and that there should be sanctions against the government when it fails in its tax obligation to the people. It is therefore recommended that Nigerian tax laws on offence and penalties require some overhaul that will entrench stiffer penalties to tax offence.

1. Introduction

The importance of tax payment is fundamental to the existence of every nation. Accordingly, tax laws have enshrined the mechanism that will ensure tax compliance. However many African countries have recorded low rate of tax Compliance as a result of different degrees of tax evasion or avoidance and other forms of tax crime. Most countries treat tax evasion as a distinct crime, adopting a more selective criminal investigation and prosecution policy than that of other criminal offences.¹ This is primarily attributable to the expense of prosecutions over other options of redress, as well as the sufficient resources and capacity of Law Enforcement Agencies (LEAs) to carry out criminal investigations, considering the high prevalence of tax offences.² This also represents a conscious choice to consider tax evasion as a crime of higher severity, worthy of higher sanction.³

The crimes continue unabated because of inefficient mechanism in compacting tax crime in most African countries and Nigeria in particular. The inefficiency of the process has hampered the expected revenue growth in tax sector. The paper advocates for improved attention to fighting tax crime in Nigeria, drawing experience from other jurisdictions like United States and United Kingdom (hereinafter 'US' and 'UK'. Where adequate attention is devoted to fighting tax crime through a robust legal frame, it expected that tax compliance will improve. Voluntary compliance as currently canvassed has not yielded the expected result. To the best of knowledge of the writer, there is no such reported case tax on evasion in Nigeria. Most of the recorded prosecutions usually boards on forgery of tax clearance certificate punishable under section 473 of the Criminal Code Act⁴, thus cannot be regarded as a tax offence.⁵

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¹ See generally, OECD, 'Offshore Voluntary Disclosure: Comparative Analysis, Guidance and Policy Advice' (September 2010) <<https://www.oecd.org/tax/administration/45967994.pdf>> accessed 14th April 2021

² AK Jain, 'Income Tax Penalty and Prosecution Provisions: A Comparison of the United Kingdom and Indian Experiences' (1987) 10 BTR 353, 357.

³ K Weidenfeld, A Spire, 'Punishing Tax Offenders in France and Great Britain: Two Criminal Policies' (2017) 24(4) JFC 574, 575.

⁴ Cap C28 Laws of the Federation of Nigeria, 2004.

⁵ AO Sanni, 'The Power to Prosecute Tax Offences: a Critique of *Unipetrol Nigeria Plc v. Edo State Board of Internal Revenue*,' available at <https://ir.unilag.edu.ng/handle/123456789/8354> (accessed on 2nd November, 2022).

This paper identifies and evaluates the policies and approaches adopted in the UK and US towards the enforcement of tax offences in comparison with the Nigerian experience.

1. Fighting Tax Crime in the United Kingdom (UK)

In the UK, Her Majesty's Revenue Customs (HMRC) is responsible for conducting all investigations, whether civil or criminal, into noncompliance with both direct and indirect taxes. Other LEAs, such as the Financial Conduct Authority (FCA) and the Serious Fraud Office (SFO) could prosecute tax offences, but very rarely do so. Before the merger of Inland Revenue and Customs and Excise, each authority was responsible for bringing prosecutions. However, owing to the larger move towards the separation of investigative and prosecutorial functions in the criminal justice system, as well as high-profile prosecutorial failures by Customs & Excise, the creation of HMRC was accompanied by the creation of the Revenue and Customs Prosecution Office (RCPO). In 2010, the RCPO was incorporated into the Crown Prosecution Service (CPS) which is now responsible for bringing all tax evasion prosecutions in England and Wales. However, it is important to note that HMRC still have a fundamental role in this process, deciding which cases to refer to the CPS for prosecution. We shall examine HMRC's approach to the enforcement of tax evasion offences, before providing a contemporary evaluation of the impact of HMRC's Criminal Investigation Policy.

2.1 The Prosecution of Tax Evaders

Historically, the Inland Revenue, and later Her Majesty's Revenue and Customs (HMRC), rarely sought prosecutions for tax evasion, instead opting to address tax evasion by way of civil penalties⁶. Indeed, since the enactment of the income tax, 'the principal response of the Revenue to fraud by the taxpayer has been to avoid the use of criminal prosecutions'.⁷ Civil penalties for VAT offences were introduced later, owing to their perceived success in addressing the evasion of direct taxes.⁸ The Inland Revenue's prosecution policy used to be based on the presence of 'badges of heinousness', which would tend towards bringing a criminal prosecution.⁹ The 'badges' included the profession of the taxpayer, the complexity of the fraud, the use of forged documents, collusion and incomplete, or repeated non-disclosure, of information.¹⁰

In 1983, a report by the Keith Committee found that the enforcement powers of the revenue collection authorities had not been subjected to a comprehensive evaluation and seemed to 'have grown up as an historical hotchpotch without any comprehensive scheme or logical framework'.¹¹ Nonetheless, the selective use of the criminal justice system in combatting tax crimes was approved by the Committee.¹² This position still persists to this day, with no comprehensive review being undertaken into the principles underlying the enforcement of tax offences in the UK.¹³ In addition, although judicial review is theoretically available in respect of prosecution decisions,¹⁴ courts have routinely supported the Inland Revenue's selective prosecution policy, noting 'it is not only rational

⁶ Customs and Excise had a 'much more vigorous approach to investigating offences' than the Inland Revenue, see J O'Donnell, 'Vat Investigation' (2007) 57 VAT Dig 1, 2; see also D Ormerod, 'Cheating the Public Revenue' [1998] Crim LR 627, 645.

⁷ P Alldridge, *Criminal Justice and Taxation* (Oxford Monographs on Criminal Law and Justice, OUP 2017) p.135 citing Income Tax Act 1842, s.55.

⁸ Following the recommendation of Keith Committee, *Committee on Enforcement Powers of the Revenue Departments* (Cmnd 8822, 1983) para 1.4.3. RM White, "'Civil Penalties': Oxymoron, Chimera and Stealth Sanction' (2010) 126 LQR 593, 604.

⁹ R Rhodes QC, 'The Inland Revenue and the Criminal Law' (1989) 53(4) *Journal of Criminal Law* 477, 477

¹⁰ Ibid. See also KD Deane, 'Tax Evasion, Criminality and Sentencing the Tax Offender' (1981) 21(1) *The British Journal of Criminology* 47, 49-50.

¹¹ Keith Committee, *Committee on Enforcement Powers of the Revenue Departments* (Cmnd 8822, 1983) para 1.3.1.

¹² Keith Committee, *Committee on Enforcement Powers of the Revenue Departments* (Cmnd 8822, 1983) para 1.3.1.

¹³ RM White, "'Civil Penalties': Oxymoron, Chimera and Stealth Sanction' (2010) 126 LQR 593, 605; H Travers, 'Current Issues in HMRC Criminal Investigations & Prosecutions' (IBC Tax Investigations Conference, May 2010) <<http://www.bcl.com/downloads/HarrysTaxTalk25May2010.pdf>> accessed 2nd April 2021, p.1.

¹⁴ *R v Inland Revenue Commissioners Ex p. Allen* [1997] STC 1141; *R v Inland Revenue Commissioners Ex p. Mead* [1993] 1 All ER 772; [1992] STC 482; *R v Werner* [1988] STC 550.

but probably the only workable policy'.¹⁵ In *Mead*, the court recognised that the Revenue's primary aim is to collect revenue and significant resources are needed to pursue criminal prosecution, yet a small number of prosecutions are still necessary to achieve deterrence.¹⁶ Accordingly, the application of the policy has been subjected to minimal review by the courts, which have generally supported the use of selective prosecution.¹⁷

HMRC is no longer responsible for criminal prosecutions, yet the selective prosecution policy continues, for HMRC is responsible for referring cases to the CPS for prosecution.¹⁸ As such, HMRC acts as a gatekeeper to the criminal justice system. HMRC's Criminal Investigation Policy currently provides:

It's HMRC's policy to deal with fraud by use of the cost effective civil fraud investigation procedures under Code of Practice 9 wherever appropriate. Criminal investigation will be reserved for cases where HMRC needs to send a strong deterrent message or where the conduct involved is such that only a criminal sanction is appropriate.¹⁹

In making this determination, HMRC consider several factors including the presence of organised crime or conspiracy, the extent of losses, previous conduct, the role of the individual (particularly if a professional), the presence of false statements and documents, and/or other forms of concealment or deception.²⁰ The broad range of factors considered in the policy provides little opportunity for judicial review of prosecution decisions.²¹

2.2 Criminal Investigation

Before the merger of HM Customs and Excise and the Inland Revenue, criminal investigation powers were bestowed upon the two agencies through a plethora of statutory instruments, depending on the type of tax evaded.²² The powers available to Customs and Excise were more extensive than those available to the Inland Revenue, which had to rely on the police to arrest suspected tax evaders.²³ From 2005-2012, the powers of HMRC were subject to detailed review, with the aim of 'aligning powers, deterrents and safeguards across the taxes and duties administered by HMRC'.²⁴ In the early stages of the review, HMRC's criminal investigation powers were aligned with the police investigation powers contained in the Police and Criminal Evidence Act (PACE) 1984, by virtue of the Finance Act 2007.²⁵ As a result, HMRC's powers are now aligned with those in use in the wider criminal justice system; a precursor to the increased use of prosecutions to address tax crimes. Some experts opposed this move on the basis of principle, suggesting criminal investigation power should be exercised by other LEAs,²⁶ whereas others questioned its practical effect, lamenting the lack of inclusion of appropriate safeguards.²⁷ However, in some respects, PACE provides for a higher

¹⁵ *R v Inland Revenue Commissioners Exp. Mead* [1993] 1 All ER 772; [1992] STC 482.

¹⁶ *Ibid* at 783C.

¹⁷ In *Hackett v HMRC* [2020] UKUT 0212 (TCC) A taxpayer unsuccessfully argued that HMRC should have conducted a criminal, rather than a civil, investigation.

¹⁸ HM Revenue & Customs, 'Guidance HMRC's Criminal Investigation Policy' (Updated 13 May 2019)

<<https://www.gov.uk/government/publications/criminal-investigation/hmrc-criminal-investigation-policy>> accessed 13th December 2020.

¹⁹ *Ibid*.

²⁰ *Ibid*.

²¹ H Travers, 'Current Issues in HMRC Criminal Investigations & Prosecutions' (IBC Tax Investigations Conference, May 2010) <<http://www.bcl.com/downloads/HarrysTaxTalk25May2010.pdf>> accessed 2nd April 2021, p.4.

²² N Swift, 'FB 2007 – HMRC Investigation Powers' (2007) 16(881) Tax J 6, 6.

²³ See J Collins, M Piggan, 'Finance Act Notes: Criminal Investigations and HMRC Powers – Sections 82-87 and Schedule 22' (2007) 5 BTR 562, 562.

²⁴ *Ibid*. Including, Taxes Management Act 1970, ss.20BA, 20C; Finance Act 2003, Schedule 13; Tax Credits Act 2002, s.36; Value Added Taxes Act 1994, Schedule 11. N Swift, 'FB 2007 – HMRC Investigation Powers' (2007) 16(881) Tax J 6

²⁵ Finance Act 2007, s.82-87.

²⁶ House of Lords Select Committee on Economic Affairs, *The Finance Bill 2007* (HL 2006-07 121-I) para 205.

²⁷ See for instance, J Schwarz, 'Rights and Powers: Protecting the Legitimate Interests of Taxpayers' (2009) 3 BTR 306.

threshold for the exercise of criminal investigation powers,²⁸ and stronger safeguards than those it replaced,²⁹ including increased executive review of investigation powers.³⁰ In addition, while it may be objectionable to address all instances of tax evasion using the criminal law, it is imperative to ensure that adequate powers are available to the most appropriate agencies when this course of action is considered appropriate. In this respect, the decision to base criminal investigation powers on the type of power sought, as opposed to the tax evaded, is a more integrated and logical approach. This is in contrast to the piecemeal and duplicitous approach taken to the enactment of criminal offences.³¹

HMRC have the power to request document production orders either under PACE, where the material requested is 'special procedure material'³² or otherwise under its preserved production powers relating to the type of tax at issue.³³ These powers enable HMRC to request documents from third parties when there are reasonable grounds to suspect tax fraud.³⁴ The powers are designed to prevent searches of property owned by innocent third parties.³⁵ HMRC similarly has the power to issue disclosure notices, also aimed at third parties, under the Serious Organised Crime and Police Act 2005.³⁶ Failing to comply or providing false or misleading information in response to the disclosure notice is a criminal offence.³⁷ HMRC has the power to apply for search warrants and execute seizures under PACE,³⁸ and the POCA,³⁹ where there are reasonable grounds for believing that an indictable offence has been committed and the material sought is likely to be of substantial value to the investigation.⁴⁰ Relevant HMRC officers can arrest suspects for indictable tax offences and search property following arrest,⁴¹ but may not charge or bail suspects, or take their fingerprints.⁴² At all times, HMRC has access to information that is ordinarily available, including government records and social networking sites.⁴³ In certain cases, HMRC has the power to employ intrusive surveillance powers.⁴⁴

²⁸ Employing a threshold of belief, rather than suspicion, for the purposes of obtaining search warrants, production orders, and powers of arrest, J Collins, M Piggins, 'Finance Act Notes: Criminal Investigations and HMRC Powers – Sections 82-87 and Schedule 22' (2007) 5 BTR 562, 562.

²⁹ For instance, HMRC officers must abide by PACE Codes of Practice when exercising PACE powers, Police and Criminal Evidence Act 1984, s.67.

³⁰ Including through the oversight forum, which was in place from 2009-2013. HM Revenue & Customs, 'Forum to Oversee the Implementation of New HMRC Powers, Deterrents and Safeguards: Annual Reports' (13 February 2014) <<https://www.gov.uk/government/publications/forum-to-oversee-the-implementation-of-new-hmrc-powers-deterrents-and-safeguards-annual-reports>> accessed 9th April 2021. The latest evaluation of HMRC's powers was undertaken from 2020-21, HM Revenue & Customs, 'Evaluation of HMRC's Implementation of Powers, Obligations and Safeguards Introduced since 2012' (January 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/958474/Evaluation_of_HMRC_s_implementation_of_powers_obligations_and_safeguards_introduced_since_2012.pdf> accessed 9th April 2021.

³¹ B Samantha, *A Critical and Comparative Analysis of the Prevention of Tax Evasion through the Application of Law and Enforcement Policies in the United Kingdom and United States of America*, A thesis submitted in partial fulfilment of the requirements of the University of the West of England, Bristol for the degree of Doctor of Philosophy.

³² Police and Criminal Evidence Act 1984, Schedule 1, s.14(2).

³³ Taxes Management Act 1970, s.20BA; Value Added Tax Act 1994, Schedule 11, para 11; Finance Act 1994, Schedule 7, para 4A; Finance Act 1996, Schedule 5, para 7; Finance Act 2000, Schedule 6, para 131; Finance Act 2001, Schedule 7, para 8; Finance Act 2003, Schedule 13, Part 6.

³⁴ *Ibid.*

³⁵ A Craggs, 'Beware of the Knock' (2017) 180(4617) Taxation 11, 13.

³⁶ Serious Organised Crime and Police Act 2005, ss.60-70.

³⁷ *Ibid.*, s.67.

³⁸ Police and Criminal Evidence Act 1984, s.8, s.114.

³⁹ Finance Act 2013, s.224, Schedule 48.

⁴⁰ Police and Criminal Evidence Act 1984, s.8, s.114.

⁴¹ Police and Criminal Evidence Act 1984, s.24, s.32.

⁴² Police and Criminal Evidence Act 1984 (Application to Revenue and Customs) Order 2015, SI 2015/1783, Art 4.

⁴³ HM Revenue & Customs, 'Guidance: HMRC's Criminal Investigation Powers and Safeguards' (13 May 2019) <<https://www.gov.uk/government/publications/criminal-investigation-powers/criminal-investigation>> accessed 9th April 2021.

⁴⁴ Contained in the Investigatory Powers Act 2016, the Regulation of Investigatory Powers Act 2000 and the Police Act 1997, *ibid.* A Craggs, 'Caught in the Act' (2021) 187(4786) 24, 25

2.3 Conviction and Sentencing

The conviction rate for tax evasion offences is relatively high, with over 90% of cases referred for prosecution resulting in a conviction.⁴⁵ When compared to an average conviction ratio for other criminal offences of 87%,⁴⁶ this may reflect the fact that difficult cases are not being referred for prosecution. In 2015, the most commonly charged offence was fraudulent evasion of income tax,⁴⁷ followed by fraudulent evasion of VAT,⁴⁸ and cheating the public revenue.⁴⁹ In 2019-20, the VAT offence was most commonly used, followed closely by the cheating offence, whereas in 2018-19, cheating, and conspiring to cheat, were the most common charges.⁵⁰ In sentencing tax offenders, courts take into account the gain to the offender, or the loss to HMRC, as well as their culpability in committing the offence.⁵¹ Fraud offences have a maximum sentence of 10 years imprisonment, specific tax offences typically have a maximum sentence of 7 years imprisonment, and the cheating offence has a maximum sentence of life imprisonment.⁵² Approximately 43% of convicted tax evaders face a custodial or suspended sentence.⁵³

2. Fighting Tax Crime in the United State (US)

In the US, the Internal Revenue Service (IRS) is responsible for criminal and civil investigations into noncompliance with tax laws.⁵⁴ The Criminal Investigation (CI) Division of the IRS is responsible for conducting criminal investigations into violations of the tax code (Title 26) and related Title 18 offences, including money laundering and identity theft, as well as BSA violations (Title 31).⁵⁵ The IRS has a similar role to HMRC in that it is responsible for investigating and recommending cases for prosecution, but does not carry out prosecutions by it.⁵⁶ In order to 'achieve uniform, broad, and balanced criminal tax enforcement' all tax prosecutions must be authorised by the Tax Division of the Department of Justice.⁵⁷ This section examines the IRS's approach to the investigation and enforcement of tax evasion offence.

3.1 The Prosecution of Tax Evaders

Like its UK counterpart, the US has long addressed tax evasion using civil rather than criminal penalties, with civil penalties predating, and accompanying, the introduction of the income tax.⁵⁸ Indeed, the civil fraud penalty derives from the Civil War era.⁵⁹ The US has also held a similar philosophy to the UK in regards to the use of the criminal justice system to address tax crimes, recognising that smaller numbers of prosecutions enables deterrence to be achieved cost effectively.⁶⁰

⁴⁵ HM Revenue and Customs, *Annual Report and Accounts 2017-18 (For the year ended 31 March 2018)* (HC 2017-18, 1222-I) p.16.

⁴⁶ Ministry of Justice, 'National Statistics: Criminal Justice Statistics Quarterly: December 2019' (Updated 26 November 2020). <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/888301/criminal-justice-statistics-quarterly-december-2019.pdf> accessed 22nd April 2021

⁴⁷ Taxes Management Act 1970, s.106A

⁴⁸ Value Added Tax Act 1994, s.72(1)

⁴⁹ Tax Watch, 'Equality before the Law? HMRC's Use of Criminal Prosecutions for Tax Fraud and other Revenue Crimes. A Comparison with Benefits Fraud' (February 2021) <https://www.taxwatchuk.org/tax_crime_vs_benefits_crime/> accessed 6th April 2021.

⁵⁰ *Ibid.*

⁵¹ Sentencing Council, 'Revenue Fraud: Common Law, Common law, Customs and Excise Management Act 1979 (sections 50, 170 and 170B), Fraud Act 2006, s.1, Taxes Management Act 1970 (section 106A), Theft Act 1968, s.17, Value Added Tax Act 1994 (section 72)' (1 October 2014)

<<https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/revenue-fraud/>> accessed 22nd April 2021

⁵² *Ibid.*

⁵³ Tax Watch, 'Equality before the Law? HMRC's Use of Criminal Prosecutions for Tax Fraud and other Revenue Crimes. A Comparison with Benefits Fraud' (February 2021)

<https://www.taxwatchuk.org/tax_crime_vs_benefits_crime/> accessed 6th April 2021.

⁵⁴ US Department of the Treasury, 'Treasury Order: 150-10' (22 April 1982)

<<https://www.treasury.gov/about/role-of-treasury/orders-directives/pages/to15010.aspx>> accessed 17th April 2021.

⁵⁵ IRS, 'How Criminal Investigations Are Initiated' (15th April 2021)

<<https://www.irs.gov/compliance/criminal-investigation/how-criminal-investigations-are-initiated>> accessed 18th April 2021.

⁵⁶ US Department of Justice, 'Justice Manual 4-4.000 Criminal Tax Case Procedures' (Updated June 2020) <<https://www.justice.gov/jm/jm-4-4000-criminal-tax-case-procedures>> accessed 17th April 2021 at §6-4.010

⁵⁷ *Ibid.*

⁵⁸ DA Winslow, 'Tax Penalties – They Shoot Dogs, Don't They' (1991) 43 Fla L Rev 811, 823-4.

⁵⁹ *Ibid.*

⁶⁰ RS Frase, 'The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion' (1980) 47(2) The University of Chicago Law Review 246, 300.

In theory, the US enforcement policy concerning tax evasion offences has been consistently based on the sufficiency of evidence and likelihood of securing a conviction.⁶¹ However, in practice, the decision as to whether to prosecute suspected tax evasion depends on IRS policy, priorities and budgetary constraints,⁶² as well as institutional willingness to refer difficult cases to the DoJ.⁶³ Owing to this, the IRS approach to recommending cases for prosecution has been considered 'perplexing'.⁶⁴

IRS CI receives cases for potential criminal investigation from other IRS divisions, other government authorities, informers, whistle-blowers and general investigations conducted by CI.⁶⁵ IRS employees, most often those working in examination and collection, must refer cases to CI whenever 'firm indications of fraud' are present, and must monitor any indicators of fraud.⁶⁶ If CI accepts the invitation, a Subject Criminal Investigation will begin, whereas non-acceptance by CI will likely result in a civil investigation and an assessment to penalties. CI's decision is based on whether the case is high profile, involves egregious allegations, is likely to achieve a deterrent effect, and is in accordance with its strategic priorities.⁶⁷ IRS priorities currently include, abusive return preparer enforcement, abusive tax schemes, bankruptcy fraud, corporate fraud, cybercrimes, employment tax enforcement, financial institution fraud, gaming, general fraud investigations, healthcare fraud, identity theft, international investigations, money laundering and BSA violations, narcotics investigations, corruption offences and fraudulent refunds.⁶⁸ Other factors influencing prosecution include the severity of the offence, including the tax loss, whether it is a repeat offence and whether the offence is likely to result in a sentence of imprisonment.⁶⁹ If a referral is made to the Tax division, authorization will depend upon the application of the ordinary Principles of Federal Prosecution.⁷⁰

Theoretically, UK and US criminal investigation policies appear to be similar in scope and operation, highlighting the need for deterrent prosecutions and focusing upon the most serious cases. However, one clear distinction is that the US considers corporate prosecutions as a priority within its wider tax evasion enforcement policy and approach; a focus clearly missing within the UK.⁷¹

3.2 Criminal Investigation

Like HMRC, the IRS has the power to obtain information on an informal basis, simply by making contact with taxpayers or third parties.⁷² The IRS also the power to issue administrative summonses

⁶¹PP Lipton, 'The Relationship between the Civil and Criminal Penalties for Tax Frauds' (1968) U Ill L F 527, 531; MS Winer, 'An Appraisal of Criminal and Civil Penalties in Federal Tax Evasion Cases' (1953) 33 BUL Rev 387, 388.

⁶²I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at 8.01.

⁶³MS Winer, 'An Appraisal of Criminal and Civil Penalties in Federal Tax Evasion Cases' (1953) 33 BUL Rev 387, 388.

⁶⁴I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at 8.01.

⁶⁵*Ibid* at §4.02[1]. See also, Internal Revenue Service, 'Internal Revenue Manual, Part 9. Criminal Investigation, Chapter 4. Investigative Techniques, Section 1 Investigation Initiation' (31 July 2020) <https://www.irs.gov/irm/part9/irm_09-004-001> accessed 17th April 2021 at §9.4.1.5.1.

⁶⁶Internal Revenue Service, 'Internal Revenue Manual, Part 25. Special Topics, Chapter 1. Fraud Handbook' (23 January 2014) <https://www.irs.gov/irm/part25/irm_25-001-001> accessed 17th April 2021 at §25.1.1.3.

⁶⁷Internal Revenue Service, 'Internal Revenue Manual, Part 9. Criminal Investigation, Chapter 1. Criminal Investigation Mission and Strategies' (6 March 2017) <https://www.irs.gov/irm/part9/irm_09-001-001> accessed 17th April 2021 at §9.1.1.4.

⁶⁸Internal Revenue Service, 'Program and Emphasis Areas for IRS Criminal Investigation' (5 March 2021) <<https://www.irs.gov/compliance/criminal-investigation/program-and-emphasis-areas-for-irs-criminal-investigation>> accessed 17th April 2021. See also, Internal Revenue Service, 'Criminal Investigation Annual Report 2020' <<https://www.irs.gov/pub/irs-pdf/p3583.pdf>> accessed 17th April 2021 at p.6.

⁶⁹Comisky notes that 'the precise numerical criteria for case selection are detailed in classified official use only nonpublic portions of the IRM' I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at §4.03, fn.106.

⁷⁰US Department of Justice, 'Justice Manual 4-4.000 Criminal Tax Case Procedures' (Updated June 2020) <<https://www.justice.gov/jm/jm-6-4000-criminal-tax-case-procedures>> accessed 17th April 2021 at §6-4.211.

⁷¹HM Revenue & Customs, 'Guidance HMRC's Criminal Investigation Policy' (Updated 13 May 2019) <<https://www.gov.uk/government/publications/criminal-investigation/hmrc-criminal-investigation-policy>> accessed 13th December 2020.

⁷²26 USC § 7601. 'The Internal Revenue Service is under a statutory mandate to investigate' *United States v Silkman*, 543 F2d 1218, 1220 (8th Cir 1976).

for both BSA and tax purposes,⁷³ which, since 1978, has applied to both civil and criminal investigations.⁷⁴ The administrative summons 'is the principal investigative technique used by special agents in non-Grand Jury cases' in respect of a wide variety of taxes.⁷⁵ IRS summonses enable the IRS to obtain books, records and other documents from the taxpayer and other relevant persons, as well as to compel the taxpayer or third parties to appear and testify before the IRS.⁷⁶ However, the power can only be used to further criminal investigations before a referral has been made to the DoJ Tax Division.⁷⁷

The IRS also obtains information for criminal investigations from informants, other government authorities and databases,⁷⁸ and through interviewing suspects and witnesses.⁷⁹ Similarly to HMRC, the IRS also has the power to execute search warrant,⁸⁰ to arrest suspects,⁸¹ and to arrest suspects following arrest.⁸² Following the involvement of the IRS in the US 'war on drugs', the IRS has made increasing use of intrusive investigation methods, including the use of undercover operations in serious cases.⁸³ IRS Special Agents are able to use techniques such as surveillance,⁸⁴ and, in BSA or money laundering cases, interception.⁸⁵ In the 1970s, Grand Jury investigations for tax evasion offences were the exception, rather than the norm, with administrative investigations being utilised in the majority of cases.⁸⁶ During the 1980s, the use of Grand Jury investigations began to expand beyond serious cases,⁸⁷ and this investigative tool is now used in over 50% of investigations.⁸⁸ Grand Jury investigations are often more efficient and effective than obtaining evidence via administrative routes, owing to the use of less-restrictive tools, such as, the Grand Jury Subpoena and possibility of offering immunity to cooperating witnesses.⁸⁹ Some restrictions are imposed on the use of information obtained through Grand Jury investigations in civil tax matters.⁹⁰

⁷³ 31 USC § 5318(4); 26 USC § 7602(a).

⁷⁴ In order to overrule the decision in *United States v LaSelle National Bank*, 437 US 298 (1978), Congress enacted 26 USC § 7602(b), which provides that the power to summon may be used for 'the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.' L Book, M Saltzman, *IRS Practice and Procedure* (Thomson Reuters, Updated 2021) §13.01[2].

⁷⁵ I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at §4.04[4].

⁷⁶ 26 USC § 7602(a)(1),(2)&(3).

⁷⁷ 26 USC § 7602(d)(1).

⁷⁸ Internal Revenue Service, 'Internal Revenue Manual, Part 9. Criminal Investigation, Chapter 4. Investigative Techniques, Section 2. Sources of Information' (2 August 2018) <https://www.irs.gov/irm/part9/irm_09-004-002> accessed 17th April 2021 at §9.4.2.1.

⁷⁹ 26 USC § 7602; Internal Revenue Service, 'Internal Revenue Manual, Part 9. Criminal Investigation, Chapter 4. Investigative Techniques, Section 5. Interviews' (12 May 2020) <https://www.irs.gov/irm/part9/irm_09-004-005> accessed 17th April 2021 at §9.4.5.1.

⁸⁰ 26 USC § 7608; Internal Revenue Service, 'Internal Revenue Manual, Part 9. Criminal Investigation, Chapter 4. Investigative Techniques, Section 9. Search Warrants, Evidence and Chain of Custody' (27 March 2013) <https://www.irs.gov/irm/part9/irm_09-004-009> accessed 17th April 2021 at §9.4.9.

⁸¹ 26 USC § 7608; Internal Revenue Service, 'Internal Revenue Manual, Part 9. Criminal Investigation, Chapter 4. Investigative Techniques, Section 12. Arrests' (11th August 2008). <https://www.irs.gov/irm/part9/irm_09-004-012> accessed 17th April 2021 at §9.4.12.1

⁸² Ibid at §9.4.12.11.2.

⁸³ RE Davis, DS Ashby, 'Federal Criminal Tax Enforcement in 2009: The Role of Tax Enforcement in the Federal "Voluntary" Self-Assessment and Payment Tax System' (2009) 9 Hous Bus & Tax LJ 234, 239-240.

⁸⁴ Including physical/visual, electronic, internet, video and aerial surveillance, see Internal Revenue Service, 'Internal Revenue Manual, Part 9. Criminal Investigation, Chapter 4. Investigative Techniques, Section 6. Surveillance and Non-Consensual Monitoring' (3rd September 2020) <https://www.irs.gov/irm/part9/irm_09-004-006> accessed 17th April 2021 at §9.4.6.1.

⁸⁵ Interception is not permitted for Title 26 offences, 18 USC §2516. 18 USC §2703 provides access to stored electronic communications.

⁸⁶ RE Davis, DS Ashby, 'Federal Criminal Tax Enforcement in 2009: The Role of Tax Enforcement in the Federal "Voluntary" Self-Assessment and Payment Tax System' (2009) 9 Hous Bus & Tax LJ 234, 241.

⁸⁷ Ibid; WH Webster, 'Review of the Internal Revenue Service's Criminal Investigation Division' (Prepared for the Commissioner of the IRS, April 1999) <<https://permanent.access.gpo.gov/lps19053/www.irs.gov/pub/irs-utl/27623d99.pdf>> accessed 20th April 2021, at p.9.

⁸⁸ LS Horn, 'Overview of Federal Criminal Tax Investigations and Prosecutions' (2010) 311 NYC BAR 1

⁸⁹ Ibid; see also, I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at §4.04[13].

⁹⁰ *United States v Sells Engineering Inc*, 463 US 418 (1983); *United States v Baggot*, 463 US 476 (1983); B Bittker, L Lokken, *Federal Tax of Income, Estates and Gifts* (Thomson Reuters, Updated 2021) at §114.3.8.

3.3 Conviction and Sentencing

The US has a similar conviction rate for tax evasion offences as the UK, with over 90% of prosecutions resulting in conviction.⁹¹ This is similar to the US conviction rate for other offences,⁹² the most commonly charged offences in the US are the false statements and tax evasion offences contained in 26 USC §§7206 and 7201, which routinely compete for top position.⁹³ Other commonly used offences include theft of public money, property or records,⁹⁴ conspiracy,⁹⁵ making false statements,⁹⁶ money laundering,⁹⁷ and mail fraud.⁹⁸ The maximum sentence for the §7201 tax evasion offence is five years imprisonment, while the maximum sentence for the §7206 offence is three years imprisonment.⁹⁹ In contrast, money laundering offences may result in a maximum sentence of 20 years imprisonment.¹⁰⁰ As in the UK, sentences for tax evasion offences depend on the nature of the offence, including the actual or intended tax loss, the defendant's criminal history, and the presence of aggravating or mitigating factors warranting adjustment.¹⁰¹ A higher proportion of convicted tax evaders face imprisonment in the US than in the UK, with 65% receiving a custodial sentence.¹⁰² This is perhaps unsurprising considering that the Justice Manual states that 'a term in prison is almost always warranted in a criminal tax case', owing to the limited number of tax evasion prosecutions and the need to send a deterrent message.¹⁰³

3. Fighting Tax Crime in Nigeria

4.1 Legal framework for Tax Audit and Investigation

Tax Audit and Investigation Tax audit is the examination of taxpayers' tax report by the relevant tax authorities in order to ascertain compliance with applicable tax laws and regulations of state.¹⁰⁴ Tax investigation on the other hand defers from tax audit because it would be carried out when a taxpayer is suspected to have committed tax fraud in the form of tax evasion which could be due to: failure to file tax returns; filing of incomplete or inaccurate returns; failure to register for tax purposes.

Some tax laws specifically confer auditing power on tax authorities and some can be inferred from the wording of the statute. Section 43(4)¹⁰⁵ provides that "Nothing in the foregoing provisions of this Section or in any other provisions of the Act shall be construed as precluding the Revenue Service from verifying by tax audit any matter relating to entries in any books, documents, accounts or returns as the Service may from time to time specify in any guideline." An integral part of the self-assessment

⁹¹ Internal Revenue Service, 'Criminal Investigation Annual Report 2020' <<https://www.irs.gov/pub/irs-pdf/p3583.pdf>> accessed 18th April 2021 at p.6.

⁹² E Rasmusen, M Raghav, M Ramseyer, 'Convictions versus Conviction Rates: The Prosecutor's Choice' (2009) 11 American Law and Economics Review 47, 49; US Department of Justice Executive Office for United States Attorneys, 'United States Attorneys' Annual Statistical Report Fiscal Year 2010' (September 2011)

<<https://www.justice.gov/sites/default/files/usao/legacy/2011/09/01/10statrpt.pdf>

⁹³ TRAC IRS, 'IRS Criminal Prosecutions Rise Under Obama' (Transactional Records Access Clearinghouse, Syracuse University, 4 February 2014) <<https://trac.syr.edu/tracirs/latest/342/>> accessed 18th April 2021.

⁹⁴ 18 USC §641.

⁹⁵ 18 USC §371, §286.

⁹⁶ 18 USC §287.

⁹⁷ 18 USC §1956.

⁹⁸ 18 USC §1341; TRAC IRS, 'IRS Criminal Prosecutions Rise Under Obama' (Transactional Records Access Clearinghouse, Syracuse University, 4 February 2014) <<https://trac.syr.edu/tracirs/latest/342/>> accessed 18th April 2021.

⁹⁹ 26 USC §§7201 & 7206.

¹⁰⁰ 18 USC §1956.

¹⁰¹ United States Sentencing Commission, *Guidelines Manual* (November 2018) §2T1.1-4.1.

¹⁰² United States Sentencing Commission, 'Quick Facts: Tax Fraud Offenses Fiscal Year 2019' (United States Sentencing Commission Datafiles 2019) <https://www.uscc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Tax_Fraud_FY19.pdf> accessed 18th April 2021.

¹⁰³ US Department of Justice, 'Justice Manual 4-4.000 Criminal Tax Case Procedures' (Updated June 2020)

<<https://www.justice.gov/jm/jm-6-4000-criminal-tax-case-procedures>> accessed 17th April 2021 at §6-4.010; see also, United States Sentencing Commission, *Guidelines Manual* (November 2018) §2T1.1.

¹⁰⁴ C O Olaoeye and AA Ogundipe, 'Application of Tax Audit and Investigation on Tax Evasion Control in Nigeria,' available at https://www.academia.edu/38067466/Application_of_Tax_Audit_and_Investigation_on_Tax_Evasion_Control_in_Nigeria, accessed on 19 December, 2022.

¹⁰⁵ FIRS (Establishment Act) 2007.

scheme is the need to periodically verify the tax returns filed by taxpayers through tax audit procedures. The tax audit exercise essentially is meant to enable the revenue authority to further satisfy itself that audited financial statements and the related tax computations submitted by the taxpayer agree with the underlying records.¹⁰⁶ The service shall- assess persons including companies, enterprises chargeable with tax; assess, collect, account and enforce payment of taxes as may be due to the Government or any of its agencies; collect, recover and pay to the designated account any tax under any provision of this Act or any other enactment or law; in collaboration with the relevant ministries and agencies, review the tax regimes and promote the application of tax revenues to stimulate economic activities and development; in collaboration with the relevant law enforcement agencies, carry out the examination and investigation with a view to enforcing compliance with the provisions of this Act.¹⁰⁷ According to Section 23¹⁰⁸, a taxpayer shall be refunded after proper auditing by the Service, such over-payment of tax as is due. The service shall decide on who is eligible for the refund mentioned in subsection (1) of this section subject to such rules and conditions as may be approved by the Board. The Service shall employ Special Purpose Tax Officers to assist any relevant law enforcement agency in the investigation of any offence under this Act.¹⁰⁹ Notwithstanding anything to the contrary in any other enactment or law, the Service shall have the power to investigate or cause investigation to be conducted to ascertain any violation of any tax law whether or not such violation has been reported to the Service.¹¹⁰ Similar provisions are stated in Company Income Tax Act. The Act provides that Nothing in this section or in any other provision of this Act shall be construed as precluding the Service from verifying by tax audit or investigation into any matter relating to any return or entry in any book, document, accounts, including those stored in a computer, digital, magnetic, optical or electronic media as may, from time to time, be specified in any guideline by the Service.¹¹¹ Where the service discovers or is of the opinion at any time that any company liable to tax has not been assessed or has been assessed at a less amount than that which ought to have been charged, the Board may, within the year of assessment or within six years after the expiration thereof and as often as may be necessary, assess such company at such amount or additional amount, as ought to have been charged.¹¹²

An authorised officer may at any time enter without warrant any premises upon which he has reasonable grounds to believe that a person is carrying on business in order to ascertain whether this Act is being complied with (whether on the part of the occupier of the premises or any other person), and on entry he may carry out such inspections and make such requirements as may be specified by the Board.¹¹³ Where an authorised officer enters any premises in exercise of the power conferred on him by subsection (1) of this section, he may take with him such persons as he considers Act.¹¹⁴ From the forging, it can be established that tax investigation is an in-depth investigation processed by a tax authority in order to recover tax undercharged in previous years of assessment. It is carried out to recover back duty or when a taxpayer is suspected of tax evasion. The finding of every tax audit is reproduced in tax audit report; the report forms the bases of tax adjudication. Where a tax audit report raises *prima facie* case of tax infraction, the tax authority will proceed against the taxpayer through a judicial process.

4.2 Powers to Prosecute Tax Offences

The tax authorities are empowered to prosecute tax offences in their names. Section 47 of FIRSEA provides that:

¹⁰⁶ GE Oyedokun, 'Relevance of Tax Audit And Tax Investigation in Nigeria,' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2910322, assessed on 8th February, 2022.

¹⁰⁷ FIRES Act, 2007, section 8

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*, section 35 (1).

¹¹⁰ *Ibid.*, section 35(2).

¹¹¹ CITA, section 60(4).

¹¹² *Ibid.*, see section 66.

The Service shall have powers to employ its own legal officers who shall have powers to prosecute any of the offences under this Act subject to the powers of the Attorney-General of the Federation.

It is also provided in that The Service may compound any offence under this Act by accepting a sum of money not exceeding the maximum fine specified for the offence.¹¹⁵ The Service shall issue an official receipt for any money received under subsection (1) of this section.¹¹⁶ Section 99 of PITA also confers the power to prosecute tax offences on the State Board of Internal Revenue. It provides that no prosecution in respect of an offence under this Part of this Act may be commenced except at the instance of the relevant tax authority.

The issue of capacity of tax authority to prosecute in its name came for determination in *Unipetrol Nigeria Pic v. Edo State Board of Internal Revenue*.¹¹⁷ The statements of Mukhtar, JSC who read the lead judgment are hereby reproduced *in extenso* in order to decipher the *ratio decidendi*. According to the learned Justice:

... the Respondent derived its existence from section 4(1) of the Income Tax Law (*supra*). A thorough understanding of these provisions confirms that the respondent could take any action, be it civil or criminal. In this respect, I cannot fault the following finding of the lower court which reads thus:

I do not think I can agree with the construction or meaning placed on the Word 'sue' in section 4(2) of the Income Tax Law by learned counsel for the Appellant. Even going by *Black's Law Dictionary* definition of the word as indicated by learned counsel, both 'sue' and 'prosecute' cover an action. It is a common denominator in both Words. An action could be civil or criminal, it cannot be only civil.¹¹⁸

According to Sani,¹¹⁹ a close reading of the Supreme Court's decision in *Unipterol's Case* will reveal that the Court did not decide that being a legal person *simpliciter* confers power to prosecute an offence in the name of a corporate person, of course, such a decision would be troubling and open a floodgate of prosecutions by any corporate person in its own name as rightly argued by the Appellant. The decision would have upset a well settled public policy and legal order which makes the Attorney-General and the Police, the defender of the state against crimes (regarded as injuries or wrongs against the public and not individuals), If the intention of the apex Court had been to establish a new paradigm in this regard, it is reasonable to expect some specific comments on the inadequacy or otherwise of the existing principles and what informed a departure, In effect, one would have expected the Supreme Court to do a robust analysis of the groundswell authorities¹²⁰ on the nature and extent of the power of the Attorney-General to prosecute. He also submitted that a close reading of the decisions in *Unipetrol's Case* reveals that the learned Justices placed reliance on section 51 of the *Income Tax Law*,¹²¹ Thus, it will be hollow for any corporate person to seek to prosecute an offence in its corporate name on the authority of this case in the absence of any specific statutory provisions similar to that of section 51 of the *Income Tax Law*.¹²² He¹²³, however, submitted that the reliance of the Supreme Court on section 51 of the Income Tax Law is misconceived. The provision is totally irrelevant to the

¹¹³ Ibid, section 39(1).

¹¹⁴ Ibid, 39(2).

¹¹⁵ FIRSEA, section 48 (1).

¹¹⁶ Ibid, section 48 (2).

¹¹⁷ (2006) 8 NWLR (Pt. 983) 624; (2006) CLR 28.

¹¹⁸ (2006) CLR 28 at 35, 1.

¹¹⁹ AO Sanni (n7).

¹²⁰ Ibid, for a scholarly discussion of the power of the Attorney-General see generally, FNwadiolo, F, *The Criminal Procedure of the Southern States of Nigeria*, 2nd ed. (Lagos: MIJ Publishers, 1987) 368-370; O Doherty: *Criminal Procedure in Nigeria*, (London: Blackstone Press Limited, 1990) xx; Ajayi, K.: "Revisiting Police Power to Prosecute: A Critique of *Federal Republic of Nigeria v. George Osahan & 7 Ors.*", *The Appellate Review*, Vol 1, No.1,

¹²¹ Cap.71, Vol III.

¹²² AO Sanni (n 7).

¹²³ Ibid.

determination of the question whether the particular charges brought pursuant to the section were competent having been preferred in the name of the Respondent instead of the Attorney-General.¹²⁴

We agree with the opinion of Sanni to the extent that he *ratio* of the judgment can be further scrutinized in view of the general power of the Attorney General of the State to prosecute criminal offences in its name since the section 51 of the Income Tax in questions is state law. There is no clear provision under PITA as to whether the State authorities can prosecute in their name.¹²⁵ Nonetheless, the current position of the law has conferred the power of prosecution of tax offences on FIRS. The law provides that:

The Service shall have powers to employ its own legal officers who shall have powers to prosecute any of the offences under this Act subject to the powers of the Attorney-General of the Federation.¹²⁶

The power is however subject to the overriding powers of Attorney General under the constitution. The essence of this provision is to unburden the office of Attorney General that is saddled with other criminal matters other than the tax crime. What it means therefore is that if the *Unipetrol case* was decided on the provision of section 47 of FIRSEA, the decision of the Supreme Court will be impeachable.

4. Comparing Nigerian Experience with UK and US in Fighting Tax Crime

There are substantial similarities in the prosecution of tax offences in Nigeria as well as UK and US. For instance, both countries adopt *mens rea* requirement in proving tax offences beyond reasonable doubt as against countries where tax offence is a strict liability offence. In both jurisdictions, to incur criminal penalties the evader must have possessed the requisite *mens rea* or guilty state of mind. Thus, to obtain a criminal prosecution of a tax evader in the countries, it must be proved that the defendant acted 'dishonestly'. Both countries also have selective interest in the prosecution of tax offences; their fundamental interests consist in raising revenue rather than fighting tax crime. However, both countries have significant difference in the enforcement of tax evasion than the Nigerian counterpart. While the US has prosecuted complex and high-value tax cases, the UK's criminal investigation and enforcement policy, particularly when combined with prosecutorial targets, has led to the prosecution of very low-value tax cases.

Prosecution of tax offences in UK and US starts with high skilled investigation of the offence; gathering of evidence before possible prosecution. The separation of investigative and prosecutorial functions in UK leads to the creation of HMRC which was accompanied by the creation of the Revenue and Customs Prosecution Office (RCPO). In 2010, the RCPO was incorporated into the CPS and now responsible for bringing all tax evasion prosecutions in England and Wales. HMRC still have a fundamental role in the process, deciding which cases to refer to the CPS for prosecution. In the US, the Internal Revenue Service (IRS) is responsible for criminal and civil investigations into noncompliance with tax laws.¹²⁷ The Criminal Investigation (CI) Division of the IRS is responsible for conducting criminal investigations into violations of the tax code (Title 26) and related Title 18 offences, including money laundering and identity theft, as well as BSA violations (Title 31).¹²⁸ The IRS has a similar role to HMRC in that it is responsible for investigating and recommending cases for prosecution, but does not carry out prosecutions itself.

¹²⁴Constitution of the Federal Republic of Nigeria, 1999, section 211 (2), expressly provides that: The powers conferred upon the Attorney-General of a State under subsection 1 of this section may be exercised by him in person or through officers of his department." The provisions have been given judicial elaboration by the Supreme Court in *Ibrahim v. The State*,

¹²⁵PITA, Section 99.

¹²⁶FIRSEA, section 47.

¹²⁷US Department of the Treasury, 'Treasury Order: 150-10' (22 April 1982).

<<https://www.treasury.gov/about/role-of-treasury/orders-directives/pages/to15010.aspx>> accessed 17th April 2021.

¹²⁸IRS, 'How Criminal Investigations Are Initiated' (15th April 2021)

<<https://www.irs.gov/compliance/criminal-investigation/how-criminal-investigations-are-initiated>> accessed 18th April 2021.

The position is different in Nigeria where there is no clear process of investigating tax offences. Most staff of the Nigerian tax authorities lacks the capacity to investigate and detect tax evasion. This account for the reason no tax offender has been convicted in Nigeria. There are no evidence to establish the ingredients of the tax crime. Since tax offence is a criminal offence, there should be overwhelming evidence to prove the offence beyond reasonable doubt.

The power to prosecute offences lies generally with Attorney General of the state or Attorney General of the federation or anybody from the office, on the authority of the attorney general. The state tax authorities are not given any specific power under the law to prosecute tax offences in their name. The law, however, provides that the prosecution should be at their instance.¹²⁹ There are supposed to be collaboration between the state authorities and the police or office of the Attorney General (AG) for prosecution of tax offences. This collaboration is essentially lacking. The law enforcement agency and the office of AG are saddled with huge criminal responsibility that has overwhelmed them. Little or no attention is given to tax matters.

The Federal Tax Authority (FIRS) is empowered to prosecute tax offences in its name. But, there is no conviction of any tax offender by FIRS. The body is more concern with revenue drive than prosecution of tax crime. This apathy could be poor understanding of the importance of fighting tax crime in improving tax compliance; or lack of preparedness to efficiently do so. Fighting tax crime serves as deterrent to prospective tax evader. Where there are records of convictions of tax offender, there will be reduction in the number of tax evasion.

The Tax Body should brace up its power of prosecuting tax offence. This power is not transferable and should not be usurped by other security agency. The recent attempt to usurp the power of FIRS, in the guise of collaboration, by Economic and Financial Crime Commission (EFCC) has been rejected by the court. In the case of *Wheatbaker Investment and Properties Limited v EFCC & Ano*¹³⁰, The plaintiff had approached the court for the interpretation of the relevant provisions of the Federal Inland Revenue Service (Establishment) Act, 2007 and the Taxes and Levies (Approved List for Collection) Act, 1998. The plaintiff asked the court to determine “Whether having regard to the provision of Section 8 of the Federal Inland Revenue Service (Establishment) Act, 2007 and Section 2(1) Taxes and Levies (Approved List for Collection) Act, 1998, it is the legal and statutory responsibility of the EFCC to undertake the assessment, enforcement and collection of taxes on behalf of the government of the Federal Republic of Nigeria. “A declaration that it is illegal for the EFCC to assume the statutory powers for the assessment, collection and enforcement of payment of taxes in Nigeria contrary to the combined provisions and effects of Section 8 of the Federal Inland Revenue Service (Establishment) Act, 2007 and Section 2(1) of the Taxes under Levies (Approved List for Collection) Act, 1998.

EFCC in opposition to the suit, filed a 29-paragraph counter-affidavit, and a further affidavit of 10 paragraphs. In the counter-affidavit and further affidavit, the EFCC maintained that it is statutorily empowered to conduct investigation and prosecute all economic and financial crimes with a view to identifying individuals, corporate bodies or group involved and determine the extent of financial loss and such other losses by the government, private individuals or organisations. It also contended that 'being a special creation of the law', it's given statutory powers to investigate economic and financial crimes, arrest and apprehend perpetrators of such crimes. The anti-graft agency also argued that it received intelligence alleging economic sabotage and tax evasion and found the same worthy of investigation. It said that the plaintiff filed the suit to shield itself against investigation and a possible prosecution, and urged the court not to give judicial support to the plaintiff. The court held that:

¹²⁹ PITA, section 98.

¹³⁰ FHC/L/CS/244/21, unreported, available at <https://www.thisdaylive.com/index.php/2023/01/21/efcc-lacks-power-to-probe-enforce-tax-payments-says-court/#:~:text=Justice%20Akintayo%20> (accessed on 23rd January, 2023).

The first defendant went outside its statutory mandate, usurped the statutory powers and responsibility of the second defendant and engaged in assessment of taxes based on cash flow into the plaintiffs accounts under the guise of investigative activities in violation of Section(s) 8 of FIRS (Establishment) Act and section 2(1) of the Taxes and levies (Approved List for Collection) Act, 1998 and therefore acted illegally without any lawful basis.

The conviction rate for tax evasion offences in UK is relatively high, with over 90% of cases referred for prosecution resulting in a conviction. The most commonly charged offence was fraudulent evasion of income tax,¹³¹ followed by fraudulent evasion of VAT,¹³² and cheating the public revenue.¹³³ In 2019-20, the VAT offence was most commonly used, followed closely by the cheating offence, whereas in 2018-19, cheating, and conspiring to cheat, were the most common charges.¹³⁴ The US has a similar conviction rate for tax evasion offences as the UK, with over 90% of prosecutions resulting in conviction.¹³⁵ This is similar to the US conviction rate for other offences,¹³⁶ the most commonly charged offences in the US are the false statements and tax evasion offences contained in 26 USC §§7206 and 7201, which routinely compete for top position.¹³⁷ Other commonly used offences include theft of public money, property or records,¹³⁸ conspiracy,¹³⁹ making false statements,¹⁴⁰ money laundering,¹⁴¹ and mail fraud.¹⁴² As much as Nigeria wants an efficient tax system, it should aspire towards records of conviction as recorded in US and UK.

It is also important that the punishment to be imposed would be commensurate with the resource invested in the prosecution of the offences. The situation where minimum penalties are imposed as penalties, the fight against tax crime will be a waste of time and resources. The penalties in Nigeria tax offences desire to measure up with the standard in US and UK. In US, The maximum sentence for the S. 7201 tax evasion offence is five years imprisonment, while the maximum sentence for the S. 7206 offence is three years imprisonment.¹⁴³ In contrast, money laundering offences may result in a maximum sentence of 20 years imprisonment.¹⁴⁴ While, in the UK, sentences for tax evasion offences depend on the nature of the offence, including the actual or intended tax loss, the defendant's criminal history, and the presence of aggravating or mitigating factors warranting adjustment.¹⁴⁵ A higher

¹³¹ Taxes Management Act 1970, s.106A.

¹³² Value Added Tax Act 1994, s.72(1).

¹³³ Tax Watch, 'Equality before the Law? HMRC's Use of Criminal Prosecutions for Tax Fraud and other Revenue Crimes. A Comparison with Benefits Fraud' (February 2021) <https://www.taxwatchuk.org/tax_crime_vs_benefits_crime/> accessed 6th April 2021.

¹³⁴ B Samanthan (n 548).

¹³⁵ Internal Revenue Service, 'Criminal Investigation Annual Report 2020' <<https://www.irs.gov/pub/irs-pdf/p3583.pdf>> accessed 18th April 2021 at p.6.

¹³⁶ E Rasmusen, M Raghav, M Ramseyer, 'Convictions versus Conviction Rates: The Prosecutor's Choice' (2009) 11 *American Law and Economics Review* 47, 49; US Department of Justice Executive Office for United States Attorneys, 'United States Attorneys' Annual Statistical Report Fiscal Year 2010' (September 2011) <<https://www.justice.gov/sites/default/files/usao/legacy/2011/09/01/10statrpt.pdf>> accessed 24th April 2021.

¹³⁷ TRAC IRS, 'IRS Criminal Prosecutions Rise Under Obama' (Transactional Records Access Clearinghouse, Syracuse University, 4 February 2014) <<https://trac.syr.edu/tracirs/latest/342/>> accessed 18th April 2021.

¹³⁸ 18 USC §641.

¹³⁹ 18 USC §371, §286

¹⁴⁰ 18 USC §287.

¹⁴¹ 18 USC §1956.

¹⁴² 18 USC §1341; TRAC IRS, 'IRS Criminal Prosecutions Rise Under Obama' (Transactional Records Access Clearinghouse, Syracuse University, 4 February 2014) <<https://trac.syr.edu/tracirs/latest/342/>> accessed 18th April 2021.

¹⁴³ 26 USC §§7201 & 7206.

¹⁴⁴ 18 USC §1956.

¹⁴⁵ United States Sentencing Commission, *Guidelines Manual* (November 2018) §2T1.1-4.1.

proportion of convicted tax evaders face imprisonment, with 65% receiving a custodial sentence.¹⁴⁶ This is perhaps unsurprising considering that the Justice Manual states that 'a term in prison is almost always warranted in a criminal tax case', owing to the limited number of tax evasion prosecutions and the need to send a deterrent message.¹⁴⁷ We are hoping to see when a tax evader in Nigeria will be sentenced to term of 20 years imprisonment.

Both countries, US and UK, provide mechanisms for taxpayers to avoid prosecution through domestic or offshore disclosure programs. In addition, both authorities have simple civil investigation powers, being able to obtain information from taxpayers and third parties, on both identified and unidentified individuals. In lieu of prosecution, the UK and US impose a number of civil penalties on those who evade taxation or otherwise fail to comply with tax responsibilities. The civil penalty regimes are comprehensive in scope, covering the failures of both evaders and facilitators, in respect of both domestic and onshore non-compliance.

The Civil penalties in Nigeria tax offences are uncomplimentary. Our tax laws still have penalty in the sun of N200 for different kind of tax offences. This is not the same in US and UK. As both, US and UK, have taken steps to reform its civil penalties regime and developed an expansive and complicated framework, consisting of over severally different penalties.¹⁴⁸ Nigerian tax laws need to catch up with the trend in imposing stiffer penalties to tax offences and penalties.

There is a point of similarity in the recognition of the taxpayer's right to investigate tax expenditure in Nigeria and US jurisdiction. The Nigerian case of *Gani v FGN* that enthrones a new legal regime of *locus standi* of a taxpayer to investigate the use of tax fund is similar to US case of *Paschal V Secretary of Public Works*⁷⁶⁷⁶ where it was held that "a taxpayer's suit is enough to confer *locus standi* to a party where the act complained of directly involve the illegal disbursement of public fund derived from taxation."

5. Conclusion

Tax Evasion should be criminally and promptly punished to serve as deterrence to tax defaulters in defaulters. Defaulters must be adequately prosecuted for tax evasion, or the general public will not take taxation seriously; and tax criminality will be on the increase. Monetary penalties and criminal sanctions should be drastically increased in order to serve as deterrent measure to tax evasion. For instance, in the ominous provision of Section 92(1) of Companies Income Tax Act, failure by a company to comply with any of the provisions of the Companies Income Tax Act attracts fine of N200. Also, Failure, without sufficient cause, to attend in answer to notice or summons served on any person under the provisions of the Act, or having attended, failure to answer any question lawfully put to him.¹⁴⁹ The punishment for this offence is also a fine of N200 and imprisonment for six months in default of payment of the fine. These provisions are not enough to deter an offender under the deterrence theory of punishment and should be amended to reflect the global trend. Nigeria should borrow from UK and US where the maximum sentence for the S. 7201 tax evasion offence is five years imprisonment, while the maximum sentence for the S. 7206 offence is three years imprisonment.¹⁵⁰ In contrast, money laundering offences may result in a maximum sentence of 20

¹⁴⁶ United States Sentencing Commission, 'Quick Facts: Tax Fraud Offenses Fiscal Year 2019' (United States Sentencing Commission Datafiles 2019) <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Tax_Fraud_FY19.pdf> accessed 18th April 2021.

¹⁴⁷ US Department of Justice, 'Justice Manual 4-4.000 Criminal Tax Case Procedures' (Updated June 2020) <<https://www.justice.gov/jm/jm-6-4000-criminal-tax-case-procedures>> accessed 17th April 2021 at §6-4.010; see also, United States Sentencing Commission, *Guidelines Manual* (November 2018) §2T1.1

¹⁴⁸ B Samantha (n 548).

⁷⁶⁷⁶ 110 phil. 331.

¹⁴⁹ S. 71 CITA.

¹⁵⁰ 26 USC §§7201 & 7206.

years imprisonment.¹⁵¹ While, in the UK, sentences for tax evasion offences depend on the nature of the offence, including the actual or intended tax loss, the defendant's criminal history, and the presence of aggravating or mitigating factors warranting adjustment.¹⁵² A higher proportion of convicted tax evaders face imprisonment, with 65% receiving a custodial sentence.¹⁵³

Tax officials, including prosecutors should be trained in criminal and civil procedures. There is need to create department of tax investigation, different from the department of tax prosecution. Prosecution of tax offences in UK starts with high skilled investigation of the offence; gathering of evidence before possible prosecution. The separation of investigative and prosecutorial functions in UK leads to the creation of HMRC which was accompanied by the creation of the Revenue and Customs Prosecution Office (RCPO). In 2010, the RCPO was incorporated into the CPS and now responsible for bringing all tax evasion prosecutions in England and Wales. The separation of prosecution and investigation will ensure efficient fight of tax crime in Nigeria.

The wordings of the relevant tax should be simple, clear and intelligible for easier understanding. Words like failure, “without sufficient cause” is ambiguous and not definitive as to what constitute reasonable cause. It has become a question fact depending on the circumstance of every case. A taxpayer can hide under this provision to evade tax.

¹⁵¹ 18 USC §1956.

¹⁵² United States Sentencing Commission, *Guidelines Manual* (November 2018) §2T1.1-4.1.

¹⁵³ United States Sentencing Commission, 'Quick Facts: Tax Fraud Offenses Fiscal Year 2019' (United States Sentencing Commission Datafiles 2019) <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Tax_Fraud_FY19.pdf> accessed 18th April 2022.