

TAX CRIME IN NIGERIA: OFFENCES AND DEFENCES

Abstract*

The importance of tax payment is fundamental to the existence of every nation. Accordingly, the law has enshrined the mechanism that will ensure tax compliance. Tax offences and penalties are cohesive measures enshrined in the law to deter tax offenders. Notwithstanding the compliance measure, the tax crimes continue to inure with the authority firmly determined to prosecute the offence. The judicial process affords taxpayer opportunity to defend itself within the robust defences allowable in law; there could be instances where a tax payer may be a victim of arbitrariness of the tax authority. This paper seeks to evaluate the generality of tax offences and the defences allowable in Nigerian tax jurisprudence. The paper adopted doctrinal methodology. It reviewed both secondary and primary sources of laws like tax statutes, case laws and other legal text and journals. It found that a successful fight against tax crime begins with proper tax audit and investigation, an approach that would crystallise overwhelming evidence required to sustain the proof of elements of crime. Just like every other crime, prove of tax crime is also beyond reasonable doubt. Taxpayers have defences allowable in law that would aid them wriggle out of the liabilities of tax crime. Both the taxpayer and the tax authority will find this paper relevant. It affords the tax authority insight into the legal requirement of sustain a fierce battle against time crime. It would help the taxpayer maintain its ground against the arbitrariness of tax authority.

1.0 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.¹ 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.

1.1 Legal framework for Tax Audit and Investigation

1.2 Some tax laws specifically confer auditing power on tax authorities and some can be inferred from the wording of the statute. Section 43(4)² 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 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 records³The 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

*Dr. Nnaemeka B. Amadi, Senior Lecturer Alex Ekwueme Federal University, Ndufu-Alike, Ikwo, Ebonyi State, 08032666969, amadinb@gmail.com

¹C O Olaoyea 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.

²FIRS (EStablisment Act) 2007.

³GE 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.

to enforcing compliance with the provisions of this Act⁴ According to Section 23⁵, 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.⁶ 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.⁷ 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.⁸ 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.⁹

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 Board¹⁰ 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.¹¹

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.

2.1 Tax Offences and Penalties

Since Nigeria tax statutes provides no legislative definition of tax offences and penalties, a working definition of tax offences is given as the action by the taxpayer to evade tax i.e. to get away illegally with his legal obligation to pay tax, file incorrect returns by omitting or underestimation of one's income constitutes tax offences and is punishable by either fine or payment of double of the amount which has been undercharged.¹² The punishment or sanction imposed against tax defaulters is referred to as Tax Penalty. The penalty could take the form of civil sanction or criminal sanction.¹³

⁴FIRES Act, 2007, section 8

⁵Ibid.

⁶Ibid, section 35 (1).

⁷Ibid, section 35(2).

⁸CITA, section 60(4).

⁹Ibid, see section 66.

¹⁰Ibid, section 39(1).

¹¹Ibid, 39(2).

¹²FIRS: Training lecture note for inspector of taxes (Model 11 taxation in law and administration P. 56).

¹³See part XIII of Company Income Tax Act (CITA), Cap C21, LFN, 2004, Part XI Personal Income Tax Act (PITA) ,Cap. P8, LFN, 2004.

Civil sanctions are those fines that are pecuniary; and include the right of revenue authority to sell the goods of a tax defaulter or chattel, bound and other security in order to realize the amount owed.¹⁴ Criminal sanctions include imprisonment, with or without option of fine, imposed by a competent court upon the conviction of a tax defaulter.

2.1.1 Examples of Civil Sanction:

Section 4 of Federal Inland Revenue Service (Establishment) Act provides as follows:

Call for Return of books, documents and information

- 1) For the purpose of obtaining information in respect of any person, body corporate or organisation, the service may give notice to that person, body corporate or organisation requiring him within the time specified by the notice to :
 - a) Complete and deliver to the service any return specified in such notice,
 - b) Appear personally before an officer of the service for the examination with respect to any matter relating to such profit or income;
 - c) Produce or cause to be produced for examination , books documents and other information at the place and time stated in the notice which may be from day to day for such period as the service may deem necessary
 - d) Give orally or in writing any other information including a notice or address specified in such notice.
- 2) For the purpose of paragraph (a) to (d) of subsection (1), the time specified on such notice shall not be less than 7 days from the date of such service which shall not be served except by an officer of the service not below the rank of Inspector of Taxes or its equivalent, who may act in any of the cases stipulated in paragraph (a) to (d) of subsection (1) with giving any of the required notices set out in this section.
- 3) A person who contravene the provisions of this section is, in respect of each offence, liable on conviction to a time equivalent to 100 percent of the amount of tax liable.

Call for Further Returns and Payment of Tax Due

- 1) The service may give notice in writing to any person it considers necessary requiring such person to deliver within a reasonable time specified in such notice, fuller or further returns in respect of any matter relating to the function of the service under this Act.
- 2) Where a tax is not paid, when it falls due under any enactment, by any person from it is due, whether or not the payment of that tax has been secured by a bond or otherwise, it shall be paid on demand by the service either that person personally or by delivering demand in writing to his place of abode or business. If it is not paid on demand, the person in default shall, in condition to the 100 percent of the tax due and payable, also be liable a penalty equal to the amount of tax due and payable.

2.1.2 Examples of Criminal Sanctions

False Statement and Returns. The law provides as follow:¹⁵

- 1) Any person other than a company who:
 - a) For the purpose of obtaining any deduction, set-off, relief or repayment in

¹⁴PITA, Section 108(4).

¹⁵CITA (n 105) section 93.

respect of tax for any company or who in any return account or particularly made or furnished with reference to tax, knowingly makes any false statement or false representation, or

- b) Aids, abets, assist, counsels, incites or induce any other person –
 - i) To make or deliver any false return or statement under this Act; or
 - ii) To keep or prepare any false account or particulars concerning any profits on which tax is payable under this Act; or
 - iii) Unlawfully refuse or neglect to pay tax

Shall be guilty of an offence and shall be liable upon conviction to a fine of N,1000 or to imprisonment for five years, or both such and imprisonment.

FIRS (Establishment Act) ¹⁶ provides that any person who being obliged to deduct any tax under this Act or the laws listed in the first schedule to this Act, but fails to deduct, or have failed to pay to the service within 30 days from the date the tax was deducted or the time the duty to deduct arose, commits an offence and shall, upon conviction be liable to the tax withheld or not remitted in addition to penalty of percent of the tax withheld or not remitted per annum and interest of the prevailing Central Bank of Nigeria rate and imprisonment or imprisonment not more than 3 years. Tax offences are also created in various tax enactments. Under the Personal Income Tax Act, where the tax authority is satisfied that there is reasonable ground for suspecting that an offence involving any form of total or partial non-disclosure of information, or any irregularity or an offence in connection with or in relation to tax has been committed; and is of the opinion that evidence of the offence or irregularity is to be found in the premises, the registered office, or any other office or place of management of the trade, vocation, profession or business or in the residence of the principal officer, factor, agent or representative of the individual, the relevant tax authority may authorize any of its officers to enter, if necessary by force to conduct a search as such. In doing this a search warrant must be served on the person in possession of such premises or office and where he refuses to cooperate or does anything which amounts to failure to co-operate, or engages in act or acts resulting in abuse, physical assault or similar misbehaviour shall be guilty of an offence and liable on conviction to a fine of N5,000 or to imprisonment for a term not exceeding 3 months or both. ¹⁷

Again, a person who for the purpose of obtaining a Tax Clearance Certificate, gives incorrect information in relation to any matter or thing affecting his liability to tax; or obtains Tax Clearance Certificate through misrepresentation, forgery or falsification shall be guilty of an offence and liable on conviction to a fine of N500 plus twice the tax payable by him or to imprisonment for three years or to both.

In Part XII of the Companies Income Tax Act ¹⁸

a) The contravention or failure by a company to comply with any of the provisions of the Companies Income Tax Act ¹⁹ made under attracts a fine of N200 and where the offence is the failure to furnish a statement or information or to keep records required, a further sum of N40 for each and every day during which such failure continues. In the event of default of payment of the above fine, then to imprisonment for six months. This penalty is also applicable for an offence or contravention of any of the provisions of the Act for which no other penalty is specifically provided. ²⁰

¹⁶Part VI, 2007.

¹⁷PITA (n 105) Section 52 (7).

¹⁸CITA (n 105).

¹⁹See s. 92(1) (n 105).

²⁰The rationale behind this Omnibus penalty section is to bring every imagined offence within the Act which had not been envisaged by the Legislature. This omnibus provision however falls short of the requirement of certainty and predictability of law which demands that an act is only a crime if at the time of its commission it is illegal and punishment clearly provided against it. See Section 36(8) of the constitution of the Federal Republic of Nigeria, 1999.

b) Failure to comply with the requirements of a notice served on any person under the provisions of the Act is punishable.²¹ Upon conviction, an offender under this provision shall be fined the sum of N200 and where the offence is the failure to furnish a statement or information or to keep records required, a further sum of N40 for each and every day during which such failure continues. In default of payment then to imprisonment for six months²²

c) 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.²³ The punishment for this offence is also a fine of N200 and imprisonment for six months in default of payment of the fine.

d) Knowingly making false statement or false representation for the purpose of obtaining any deduction, set-off, relief or repayment in respect of any company is punishable.²⁴ This offence is punishable with a fine of N1, 000 or to imprisonment for five years or to both.

Aiding, abetting, assisting, counseling, inciting or inducing any person to make or deliver any false return or statement under any Act, or to keep or prepare false accounts or particulars concerning any profits on which tax is payable under the Act, or unlawfully refuse to pay tax is punishable.²⁵

This offence also attracts a fine of N1, 000 or imprisonment for five years or both.

f) Any official of the Service or any of its employees shall also be guilty of an offence by:

- i) Demanding from any company an amount in excess of the authorised assessment of the tax, or
- ii) Withholding for his own use or otherwise any portion of the amount of tax collected; or
- iii) Rendering a false return, whether orally or in writing of the amount of tax collected or received by him;
- iv) Defrauding any person, embezzling any money or otherwise using his position as to deal wrongfully with the Board; or
- v) Collecting or attempting to collect the tax under the Act without being authorised under the Act to do so.

The foregoing offences and penalties are those provided under Part XII of the Companies Income Tax Act.²⁶ These include the following:

(a) In terms of secrecy and confidentiality of staff employed in the administration of the Companies Income Tax, any wrong communication or attempt to communicate information contained in documents to un-authorised persons is an offence. And since no penalty in that regard has been provided by the section, such an offender shall on conviction be liable to a fine of N200 and in event of default in payment of such fine, shall be sentenced to a six months term of imprisonment in accordance with section 71 (1) of the Companies Income Tax Act.²⁷

(b) It is also an offence for any person to obstruct any officer of the Board in the exercise of his (the officer's) functions under the Act or to use violence on such officer. A first offender in this regard shall on conviction be sentenced to six months imprisonment or a fine of not less than N2000 or both while in the case of a second offender or subsequent offence and in case where violence is

²¹ CITA (n 105) S. 71(2) (b).

²² CITA. (n 105) S. 73 (1) (b).

²³ CITA, S. 71.

²⁴ CITA, S. 5(5).

²⁵ CITA, S. 5(5).

²⁶ CITA, S. 7(5).

²⁷ PPTA, (n 105).

used on any such officer, imprisonment for six months without the option of a fine.²⁸

Certain criminal offences have been listed under the Petroleum Profits Tax Act,²⁹ the breach of which makes a company liable to stated penalties. These offences and penalties are as follows:

(a) Failure to comply with the requirements of notice served on a company under the Act or to prepare and deliver accounts.

This offence on conviction attracts a penalty of N10,000 and a further N2,000 for every day during which such offence or failure continues. In default of payment, the person responsible shall be liable to six months imprisonment.³⁰

(b) Making false statements and returns for the purpose of obtaining any deductions, rebate, reduction or repayment in respect of tax or aiding, and abating the same attracts a fine of N1,000 plus triple the amount of tax for which the company is liable under the Petroleum Profits Tax Act or to imprisonment for six months or both.³¹

(c) Corruption and dishonesty on the part of the staff of the Board of Inland Revenue makes them liable to a fine of N600 or to imprisonment for three years or both.³²

Recently, tax offences and penalties have played a role in our political climate. In the fight against tax evasion and corruption, it has often been thought that taxation would be used to weed out elective offices persons who are deficient in their tax payments. Electoral rules have accordingly made payment of tax a precondition for qualification to stand for elective offices. Unfortunately, however, this desire goal has not been realizable in reality. A review of case law authorities have shown that rarely has elections been annulled on the ground of failure to pay tax as and when due. The only known case within the knowledge of the writer of where an election was annulled (and a new one ordered) on the ground that tax has not been paid as and when due is *Alhaji Mohammed Nasir Idris (UNCP) v. Alhaji Mohammed Saleh & ors*³³.

Aside from this case, most law reports are replete with cases where the call for such annulment was refused. In *Mohammed Hassan Rimi v. INEC & anor*³⁴, for instance, it was held that where failure to pay tax is one of the grounds which make an election to be questionable, the requirements of the law to be fulfilled are as follows –

- (i) That the person earned a taxable income during the period in question;
- (ii) That there was a proper assessment of the tax covering the period;
- (iii) That notice of assessment was served on the person to pay his tax and he defaulted; and that the person failed to pay tax assessed within two months after the service of notice of assessment.

3.1 Liabilities to Tax offences

3.1.1 Personal Liabilities

Section 98 of PITA provides that:

The institution of proceedings for the imposition of a penalty, fine or term of imprisonment under this Act shall not relieve a person from liability to payment of any tax for which he is or may become liable.

²⁸PPTA, S. 48(2).

²⁹PPTA, S. 49.

³⁰PPTA, S. 51.

³¹PPTA, S. 49.

³²PPTA, S. 48(2)(B). The foregoing offences and penalties have been re-enacted in part VI of Federal Inland Revenue Service (Establishment) Act, 2007.

³³[1960 – 2010] 1 NTLR 421 at 424 per Ogebe, JCA (as he then was).

³⁴[1960 – 2010] 1 NTLR 155 at 180. See also *Lanto v. Wowo* [1999] 7 NWLR (Pt. 610) 227, *Ikwuomola v. Ige* [1992] 4 NWLR (Pt. 236) 511, *FBIR v. Rezcallah & Sons* [1962] 1 SCNLR 1; [1962] 1 ANLR 1.

The provisions of this Part of this Act shall not affect any criminal proceeding under any other enactment.³⁵ In other words, A taxpayer could liable to offences under the income tax or other offences outside the income tax.

3.1.2 Employer's Liability

Section 81 of PITA provides that income tax chargeable on an employee shall be recoverable from any emolument paid, or from any payment made on account of the emolument paid by the employer to the employee. The employer shall register with the relevant tax authority for the purpose of deducting income tax from the employees with or without formal notification or direction by the relevant tax authority³⁶. An employer who fails or refuses to register with the relevant tax authority commits an offence punishable under the Act.³⁷

The employer shall make two certificates of tax deduction; issues one to the employee and send one send one to tax authority.³⁸

Although, it is only employer that can collect and remits PAYE to tax authority on behalf of its workers, it is only the worker who can object to PAYE assessment notice from the tax authority, and not the employer. In *D.S.A. Agricultural Machinery Manufacturing Company Limited v. Lagos State Internal Revenue Board*³⁹, the Court of Appeal (Lagos Division), per Salami, JCA, held thus.

A company is not the actual person liable to tax assessment of PAYE or Withholding Tax Assessment and so it cannot protest against an assessment of tax on PAYE. It is merely an agent of collection of these taxes for the Tax Authority.

Similarly, in *Lagos State Board of Internal Revenue v. Jenkins Investment Limited*,⁴⁰ the High Court of Lagos State, per Obadina, J held thus:

The employer is not the party assessed to tax under the PAYE dispensation and cannot therefore object to the assessment. The employer as a company is liable to assessment under the Companies Income Act Tax and is equally vested with the right to object and appeal any tax assessment. The Assessment in issues is the Personal Income Tax of its employees which can be objected or appealed against by the respective employees.

And in *Westoil Petroleum Services Limited & Anor v. Lagos State Board of Internal Revenue & Anor*,⁴¹ the High Court of Lagos State, per Obadina, J held thus:

The employer has no locus to complain on behalf of its employees on alleged non-compliance with PITA. The employees are the ones to complain.

3.1.3 Corporate liabilities

Any person who contravenes any provisions of this Act for which no specific penalty was provided, commits an offence and shall be liable on conviction to a fine not exceeding N50,000.00 or imprisonment for a term of imprisonment not exceeding six months or to both fine and imprisonment.⁴²

Where an offence under this Act is committed by a body corporate or firm or other association of individuals-

(a) every director, manager, secretary or other similar officer of the body corporate;

³⁵PITA section 100.

³⁶Paragraph 1 of PAYE Regulations.

³⁷Paragraph 2(2) of the Regulations.

³⁸ See Paragraph 5 of the Regulations.

³⁹(2013) 11 TLRN 115 at 117, ratio 1

⁴⁰(2013) 10 TLRN 148 at 150 – 151, ratio 8

⁴¹(2012) 6 TLRN 48 at 51, ratio 4

⁴²FIRSEA, section 49 (10).

- (b) every partner or officer of the firm;
 - (c) every person concerned in the management of the affairs of the association; or
 - (d) every person who was purporting to act in any capacity,
- commits an offence and shall be liable to be proceeded against and punished for the offence in like manner as if he had himself committed the offence, unless he proves that the act or omission constituting the offence took place without his knowledge, consent or connivance.

3.1.4 *Mens Rea* under Income Tax Liabilities

Mens rea is a technical term, generally taken to mean some blame worthy mental condition, whether constituted by intention or knowledge or otherwise, the absence of which on any particular occasion negates the punishment of a crime.⁴⁴ In other words, the act becomes criminal when the actor does it with a guilty mind. The question that arises in this connection is whether the general rule that *mens rea* applies to all criminal offences; would it be applicable in holding a person criminally liable for offences committed under the Income Tax Acts? In determining whether *mens rea* is applicable in Nigerian Tax Law, one may briefly examine the doctrine. In a case from Singapore, *Lim Chin Aik v. R*⁴⁵, the Privy Council. accepted as correct what has for long been a classic statement of the doctrine, that of WRIGHT J., in *Sherras v. de Rutzen*⁴⁶

There is a presumption that *mens rea*, or evil intention or knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence, or by the subject matter with which it deals, and both must be considered.

The presumption of *mens rea* received the support of the House of Lords in *Sweet v. Parsley*.⁴⁷ Dealing with cases in which a section of a statute is silent as to *mens rea* LORD REID said:

In such cases there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a section is silent as to *mens rea* there is a presumption that, in order to give effect to the will of Parliament we must read in words appropriate to require *mens rea*.

The presumption of *mens rea* is essentially a problem of statutory interpretation -“In order to determine whether *mens rea*, that is to say a guilty mind or intention is an essential element of the offence charged, it is necessary to look at the object and terms of the law that creates that offence.”⁴⁸ In the Nigerian Tax Statutes words such as “wilful”,⁴⁹ “without sufficient cause” “knowingly”,⁵⁰ and “unlawfully”,⁵¹ are used to qualify the conduct forbidden by law and since qualifying words such as these import the need for *mens rea* it may be safely said that *mens rea* is an essential ingredient of a tax offence in Nigeria. The word “knowingly”, for instance, means that the prosecution must prove guilty knowledge and that wherever the word is used in connection with any term denoting false

⁴³FIRSEA, 49 (2).

⁴⁴TA Aguda, *Principles Of Criminal Liability in Nigeria*, (Ibadan University Press, 1965)

⁴⁵(1963) A.C. 160 P.c.

⁴⁶(1895) 1 Q.B. 918.

⁴⁷(1970) A.C. 132, 148; [1969] 1 All ER 347.

⁴⁸Per Foster Sutton P, in *Arnoffa v. R.* (1952) 14 W.A.C.A. 238. See also *R. v. Efana* (1927) 8 N.L.R. 81 at 85 per Webber 3 -‘But in all enactments, the question whether the absence of *mens rea* or the positive proof of bona fides is an excuse or defence to the acts prohibited is a question of the construction of each particular enactment’.

⁴⁹CITA, S 94(2). PITA, S. 31(1).

⁵⁰CITA, S.94 (1), PITA, S.56(1) (a).

⁵¹CITA, S.94 (1) (i), (iii), S56 CITA, PITA, S.56 (1) (b) (iii).

statement or false representation, it implies knowledge of the character of the thing falsified.⁵² The word “wilfully” on the other hand has been the subject of differing interpretation in England⁵³ and even in Nigeria there is not judicial consensus as to its meaning.

In *Clegg v. C. O.P*⁵⁴ the word “wilfully” was said to govern the whole definition of the offence and thus to require knowledge of all facts constituting it. But a somewhat different view of the word was taken in *Re D. P. P (Western Nigeria) v. Associated Newspapers of Nigeria* where the court said:

“wilfully” meant deliberately. The word “unlawfully” is however simpler and suggests a deliberate attempt to go against the provisions of the law. It should be noted that the meaning of these words are gleaned from the general criminal statutes and judicial decisions, since their meaning in very clear cases of tax evasion has not yet arisen. Although, whenever it does arise it is doubtful whether a different meaning to these word would be given. The other problem which arises in this respect is that concerning the criminal liability of corporations under the Companies Income Tax Act.

It is clear that a corporation can be made criminally liable by the express words of a particular statute. Section 92 of CITA2004 contemplates the possibility of the commission of one of the offences it creates by a company and every other person without sufficient cause. What is not clear is the meaning of section 94 which provides that: “Any person other than a Company”. Are we to assume that offences listed under this section cannot be committed by a company? If so why does it appear in the Companies Income Tax Act? Does any person refer to officers of the company?, but even then, when they act for the company such acts are those of the company or does it simply acknowledge in this section that the punishments are reserved for persons other than a company because a company cannot be sent to prison?, but at least it can pay a fine. Or does it simply want to deter the use of the corporate veil to commit offences by officers of the company?⁵⁶ The old common law rule was that corporate criminal liability was not possible. The reasons for this were several and in the case of *R .v. Anglo—Nigerian flit Mines Ltd., Berkeley, J.*⁵⁷ gave one, that:

“There was no one who could be brought before the court and if necessary placed in the dock”.

There was also the objection the a corporation could not be said to have a mind capable of being guilt and therefore could not be convicted of any offence requiring any type of *mens rea* and there was the further point that a corporation could not be sent to prison.⁵⁸ This old view however broke down with the increasing proliferation of corporations and now, the states of mind of the agents of the corporation are held to be attributable to the corporation, so that the corporation itself could be said to have committed the offences with the requisite mental element.⁵⁹

There is therefore no special legal reason why a corporation should not be convicted under section 94 of the Companies Income Tax Act of 2004. Practically every offence in the Act begins with the word:

⁵²Criminal Code, S. 1, Offences in the Penal Code are usually defined in terms of some mental Element Gledhill. The Penal Codes of Northern Nigeria and the Sudan pp.7 -14; *Dosunmu v. Controller of Customs* (1956) L.L.R. 41.

⁵³E.g. in *Young hunband v. Luftig* (1949) 2 K.B. 354 the word wilfully in a statute was said to import *mens rea*. See also *Wilson v. Inyang* (1951) 2 K.B. 799. But the opposite view of “wilfully” was taken in *Horton v. Gwynne* (1921) 2 KB. 661; *Cotteril v. Penn* (1936) 1 KB. 53.

⁵⁴(1949) 12 W.A.C.A. 379.

⁵⁵C Okonkwo and E Naish, *Nigerian Criminal Law in Nigeria*, (Ibadan: Spectrum, 2012) pp. 124 -127.

⁵⁶*R. v.LC.R. Haulage*(1944)K.B.551;*Moore v.Bresier*(1944)A11 E.R.515.

⁵⁷(1930) 10 N.L.R. 69.

⁵⁸MT Abulrazaq (n 65).

⁵⁹See Partll,S.108,T.M.A.1970.

“Any person ...”. The meaning of “person” as defined in section 105 includes a company or body of persons. The problem with section 74 is that it specifically excludes a corporation for liability for offences listed under it, probably because it was repugnant to its subject matter or context, to include a corporation because the punishment included imprisonment.⁶⁰ The way to get round this in order to inflict imprisonment on persons responsible for the company was to exclude the company from liability on the assumption, that it could not possess the requisite *mens rea* needed to commit these offences.⁶¹ The argument that *mens rea* cannot be attributed to a corporation was rejected in, *Attorney-General (Eastern Region) v Amalgamated Press*,⁶² where a corporation was charged for publishing a statement which it knew it knew was false.⁶³ In convicting the accused company, Ainley C. J. said:

I make no doubt that a corporation can have knowledge to the falsity or otherwise of that which is published in a newspaper, and a corporation, through its agents, is clearly capable of publishing newspapers. I cannot see, therefore, why a corporation is incapable of publishing in a newspaper that which the corporation knows or has reason to know is false.

The same reasoning could be applied in arguing that a corporation has a “will” for the purposes of section 94 of the Companies Income Tax Act. Since a corporation has no physical existence this “will” must be found in some human agent. However, the will of every servant or agent of the company cannot be regarded as the company's will. As Denning L. J. has observed.⁶⁴

A company may in many ways be likened to human body. It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.

Clearly then some officials of the company are identified with the company or are the company and not merely agents of it.⁶⁵ Each offence under section 94 would have to be considered on its merits when deciding whether it would be repugnant to its subject or context to convict a corporation. It seems that major difficulty involved in such convictions is the physical impossibility of imposing certain punishments on corporations. The punishment in section 94 are fines imprisonment and so a company can be fined for any transgression against it, to imprison “any person” being an official of and acting for a company is to make nonsense of the doctrine of corporate personality. An insight into the various offences for which punishment are provided under the tax laws of different countries would reveal that they differ from country to country as regards the tax payers' criminal liability for such offences is concerned.⁶⁶

⁶⁰*R. v. Opara* (1943) 9 W.A.C.A. 70.

⁶¹*D.P.P. v. Kent and Sussex Contractors* (1944) 1 K.B. 146, *Mendilas and Kareberis Ltd. v. I.Q.P.* (1958) F.S.C. 20.

⁶²(1956-57) 1 E.R.L.R. 12.

⁶³*Eastern Region Newspaper Law* (1955); S.14(10).

⁶⁴*H.L. Bolton (Engineering) Co. Ltd. v. T. J. Graham and Sons Ltd.* (1957) 1 Q. B. 159 at 1972; (1956) 3 All E.R. at 630.

⁶⁵LC Gower, *Modern Company Law* (Stevens 4th Ed. 1979) p.208; *Tesco Supermarkets Ltd. v. Natrass* (1972) AC. 153 at P.170, (1971) 2 All E.R. 127 at 131-132.

⁶⁶KD Gaur, *Civil and Criminal Sanctions Under the Income Tax Act*. 1979, 3.11.1. Vol. 21:4 p.485.

In the United Kingdom, New Zealand and Australia, the tax payers' liability in regard to the failure to comply with the statutory duties under the taxing statute is absolute. Words like “wilfully”, “intentionally” or “knowingly” are not found in such provisions. The courts there neither consider the accused's' state of mind when trying such offences as they normally do in criminal cases, nor do they include the concept of *mens rea* in deciding such cases. In the United States and Canada⁶⁷ on the other hand, the tax payers' criminal liability is not absolute. A person will not be held guilty of failure to pay tax unless the failure is wilful or with a guilty intent, In other words, a person would be exonerated from statutory liability to comply with specific directions under the Act, if there is no requisite *mens rea* to such offences. In India, the legislature adopted middle a course which is an approach midway between what is followed in the United Kingdom, New Zealand and Australia on the one hand, and the United States and Canada on the other, in regard to a person's criminality liability under the provisions of the Income Tax Act, neither is absolute liability imposed, nor is a search made for the accused's' evil state of mind. A person can plead “reasonable cause or excuse” as a defence to a charge of failure to discharge his statutory obligations under the Act. This defence is also available

4.1 Defences to Tax Liabilities

4.1.1 Sufficient Cause

The Nigerian Tax Statutes make mention of “sufficient cause” and “reasonable excuse” as possible defences.⁶⁸ Despite the use of different descriptions in the Act they all mean such a cause as would prompt a man of ordinary intelligence to act reasonably in failing to comply with his statutory obligations. They may also be interpreted on the same lines as the test applicable in the law of tort as follows: “If the tax payer exercised ordinary care and prudence and was nevertheless unable to file the return in the prescribed time, then the delay is due to reasonable cause”.⁶⁹

The question whether the circumstances justify the defence of “sufficient cause” or “reasonable excuse” in a particular case is entirely a question of fact.⁷⁰ The case of *Handley Motor Company Inc. v. United States*⁷¹ decided by the United States Court of Claims, appears to be relevant to show when the defence of reasonable cause and excuse could be sustained. The Commissioner of Inland Revenue assessed a penalty,⁷² because of the appellant's failure to file a return with respect to the purchase of certain automobile from Germany. The question before the court was whether the plaintiffs failure to file the return was due to reasonable cause, and not due to wilful neglect. The court while rejecting the plaintiffs defence, that he did not file a return because he believed in good faith that no tax was due, stated: *Plaintiff has not shown by a preponderance of the evidence that it exercised ordinary business care and prudence in connection with its failure to file an excise tax return.*

The burden of proof is on the tax payer to prove reasonable cause for failure to comply with the statutory obligations under the Act.⁷³

4.1.2 Reasonable Excuse

Where a person has a reasonable excuse for not doing something required to be done he is deemed not to have failed to do it if he did it within a reasonable time after the excuse had ceased.⁷⁴ The tax authorities take a very restrictive view of reasonable excuse. They say, 'in most cases it is unlikely that illness, absence or domestic problems would persist at such a level throughout the period for making

⁶⁷J Potvin, 'Tax Evasion in Canada,' *Canadian Tax Journal* [1977] Vol. 25,p.240.

⁶⁸Sections 94(ee2) (b), 95 (1), P.I.T.A; Gaur, K.D. (1979), Op cit pp. 486, 487.

⁶⁹RE Paul. and Marten, *Law of Federal Income Tax*, (1934) Sec. 48, p.457; See also Winfield and Jolowjcz on Tort. (London: Sweet & Maxwell ,2020).

⁷⁰*Orient Investment and Finance Co. v. Commissioner of Internal Revenue*, 1 66 F (2nd) 601, 604 (1948).

⁷¹338F (2nd) 361 (1965); *Piak v. Commissioner* 203F 2(d), 358(6Gr) (1953).

⁷²Section 6651 Internal Revenue Code, 1954.

⁷³*Hatfried Inc. v. Commissioner* I 62F 2nd 623 (CCA 3rd 1948), *Paymer v. commissioner*, 150 F 2nd 334 (CCA 2nd 1945).

⁷⁴R W, Maas, 'Guide to Taxpayers Rights and HMRC Powers', 2009, Tottel Publishing, Pg 283, 284, 285.

payments and delivering tax returns and, even if the difficulties were at their worst at the crucial time towards the end of the due dates in respect of those obligations, then the tax payer should still be able to comply with their statutory duties within a reasonable time after this. For an illness to be treated as a reasonable excuse it must generally be so serious that it prevented the tax payer from dealing with their tax affairs before the deadline and from that date to the time the payment(s) or completed return(s) were actually sent in. Certain circumstance which may justify the defence of reasonable excuse include, coma, major heart attack, stroke, any serious mental or life-threatening illness.⁷⁵

If an illness involves a lengthy stay in hospital or convalescence the customer is expected to have made arrangements for completing and sending in any payments due, completing self- assessment or company tax returns due. If the excuse is the serious illness of a close relative or partner it may be accepted as a reasonable excuse only if the situation took up a great deal of the taxpayer's time and attention during the period from the various deadlines to the date the year completed return(s) was sent, and steps had already been taken to have the payment or return ready on time.'

Reasonable excuse is an important concept in relation to the system of penalties and has been considered on many occasions. According to Abdulrazaq,⁷⁶ Some of the things that may be held by the tax authorities to constitute a 'reasonable excuse' include:

The relevant tax authority not telling the company that it could estimate its figures when it phoned to explain that problem with a new computer prevented it filing its return on time; delay resulting from the installation of a computer and Computer malfunction etc. The excuses, of course, must depend on the circumstance of its own facts. A thing that is reasonable in one case is not necessarily so in another where the factual matrix is different. Nevertheless, the above list gives some guidance as to the sort of things that the relevant tax authority or the Tax Appeal Tribunal might consider to constitute a reasonable excuse. The following issues may also be used as a defence:

4.1.3 Error as to Date

A delay in filing due to the onerous recording of an extended date⁷⁷ or due to ignorance of the due date as clearly stated in the statutes is not a reasonable cause excusing the delay. However reasonable cause has been held to exist where ignorance of the proper due date was caused by a more complex situation such as the introduction of a short tax year by the loss of an exempt status.⁷⁸

4.1.4 Error by Agents and Lack of Assistance

The duty to file a return must be exercised by the individual tax payer or corporate officer personally and, for the purpose of showing reasonable cause may not be delegated to an employee, unless the tax payer is physically incapacitated⁷⁹ A claim that the delay has been due to the illness of employees or insufficient clerical assistance, has been rejected as reasonable cause. And when tax payers have filed late returns with due aid of outside assistance called in after the due date of the return, it is reasoned that prudence required an earlier call upon that assistance. Although the unavailability of employees for the preparation of a return does not constitute reasonable cause, failure of officers to receive prepared forms mailed for signature is a sufficient cause where they were travelling around doing field work.

4.1.5 Injunction

Obtaining an injunction against the collection of the tax prior to the due date constitutes reasonable cause for not filing, provided the return is filed prior to the expiration of the injunction. The issuance of the writ gives ample cause for belief that the requirement of filing is improper It is however

⁷⁵ EL Gordon EL, 'Income Tax Penalties', 1950, *Tax Law Review* Vol.5 pp.171 - 180.

⁷⁶ MT Abdulrazaq, (n 6) pg 102- 103.

⁷⁷ *American Milk Products Corp. v. United States*, 41 F 2d 966 (Ct. CI. 1 930).

⁷⁸ *The Economy Savings and Loan Co. v. Commissioner*, 158 F2d 472 (C.C.A. 6th 1946).

⁷⁹ *BF Irvine*, 10 T.C. 1031 (1948). 174 FF 2d 388 (C.C.A. 4th 1949).

doubtful whether reasonable cause exists when the assets of the taxable entity are all tied up in litigation and are not held by the tax payer.

4.1.6 Error of Law

The case of *Dayton Bronze Bearing Co. v. Gilligan*,⁸⁰ held that an honest mistake constitutes reasonable cause, and went on to state that, while seeking the advice of counsel would tend to show good faith, it was insufficient by itself to constitute reasonable cause. The case may be cited for the proposition that a tax payer who has relied upon an erroneous opinion of counsel that a return need not be filed, has proved the existence of reasonable cause. A tax payer who fails to file a return in the belief that his income was insufficient to require it⁸¹ or that a statutory provision is inapplicable, may not rest upon a mere belief, however strongly held, but must demonstrate a reasonable basis for that belief.

4.1.7 Expert Advice

It may be argued that the precautions required by a prudent man have been satisfied when a tax payer consults a legal practitioner, accountant or tax consultant or a Revenue Officer authorized to advise on tax matters, and proffers all the information he should reasonably know is relevant or which the expert requests. A tax payer is not expected to call for detailed opinions from counsel for he may not even be aware that the issues exist. For similar reasons he cannot be expected to tender all the relevant information, the expert who is aware of its significance should call for the relevant facts. The case of *Fides, A. G. v. Commissioner*⁸² introduced a new concept. The court held that a prudent person would not rely upon a "subjective opinion of counsel. It may be supposed that a subjective opinion is one arrived at by interpreting the bare language of the statute without checking the regulations and cases. The court goes on to say that it does not matter whether the opinion is well founded or not, which may be taken to mean that the reasonableness of the opinion is immaterial. Reliance upon expert advice has been held not to constitute reasonable cause for delinquent filing where the law on the point at issue is very clear.⁸³ Since it is possible for an expert to err even on settled matters, the decisions do not appear correct in principle and may be justified only as an assurance against collusion. It must be strongly noted that the defence of reasonable cause includes the fact that there is no element of fraud, and the following errors are likely to be accepted as reasonable excuse when they occur in the returns.⁸⁴ Frequently, deficiencies are caused by the tax payer's reliance upon inadequate or poorly kept systems of accounting from which income cannot be determined, or which may not support the tax payer's return years later when he has forgotten the facts which he used to supplement his records. Or errors may be caused by inexperienced book keepers, or by misunderstandings which arise when the individual recording the transaction does not have all the facts and makes an erroneous assumption, by an unsuccessful attempt to straighten out a badly kept set of book, or by accident. Errors in are turn due to such causes negative fraud, however numerous or complicated the necessary adjustments, unless the errors are so large that the tax payer must have realized that his income was under-reported by the obvious comparison with his expenditures and change in net worth, by the variance with known income, or unless the accounting system itself or the claimed carelessness appears to be an elaborate artifice to understate income.

One of the factors considered in determining that the tax payer has acted erroneously rather than with fraudulent intent, is the errors in the return in favour of the Revenue.⁸⁵ Although this may not

⁸⁰281 709 (C.C.A. 6th 1922).

⁸¹*P Dougherty Co.*, 331 U.S.838 (1947).

⁸²*Credit Bureau of Greater New York v. Commissioner* 162 F. 2nd 7 (C.C.A. 2nd 1947).

⁸³137 F. 2nd 731 (C.C.A.4th 1943).

⁸⁴*United States v. Archer*, 174 F. 2nd 353 (C.C.A. 1st 1949).

sometimes be accepted as an unequivocal disproof of fraud as there is possibility of planting such errors, or even that a tax payer, making false entry with fraudulent intent may accidentally err in favour of the Revenue on another entry. Certain errors in returns are fraudulent by their very nature. Examples are the taking of false personal exemptions by individuals, the deduction of expenses neither incurred nor paid by a corporations, concealing under a false label expenses deducted because their deductibility was doubtful, the payment of salaries without the performance of services⁸⁶ and the deduction by a corporation of the losses incurred by, and personal expenses of, its officer, stockholders. A failure to record a substantial number of entries of transactions yielding income in the tax payer's customary records tends to prove fraud where such income has not been reported on the tax return. On the other hand, the revelation of all the facts on the tax payer's books where they may be audited easily by a revenue agent tends to disprove fraud if the failure to report them may be explained by some error such as accruing items during the wrong year. Withholding some bank accounts from the person requested to make up the tax payer's tax return, keeping bank accounts in the name of others⁸⁷ and making sales under assumed names, also tend to prove a fraudulent intent.

4.1.8 Burden of Proof

Generally, tax evasion being a criminal offence has always made the courts require that it be proved beyond reasonable doubt like other offences of a criminal nature.⁸⁸ This principle was restated in the case of *R. v. Basil Ranger Lawrence*,⁸⁹ where Lord Atkin said: "... it has to be remembered that it is an essential principle of our criminal law that a criminal charge has got to be established by the prosecution beyond reasonable doubt ...". The burden of proof lies on the tax authority as stated in *Hochstrasser v. Mayes*,⁹⁰ where Viscount Simonds said: "It is for the crown, seeking to tax the subject to prove that the tax is exigible, not for the subject to prove that his case falls within exceptions which are not expressed in the statute but arbitrarily inferred from it."

The burden may however change in certain circumstances as illustrated by the case of *John Ihekweba v. Commissioner of Internal Revenue*,⁹¹ where the plaintiff, in the absence of detailed information as to his annual income was assessed for tax by the defendant. It was held that the burden of proving that the assessment was excessive under sections 17(3) and 18 of the Eastern Nigeria Finance Law No.1 of 1956 was on the plaintiff. As Pennycuik J also held in *Hudson v. Humblcs*: 'The taxpayer knows the full facts, and the Revenue does not. In the nature of things, it must often be the case that, even if the Revenue can show a prime facie case that receipts have been satisfactorily accounted for, it has no material upon which to set up a prime facie for bringing the receipts in question under one or other source of income. On the other hand, it is always open to the taxpayer to challenge the assessment, not only on the ground that there has been no willful default, but also on the ground that the receipts did not represent income from a particular source selected by the Revenue.

Despite the apparent difficulties which may be faced by the Revenue in trying to prove a case of tax evasion beyond reasonable doubt, they nevertheless possess a considerable legal armoury at their disposal to crush the fight out of anybody daring to challenge their judgments.⁹²

⁸⁵ EL Gordon (n457) 139, 140, 148, 149.

⁸⁶ *Coast Carton Co. v. Commissioner* 149 F. 2nd 739 (C.C.Ac 9th 1945).

⁸⁷ *Murray Humpbreys* 125 F. 2nd 340 (C.C.A. 7th 1942), 317 U.S. 637 (1942).

⁸⁸ Evidence Act, S. 137(1)..

⁸⁹ (1932) 11 N.L.R. 6 at 7.

⁹⁰ (1960) A.C. 376.

⁹¹ (1958) 3F.S.C. 6; *Mobil v. FB.I.R.* S.C.488/75;(1977) 3 5C 1; F.B.L. *R. v. Nasr* S.C. 205/1964, (1964) 1 All N.L.R. 408. See also *Hudson v. Humblcs* (1965) 42 TC 380 at p 387.

⁹² H Toch., *The Times* (London) March 9, p.5.

5.1 Sentencing

Sentencing is an art, the practice of which involves weighing various factors which are unlikely to be precisely duplicated in another situation.⁹³ In that sense, the courts will always have a vital role to play in interpreting the provisions of the taxing statutes, for, nowhere are judicial attitudes more evident than in the manner the courts impose Sentences. Presently, it is difficult to assume that there are any specific attitudes or predict what considerations would operate on the mind of Nigerian judges, in the absence of a large number of cases on tax evasion coming before them.⁹⁴ But, judging from the remarks of some Federal High Court judges in the tax cases already discussed, the attitudes of the Nigerian courts towards tax evasion would likely be one of indifference. Many decisions from other jurisdictions have elaborated criteria used to determine an adequate sentence for tax evasion. These include the amount of tax evaded, the repetition of offences, the plea of guilty by the accused, the deterrent factor for the accused and the community, the age, family situation and social ranking of the accused.

Despite the prevarication of the English Courts in *R. v. Curtis*,⁹⁵ Where the accused was convicted of three counts of making false statements with intent to defraud the Inland Revenue and was sentenced to nine months' imprisonment by the trial court and on appeal, the Criminal Court of Appeal felt that; some mercy could be shown and subsequently fined him, the following considerations have operated on the minds of the judges in deciding whether a custodial or non-custodial sentence was an appropriate one for tax evasion. They are, good character illiteracy or level of education religious obligations, health and family situation, age, and likelihood of repetition, repayment of tax, job loss, amount involved, delay in instituting proceedings, persistence in fraud, and public interest'.⁹⁶ The appropriateness or otherwise of these considerations can only be a matter for personal opinion even though the objects which judges have in mind when imposing sentence include not only the punishment and reformation of the offender but also, and perhaps predominantly the protection of the public. In this light, whatever sentencing policy the Nigerian courts eventually evolve on tax evasion, it is a matter for thought whether it is proper to use the criminal process to enforce revenue and regulatory laws which are the typical province of most non-police agencies. With the current pressure of criminal business and general congestion on the courts, this is surely a matter to which the government should be giving attention.⁹⁷ The income tax sanctions, both civil and criminal, have been enacted in response to felt needs of the moment. Neither of the groups of sanctions would seem at the moment to have dealt adequately with the problem of tax evasion.

Despite the supposedly more severe sanction applicable to criminal proceedings, the growing tendency of permitting tax evasion cases to go to court as civil actions permits the festering of evasion. The Nigeria tax authorities have shown a lack of understanding of the ingredients of tax evasion and so have always found it difficult to decide whether to bring a civil or criminal action. This state of affairs is regrettable and would seem to be also contributing to the prevalence of tax evasion.

5.1.1 Fine in Lieu of Sentence

There are relevant provisions of tax laws that provides for fine in lieu of sentencing. The provision exorbitating the focus of tax authority is focused more on revenue generation than imprisonment of tax payer. The fine, though monetary can only be imposed upon conviction of the defaulting tax payer.

Section 49 (1) of PITA imposes an obligation on a banker to file return specifying the names and addresses of new customer of the bank to a tax authority of the area where the bank operates, or where such customer is a company, to the **Federal Board of Inland Revenue**.

⁹³J Potvin, 'Tax Evasion in Canada' *Canadian Tax Journal*, 1977, Vol. 25,p.240.

⁹⁴MT Abdulrazaq (n 6).

⁹⁵Criminal Law Review (Crim. L.R) (1973).

⁹⁶MT Abdulrazaq (n 6) pg 117.

⁹⁷Ibid .

Section 49(3) of PITA provides that:

A person engaged in banking in Nigeria who contravenes the provisions of this section is, in respect of each offence, liable on conviction to a fine of N5,000 in the case of a body corporate, and a fine of N500 in the case of an individual.

The clear provision of this section shows that the liability of a person engaged in banking pursuant to the provision of section 49(3) is not that of assessable income to which a demand notice can be issued. It is rather a penalty imposable when the person engaged in banking has been subjected to the crucibles of a criminal trial, and conviction secured. The fine as provided in law is not automatic; the Law anticipates that the banker could avail itself with all the possible defences allowable under our criminal jurisprudence, engineered by the fundamental principle of fair hearing. The defences, where successfully established may exonerate the banker from the prescribed fines. That is why the Law prescribes conviction before the imposition of the fine.

Conviction is condition precedence to the imposition of the fines as provided under section 92(3) of PITA. Even after conviction is achieved, the prescribed fine is the maximum fine. The *Judex* is permitted to impose a lesser fine, subject to the entire circumstances of the case before him.

In the case of *Mohammed v. Olawunmi & Ors* (1993) LPELR-1898(SC) (Pp. 61-62 paras. D), the court held, per OGUNDARE, JSC, that: “a conviction is an act of a Court of competent jurisdiction adjudging a person to be guilty of a punishable offence. The sentence or resulting order is something distinct from the conviction.” For fine to be imposed under 49 of PITA, a conviction my court of competent jurisdiction must have been secure.

Fine, in this circumstance, is strictly restricted to crimes. By definition therefore, fine is a payment of money ordered by a Court from a person who has been found guilty of violating law. It may be specified as the punishment for an offence, usually a minor offence.⁹⁸ Fairly hearing would haven extend to the defaulter before a court of competent jurisdiction; the court has the responsibility to find guilty and ascertain the kind of fine imposable.

In the case of *National Oil Spill Detection and Response Agency (NOSDRA) V Mobil Producing Nigeria Unlimited*,⁹⁹ the court of Appeal was called upon to determine whether having regard to section 6(2) and (3) of the Plaintiff/Appellant's Establishment Ac, the Learned Judge was right in holding that the imposition of penalties on the Defendant/Respondent by the Plaintiff/Appellant ultra vires its power. The court held that:

On the facts and circumstances of this case, I am of the firm but humble view that the imposition of penalties by the Appellant was ultra vires its power to observe the principles of natural justice. Penalties or fines are imposed as punishment for an offence or violation of the law. The power as well as competence to come to that finding belongs to the courts and the Appellant is not clothed with the power to properly exercise that function in view of the law creating (NOSDRA).

6.0 Conclusions

The government is unrelenting in its pursuit to combating tax crime; there are various offences and penalties ascribed to every tax crime. The tax authority assumes the determination to prosecute every

⁹⁸In *Abdullahi v. State* (2015) LPELR-25928(CA) (Pp. 19 paras. C

⁹⁹(2018) 38 TLRN 52

tax offences, however, the offences, no matter how minute, are still subject to the crucible of judicial trial with its attendant rigidity. The tax payer enjoys all the defensible restrictions allowable in criminal trial. The defences have been discussed to include sufficient cause, error as to date, error by agent etc. Where a tax audit report raises *prima facie* case of tax infraction, the tax authority would proceed against the taxpayer through a criminal judicial process. The burden of proving *mens rea* lies on the prosecutor. In the Nigerian tax statutes words such as “wilful” “without sufficient cause” “knowingly” and “unlawfully” are used to qualify the need for *mens rea*. It is safely assumed that *mens rea* is an essential ingredient of a tax offence in Nigeria. A person can plead “reasonable cause or excuse,” among others, as a defence to a charge of failure to discharge his statutory obligations under tax statutes. Tax authority should align with the rigid legal process and acquaint itself with relevant evidence that would grant a successful conviction of a tax offender: the burden of proving tax offences is beyond reasonable doubt.