Coventry Law Journal

Editor-in-chief: Dr Steve Foster

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2022 | Volume 27 Issue 2

Coventry Law School

Coventry Law Journal

Volume 27(2)

December 2022

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Editorial

We are very pleased to publish the second issue of the twenty-seventh volume of the *Coventry Law Journal*. This issue contains many pieces that reflect what has occurred in this turbulent year. In the leading article, Andrew Jones writes on the application of international criminal law with respect to Russia's invasion of Ukraine. There are also a number of case notes and recent developments on recurring matters such as assisted dying, free speech and public morality, and patient autonomy and human rights. We are also pleased to include an update on discrimination and hairstyles, where ex-student Demi Clarke-Jeffers re-visits her piece in the last issue of the Journal to incorporate recent observations in this area.

We are especially pleased to include a reflective article by Rhonda Hammond-Sharlot, the School's Curriculum Lead for Professional Studies, who uses her professional and academic experience to explore the potential impact of the new Solicitors' Qualification Examination (SQE) on legal education and the expectations of students and the various professions. Coventry University, as with many other institutions, will become involved in the new Qualification, and Rhonda offers a valuable insight into legal education and how the new scheme will impact on students, staff and the legal profession.

The Journal is also delighted to include articles from academics overseas. Dr Isau Olatunji Ahmed and Khafayat Yetunde Olatinwo, both from Kwara State University in Nigeria, write, respectively, on tax avoidance in Nigeria, and space law; this time considering the potential application of the law of mortgages in outer space. Our thanks also go to John Sawyer, for researching and writing, with Steve Foster, on another piece of legal history relating to his family. We are also grateful to other staff at the Law School, who contributed case notes and book reviews on crime, criminal justice and human rights.

On a sad note, we bid farewell to Dr Romit Bhandari, Dr Monica Ingber and Sandrea Maynard, who leave us to take up exciting new positions at other universities. Our thanks go to them for all their hard work at Coventry Law School; we wish all of them every success in the future.

We hope you enjoy reading this issue and find something that will interest you: either as a student to inform your law study, or as a scholar to inspire your future research and interest in law. We also look forward to receiving your contributions for future issues. We encourage contributions from students, academic staff and practitioners, and if you wish to contribute to the Journal and want any advice or assistance in being published then please contact the editors. The next publication date is July 2022, and contributions need to be forwarded to us by early June.

The editors: Dr Steve Foster and Dr Stuart MacLennan

TAX LAW

Tax Avoidance: the fiscal termite eating away the revenue base of Nigeria

Dr Isau Olatunji Ahmed*

Introduction

The need for the Nigerian government to provide social amenities and embark on developmental projects to improve the living standards of its citizens and to meet its overhead or recurrent expenditures, necessitate the need for the government to intensify its revenue generation efforts. Taxation is now generally regarded as an important source of revenue generation for the Nigerian government, which involve levying taxes on individuals, corporate entities, and goods and services.[1] This is due to the fact that, through taxation, the government is able to raise a significant amount of revenue to meet its needs and provide basic amenities for its citizens. The Nigerian government through its revenue agency, Federal Inland Revenue Service (FIRS), stated that it generated about 1.97 trillion Naira (5 billion US dollars) through taxation in the first half of 2015, which represented 98 per cent of the targeted revenue of 2.28 trillion Naira (7 billion US dollars) for January and June 2015.[2] Likewise, in 2018, the government disclosed that it generated 5.320 trillion Naira (13 billion US dollars) from taxation.[3] This was said to be the highest revenue generated from taxation in the history of Nigeria as at 2018.[4]

However, in recent times, the government's revenue generation efforts from taxation have been impeded by certain fiscal resistant tactics such as tax avoidance, which has resulted in huge revenue loss to the government. According to the Global Financial Integrity,[5] close to 100 billion US dollars per year is lost in revenue to tax avoidance in developing countries.[6] Another report compiled by Christian Aid estimates that revenue lost to tax avoidance each year in developing countries could rise to 160 billion US dollars.

Tax avoidance, alongside other concepts such as tax evasion and tax planning, has been described as fiscal termites eating away the potential tax revenue of the government. Unlike tax evasion and tax planning, which are generally considered as legal and illegal

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[1] Oladele Rotimi, Asu Udu and Aderemi Adetunji Abdul-Azeez, 'Revenue Generation and Engagement of Tax Consultants in Lagos State, Nigeria: Continuous Tax Evasion and Irregularities' (2013) 1(10) European Journal of Business and Social Sciences 26.

[2] Premium Times, 'FIRS realises N1.97trillion revenue', *Premium Times Newspaper* (Lagos 10 August 2015) <http://www.premiumtimesng.com/business/banking-and-finance/188103-firs-realises-n1-97trillion-revenue.html> accessed on 15 April 2022.

[3] Oladeinde Olawoyin, 'FIRS generates N5.3 trillion in 2018, highest in Nigeria's history-Official' (Lagos 8 January 2019) <https://www.premiumtimesng.com/news/headlines/304675-firs-generates-n5-3-trillion-in-2018-highest-in-nigerias-history-official.html> accessed on 15 May 2022.

[4] Ibid.

[5] Global Financial Integrity (GFI) is a non-profit, Washington, DC-based research and advisory organization, which produces high-calibre analyses of illicit financial flows, advises developing country governments on effective policy solutions, and promotes pragmatic transparency measures in the international financial system as a means to global development and security <http://www.gfintegrity.org/about/> accessed on 15 April 2022

[6] World Finance Magazine, 'The true costs of tax avoidance' <http://www.worldfinance.com/strategy/the-true-costs-of-tax-avoidance> accessed on 15 April 2022

respectively, there is no such clear cut classification for tax avoidance, thereby posing a serious threat to the government's revenue generation efforts.

The magnitude of potential revenue lost to tax avoidance is having a significant negative impact on the government, which requires revenue to improve essential services to its citizens.[7] This has made the government pay closer attention to the issue of tax avoidance, which has the potential of the depriving the government of the revenue needed to cater for the citizens.[8] This necessitated the need for the government to put in place mechanisms to prevent tax avoidance. The objective of this article is to examine the concept of tax avoidance and its underlying incentives. The article also examines the impact of tax avoidance and the mechanisms to prevent or counter it.

The concept of tax avoidance

There is no fixed legal, legislative or statutory definition/meaning of tax avoidance owing to the difficulty of framing an exhaustive definition to cover the concept.[9] In order to provide an understanding of the concept of tax avoidance, this article will consider definitions provided by various scholars and tax commissions, as well as the definitions contained in various judicial pronouncements on the concept.

Tax avoidance is defined under the Black's Law Dictionary as the 'act of taking advantage of legally available tax planning opportunities in order to minimize one's tax liability'.[10] This definition suggests that tax avoidance occurs when a person arranges his or her affairs in such a way as to take advantage and/or exploit the tax law to minimize tax liability. This definition implies that tax avoidance could be legal in nature. The 'Radcliffe Commission' defined tax avoidance as 'some acts by which a person so arranges his affairs that he is liable to pay less tax than he would have paid but for the arrangement'.[11] A similar definition is given by the Carter Commission, which defined tax avoidance as every attempt by legal means to reduce tax liability that would otherwise be incurred by taking advantage of some provisions or lack of provision in the law.[12]

The Organization for Economic Co-operation and Development (OECD) defined tax avoidance as one that is generally used to describe the arrangement of a taxpayer's affairs that is intended to reduce tax liability, noting that although the arrangement could be strictly legal it is usually in contradiction with the intent of the law it purports to follow.[13] The Review of Business Taxation defined tax avoidance as a misuse or abuse of the law that is often driven by the exploitation of structural loopholes in the law to achieve tax outcomes that were not intended by Parliament, but also includes the manipulation of the law and a focus on form and legal effect rather than substance.[14] Wheatcroft defines tax avoidance as

[7] Christian Aid, 'Death and taxes: The true toll of tax dodging' <http://www.christianaid.org.uk/images/deathandtaxes.pdf > accessed on 13 March 2022
[8] Vito Tanzi., 'Globalization, Technological Developments and the works of Fiscal Termites' International Monetary Fund Working Paper 2000, <http://ww.imf.org/external/.../wp00181.pdf> accessed on 13 May 2022.
[9] Mohammed T Abdulrazaq, *Principles and Practice of Nigerian Tax Planning & Management* (2nd ed. Stirling-Horden Pub. Ltd. Ibadan 2013), 86.
[10] Black's Law Dictionary (9th ed., St. Paul MN-West, 2009) 1599
[11] The Royal Commission on Taxation of Profits and Income, United Kingdom, 1955 para 1016
[12] Royal Commission on Taxation (The Carter Commission) 1966 Canada.
[13] The Organization for Economic Co-operation and Development (OECD) Glossary of Tax Terms <http://www.oecd.org/ctp/glossaryoftaxterms.html> accessed on 14 April 2022.
[14] Second Reading Speech, Income Tax Laws Amendment Bill (No. 2) 1981, Hansard, House of Representatives, 27 May 1981.

the art of dodging tax without actually breaking the law, or alternatively, the right of every citizen to structure one's affairs in a manner allowed by law, to pay no more than what is required.[15] Ulph also defined tax avoidance as the use of artificial or contrived methods of adjusting taxpayers' social, economic or organizational affairs to reduce their tax liability in accordance with the law while not affecting the economic substance of the transactions.[16]

The courts have also had opportunity to give succinct interpretation to the concept of 'tax avoidance'. This usually arises from cases coming before them on the grounds of contravention of sections in the tax law, which are usually referred to as an anti-avoidance provision.[17] However, courts in Nigeria and the United Kingdom have adopted different approaches to the interpretation of tax avoidance, resulting in different meaning and definitions of the term.[18] Different approaches by the courts in interpreting tax law have resulted in different classification of transaction. As such inter-country comparisons in this respect have proved fruitless in the search for common meaning of the concept of tax avoidance.[19]

One of the clearest definitions of tax avoidance was provided by Lord Nolan in his judgment in the *Willoughby case,*[20] which very succinctly seeks to draw a line of distinction between tax avoidance and tax planning where he stated as follows:

> The hall mark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability. The hall mark of tax mitigation, on the other hand, is that the taxpayer takes advantage of a fiscally attractive option afforded to him by the legislation, and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option.

From the above definition it is clear that there is a difference between tax avoidance and tax planning. Furthermore, Lord Templeman in the *Challenge Corporation case*[21] noted that:

> Income tax is avoided and a tax advantage is derived from an arrangement when the taxpayer reduces his liability to tax without involving him in the loss or expenditure which entitles him to that reduction. The taxpayer engaged in tax avoidance does not reduce his income or suffer a loss or incur expenditure but nevertheless obtains a reduction in his liability to tax as if he had.

Tax Avoidance is further defined by the European Court of Justice as wholly artificial arrangements which are designed to obtain a tax advantage which are aimed at circumventing tax laws.[22] The Nigerian case of *Akinsete Syndicate v Senior Inspector of*

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[15] George Shorrock Ashcombe Wheatcroft, 'The attitude of the Legislature and the Courts to tax avoidance', (1955) 18 (3) Modern Law Review 209.
[16] David Ulph, Managing Tax Risks in Beyond Boundaries: Developing Approaches to Tax Avoidance and Tax Risk Management (Freedman J. eds) Oxford University Centre for Business Taxation 101-115.
[17] Mohammed Taofeeq Abdulrazaq, *Principles and Practice of Nigerian Tax Planning & Management*, (2nd ed. Stirling-Horden Pub. Ltd. Ibadan 2013), 109.
[18] *Ibid* 109.
[19] *Ibid* 109.
[20] *CIR v Willoughby* [1997] 4 All ER 65 at p.73, See also the case of *CIR v Challenge Corp Ltd* [1986] S.T.C. 548.
[21] *CIR (NZ) v Challenge Corporation Ltd,* [1987] AC 155.
[22] Imperial Chemical Industries Plc (ICI) v Kenneth Hall Colmer (Her Majesty's Inspector of Taxes) (1998) ECR I-4695.

Income Tax[23] provided an insight into the meaning of tax avoidance. The Court held that tax avoidance by lawful means is acceptable even though it did not state which category of tax avoidance by lawful means is not acceptable.[24]

The above definitions of the concept of tax avoidance are indicative of the fact that it is not entirely illegal as it involves the legal exploitation of the tax system to reduce tax liability. Even though this legal exploitation is not fraudulent in nature, the results of such legal exploitation are considered immoral, improper, abusive and against the spirit of the tax law. It can therefore be postulated that tax avoidance is an exploitation of the fiscal legislation in a manner not intended by the legislature. Accordingly, while a person has the right to arrange his affairs in order to reduce his tax liability, where such person embarks on an artificial arrangement for the purpose of escaping and reducing tax liability otherwise due, such an arrangement may not be socially acceptable.[25] Thus, a manipulative transaction which has the effect of artificially reducing tax liability would be disallowed as being a tax avoidance scheme.[26] It is important to note however that it is not all activities of taxpayers towards reducing or minimizing their tax liability that will amount to tax avoidance. While tax avoidance is an example of tax minimization, other examples of tax minimization are tax evasion and tax planning. Although, these labels (tax avoidance, tax planning and tax evasion) are not used universally, they have been accepted internationally by the International Academy of Comparative Law at its 18th congress in Washington in 2010.[27]

The distinction between tax avoidance, tax planning and tax evasion can be viewed as a partially overlapping legal spectrum of tax minimizing behaviour.[28] At one end is tax evasion, which is illegal and criminal in nature. Tax planning, at the other end of the spectrum, is tax minimization behaviour that the government is aware of and allows to continue.[29] In some instances the government may even encourage it.[30] Tax avoidance on the other hand lies between the two, exploiting the tax law while denying its substance.

Features of tax avoidance transactions

There is no consensus as to what makes a transaction constitute tax avoidance in nature. However, there are some established features that determine whether a transaction constitutes tax avoidance. These feature revolve around the notions of 'form', 'purpose' and 'policy', [31] and are briefly discussed here:

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[23] *Akinsete Syndicate V. Senior Inspector of Income Tax* F.S.C 164/66 (Unreported).
[24] Mohammed Taofeeq Abdulrazaq, *Principles and Practice of Nigerian Tax Planning & Management*, (2nd ed. Stirling-Horden Pub. Ltd. Ibadan 2013), 109.
[25] Ibid.
[26] Ibid.
[27] Karen Brown and David Snyder, 'General Report Regulation of Corporate Tax Avoidance' <http://www.link.springer.com/content/pdf/bfm%3A978-94-007-2354-2%2F1.pdf> accessed on 15 April 2022.
[28] Prebble B.C., 'Should Tax Avoidance be Criminalised? Tax Avoidance and Criminal Law Theory' (LL.B Dissertation, University of Otago 2011) 20.
[29] Ibid.
[30] Example are some of tax incentives such as Pioneer Status under the Industrial Development (Income Tax Relief) Cap I 7 LFN 2004, The Nigerian Liquefied Natural Gas (NLNG) (Fiscal Incentives, Guarantees and Assurances) Act Cap. N8 7 LFN 2004 and so on.
[31] Graeme Cooper, Tax Avoidance and the Rule of Law (IBFD Publications BV, Amsterdam 1997) 28.

Form

The first feature used to identify tax avoidance is the 'form' of the transaction. 'Form' generally refers to the legal relationships that gives legal structure to transactions and through which taxpayers achieve desired economic results which is the 'economic substance' of the transaction.[32] The form approach identifies the economic outcome of a transaction and concludes that tax avoidance occurs when the taxpayer secures an economic outcome that avoids the normative tax treatment intended by Parliament.[33] Thus, where a taxpayer sets up an artificial or contrived transaction or scheme merely for the purpose of minimizing its tax liability, such transaction or scheme will amount to tax avoidance.[34] In *Ramsay Ltd. v I.R.C.*,[35] the question before the court was whether the taxpayer was entitled to a deduction for an alleged capital 'loss' under the capital gains legislation and resulting from a series of self-cancelling transactions. On a literal interpretation of the relevant provisions, the taxpayer had suffered such loss, however the court held that the word had to be construed purposively and as such referred to 'economic losses rather than 'arithmetical differences'. Lord Wilberforce stated thus:

> It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or tax consequence and if that emerges from a series or a combination of transactions, intended to operate as such, it is that series which may be regarded.

However, it is to be noted that not all transactions or schemes aimed at minimizing tax liability constitute tax avoidance. A transaction or scheme, even if its legal form is artificial and contrived in nature, could be justified for business reasons.[36] In addition, there are situations where tax legislation often encourages taxpayers to use artificial and contrived legal forms as an incentive to achieve particular economic outcomes by suspending the normal tax consequences of those outcomes.[37] Accordingly, taxpayers taking advantage of such incentives cannot be viewed as engaging in tax avoidance merely because they have chosen contrived, tax-preferred legal forms for their economic activities.[38] It can only be said that they are merely engaging in permissible tax planning/mitigation.[39]

Purpose

The second feature of tax avoidance focuses on the underlying purpose of the transaction. This means that where a taxpayer engages in transactions for the sole purpose of reducing its tax liability, the transaction will be deemed to constitute tax avoidance.[40] This approach is premised on the view that the underlying purpose of a transaction must have a real economic substance and not a mere artificial transactions, whose only purpose is to

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[32] Taylor M. D., Tax Policy and Tax Avoidance: The General Anti-Avoidance Rule from a Tax Policy Perspective (LLM Dissertation, University of British Colombia 2006) 37.
[33] Ibid, 38.
[34] Ibid, 38.
[35] [1982] AC 300 at 326.
[36] Graeme Cooper, Tax Avoidance and the Rule of Law (Amsterdam: IBFD Publications BV, 1997) 30
[37] Brian Arnold & James Wilson, 'The General Anti-Avoidance Rule - Part II' (1986) 36(5) Canada Tax Journal 11.
[38] *Peterson v. Commissioners of Inland Revenue* (2005) U.K. P. C. (P.C.) (Peterson).
[39] *CIR v Willoughby* [1997] 4 All ER 65 at p.73, See also the case of *CIR v Challenge Corp Ltd* [1986] S.T.C. 548.
[40] Taylor M. D., Tax Policy and Tax Avoidance: The General Anti-Avoidance Rule from a Tax Policy Perspective (LLM Dissertation, University of British Colombia 2006), 39.

minimize tax liability without real economic substance.[41] A distinct advantage of a purpose-oriented approach is that the purpose of taxpayers' transactions are generally much easier to identify as they are based on an objective.[42] It is therefore not surprising that most countries have adopted purpose-oriented approach in determining whether or not a transaction constituted tax avoidance.

In *Furniss v Dawson*,[43] Lord Brightman formulated a business purpose approach of interpretation of taxation statutes based on the principle of interpretation already established in *Ramsay*.[44] For business purpose approach of interpretation to apply, Lord Brightman stated:

> First, there must be a pre-ordained series of transactions or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (i.e. business) end ... Secondly, there must be steps inserted which have no commercial (business) purpose apart from the avoidance of liability to tax—not 'no business effect'. If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied.[45]

Taxpayers are allowed tax deductions in respect of expenditures incurred wholly and exclusively for the purposes of their trade. However, where an expenditure has more than one purpose, such an expenditure will not be deemed to have been incurred wholly and exclusively for the purposes of the trade and as such, no tax deduction will be allowed. This is known as the duality of purpose test, which was laid down by the House of Lords in the case of *Mallalieu v Drummond*.[46] In that case, a barrister claimed the cost of her court clothing as a business expense. The House of Lords said this was not incurred wholly and exclusively for the purposes of her profession because one of her objects was to serve her needs as a human being and the fact that the clothes were only for the purposes of wearing in court and would never have been used for any private purpose, was not enough to displace the duality of purpose. The House of Lords further stated that even though the clothing was required for her professional purpose because she would not have been allowed to appear in court in other clothing, the subconscious purpose of meeting her needs as a human being was enough to disallow the expenditure.

However, the purpose-oriented approach is not without its weaknesses. One is that, from a tax policy perspective, taxpayers' motives and purposes are sometimes not relevant to the taxation of their transactions.[47] This is because tax results from objective economic circumstances and not from taxpayers' purposes for their transactions. The exception to this is where legislation may make purposes relevant, such as when distinguishing between business and personal expenses.[48] A more significant problem with the purpose-oriented approach relates to the numerous tax expenditure provisions that encourage certain activities

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[41] Ibid, 39.
[42] Brian Arnold, 'In Praise of the Business Purpose Test', in Report of the Proceedings of the Thirty-Ninth Tax Conference, 1987 Conference Report (Toronto: Canadian Tax Foundation, 1988).
[43] [1984] A.C. 474.
[44] Judith Freedman, 'Interpreting Tax Statutes: Tax Avoidance and the intention of parliament' (2007) 123 Law Quarterly Review 60.
[45] Ibid.
[46] (1983) 57 TC 330.
[47] Brian Arnold, 'In Praise of the Business Purpose Test', in Report of the Proceedings of the Thirty-Ninth Tax Conference, 1987 Conference Report (Toronto: Canadian Tax Foundation, 1988).
[48] Ibid, 42.

by granting tax reductions and incentives at the expense of tax law's primary purpose of raising revenue.[49] This serves as an incentive to taxpayers to engage in certain transactions in order to obtain those tax incentives even without an underlying non-tax purpose.[50]

Policy

The third feature of tax avoidance is the policies underlying the tax legislation. Under this approach, tax avoidance occurs when taxpayers obtain tax results not intended by the tax legislation or when the transaction defeats the policy underlying the tax legislation.[51] This approach has been articulated in a number of different ways. For example, the UK Tax Law Review Committee (TLRC) described tax avoidance as any action taken to reduce or defer tax liabilities in a way that Parliament plainly did not intend or could not possibly have intended had the matter been put to it.[52] The policy-based approach is premised on the idea that the underlying policy of a tax legislation should not be defeated by the tax outcome of a transaction. Thus, from a tax policy perspective, the focus is to ensure that a transaction complies with the fiscal and economic policies underlying the tax legislation.[53] This approach also allows for tax mitigation/planning because it acknowledges that some tax-reduction transactions actually accord with the purpose of the legislation.[54]

The disadvantage of this approach is that it can sometimes be extremely difficult to clearly identify a policy underlying tax legislation. This is because determining the parliamentary intention can sometimes be problematic to the courts.[55] Requiring the courts to go behind a legislation to deal with questions of underlying policies of the legislation may sometimes be impractical.[56]

From the above, it is postulated that the features of a tax avoidance transaction are where: (a) the transactions result in a mismeasurement of taxpayers' economic income so that they pay less tax than they would have paid if they were taxed on their economic income; (b) the transactions are engaged in by taxpayers for the sole or primary purpose of obtaining such a tax benefit; and (c) the transactions result in an outcome not contemplated by policy underlying tax legislation.[57]

Thus, in identifying tax avoidance, attention should be on the means adopted to implement a particular arrangement, transaction or scheme. This means that the greater the degree of

[49] Example of these are the allowances provided under the Second Schedule to the Companies Income Tax Act CAP C.21 LFN 2004, Pioneer Status under the Industrial Development (Income Tax Relief) Cap I 7 LFN 2004, The Nigerian Liquefied Natural Gas (NLNG) (Fiscal Incentives, Guarantees and Assurances) Act Cap. N8 7 LFN 2004 and so on.
[50] See the Canadian case of *Stubart Investments Ltd. v. R.,* 84 D.T.C. 6305, at 6324.
[51] Taylor M. D., Tax Policy and Tax Avoidance: The General Anti-Avoidance Rule from a Tax Policy Perspective (LLM Dissertation, University of British Colombia 2006) 43.
[52] The Institute of Fiscal Studies Tax Law Review Committee <http://www.ifs.org.uk/comms/comm64.pdf> accessed on 15 April 2022.
[53] Taylor M. D., Tax Policy and Tax Avoidance: The General Anti-Avoidance Rule from a Tax Policy Perspective (LLM Dissertation, University of British Colombia 2006) 45.
[54] Graeme Cooper, Tax Avoidance and the Rule of Law (IBFD Publications BV, Amsterdam 1997) 31
[55] Ibid, 45.
[56] David Ward, 'The Business Purpose Test and Abuse of Rights' (1985) 1 British Tax Review 121.
[57] Neil Brooks, 'The Responsibility of Judges in Interpreting Tax Legislation' in Cooper G. S., Tax Avoidance and the Rule of Law (Amsterdam IBFD Publications BV, 1997) 96. See Rosenberg J. D., "Tax Avoidance and Income Measurement" (1988-1989) 87 Michigan Law Review 365.

artifice, the more likely it is that the arrangement, transaction or scheme is of a kind which was not intended by Parliament.[58]

The underlying incentive for tax avoidance

Various and diverge reasons have been attributed as serving as the incentives for taxpayers indulging in tax avoidance. These reasons can be classified into two categories.[59] The first category comprises of factors that negatively affect taxpayers' compliance with tax legislation. These consist of low willingness to pay taxes (low tax morale), high costs to comply with tax laws, low quality of the service in return for taxes paid, lack of fairness and equity in the tax system, low transparency and accountability of public institutions, high level of corruption and lack of rule of law and weak fiscal jurisdiction.[60] The second category comprises reasons for the low ability of tax administration and fiscal courts to enforce tax liabilities. These factors can be summarized as resulting from insufficiencies in the administration and collection of taxes as well as weak capacity in auditing and monitoring tax payments, which then limit the possibility to detect and prosecute violators.[61]

Apart from the above, several studies also indicate that taxpayers such as corporate entities make use of tax avoidance strategies as a way to increase their financial accounting earnings in order to boost their reputation and their share price.[62] This is why corporate leaders do not perceive tax avoidance as a problem, often resulting from the fact that tax avoidance is not illegal like tax evasion.[63] For example, in defending Google's tax arrangements, which reportedly involved the (legal) transfer of 9.8 billion US dollars of revenues from international subsidiaries into Bermuda in 2011, Google Chairman, Eric Schmidt, reportedly stated, 'I am very proud of the structure that we set up. We did it based on the incentives that the governments offered us to operate'.[64] Some corporate leaders have viewed tax avoidance as obligatory and as part of their fiduciary duties to shareholders.[65] For example, in response to criticism of General Electric (GE)'s tax practices, GE's 2010 Citizenship Report emphasized that the company fully complies with the law and there are no exceptions, but at the same time acknowledged that it has a responsibility to its shareholders to reduce its tax costs as the law allows.[66]

A study analysing why a corporate tax executive would refuse to engage in tax avoidance strategies revealed that a majority (69.5 per cent) of executives considered the potential harm to the company's reputation as an important or very important factor in determining whether or not to adopt a tax avoidance strategy.[67] This means that the risk of harm to a company's reputation is a more frequently cited consideration not to engage in tax avoidance

[58] Mohammed Taofeeq Abdulrazaq, *Principles and Practice of Nigerian Tax Planning & Management*, (2nd ed. Stirling-Horden Pub. Ltd. Ibadan 2013), 113.
[59] The International Tax Compact (ITC), 'Addressing tax evasion and tax avoidance in developing countries' <http://www.taxccompact.net/.../2011-09-09_GT > accessed on 24 April 2022.
[60] Ibid.
[61] Ibid.
[62] John Graham, 'Incentives for Tax Planning and Avoidance: Evidence from the Field 26' (MIT Sloan Research Paper No. 4990-12, 2013) http://www.ssrn.com/abstract= 2148407 m accessed on 22 March 2022
[63] Jasmine Fisher, 'Fairer Shores: Tax Havens, Tax Avoidance and Corporate Social Responsibility' (2014) 94 Boston University Law Review 348.
[64] Ibid, 349.
[65] Ibid, 349.
[66] General Electric Corporation, GE 2010 Citizenship Report 17 (2010) http://www.ge.com/lu/en/docs/1315417188571_ge_2010_citizenship_report.pdf accessed on 22 April 2022.
[67] Jasmine Fisher, 'Fairer Shores: Tax Havens, Tax Avoidance and Corporate Social Responsibility' (2014) 94 Boston University Law Review 349.

than the risk of detection and challenge by the tax authority.[68] Overall, many factors influence the decisions whether or not to engage in tax avoidance practices. On the whole, tax avoidance involves no more than the selection of a method of transaction which is least costly in tax as it conveniently involves the techniques by which the lawyers and the accountants can so arrange a client's affairs so as to achieve a reduction in the amount of tax he would otherwise have to pay.[69]

The impact of tax avoidance in Nigeria

Tax avoidance has a damaging effect on the economy as there is always the prospect of losing much needed revenue through it. For example, investigative reports indicated that Nigeria has been losing several billions of dollars in revenue every year due to tax avoidance activities by local and multinational corporations.[70] According to an investigative report by Premium Times, the Nigerian government lost about 23.187 billion Naira (700 million US dollars) to the tax avoidance activities of certain telecommunication operators in the country.[71] Furthermore, the recent announcement by the FIRS that Nigeria lost about 178 billion US dollars to tax avoidance between 2007 and 2017 is confirmation that tax avoidance is on a continuous rise and it is gradually obliterating the revenue base of the country.[72]

Further, it has been suggested that the adverse effect of tax avoidance on developing countries such as Nigeria is more damaging than that of developed countries.[73] According to research, the effects of tax avoidance on developed economies is minimal because these countries have strong regulatory frameworks to check and prevent the menace of tax avoidance.[74] On the other hand, developing countries are more susceptible to tax avoidance.[75] This is due to the lack of a strong regulatory framework and administrative resources to tackle the issue of tax avoidance head on.[76]

The lack of a strong regulatory framework therefore makes the impact of tax avoidance more acute in developing countries. This causes tax avoidance to have a direct life or death impact in developing countries, bearing in mind that the tax revenue needed by the government to invest in essential services such as healthcare, education, and infrastructure

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[68] Ibid, 349.
[69] Mohammed Taofeeq Abdulrazaq, 'Judicial and Legislative Approaches to Tax Evasion and Avoidance in Nigeria' (1985) 29(1), Journal of African Law 65.
[70] Bakre Owolabi, 'Tax Avoidance, Capital Flight and Poverty in Nigeria: The Unpatriotic Collaboration of the Elite, the Multinational Corporations and the Accountants: Some Evidence' (Paper presented at the Tax Workshop, University of Essex, United Kingdom, July 2006).
[71] Emmanuel Mayah 'How MTN ships billions abroad, paying less tax in Nigeria' Premium Times Newspaper (Nigeria 26 October 2015) <http://www.premiumtimesng.com/investigationspecial-reports/192159-investigation-how-mtn-ships-billions-abroad-paying-less-tax-in-nigeria.html> accessed on 29 April 2022.
[72] James Emejo, 'FIRS: Nigeria lost =N=5.4tr to tax evasion by Multinationals' This day Newspaper (Nigeria 12 January 2021) <https://www.thisdaylive.com/index.php/2021/01/12/firs-nigeria-lost-n5-4tn-to-tax-evasion-by-multinationals/> accessed on 29 April 2022.
[73] Rushanara Ali, 'Tax avoidance hurts both Britain and developing countries', Labour List Magazine (United Kingdom, 9 February 2013) <http://labourlist.org/2013/02/tax-avoidance-hurts-both-britain-and-developing-countries/> accessed on 14 April 2022.
[74] Ibid.
[75] World Finance Magazine, 'The true costs of tax avoidance' <http://www.worldfinance.com/strategy/the-true-costs-of-tax-avoidance> accessed on 15 April 2022
[76] Ibid.

is severely and negatively affected.[77] For some Non-Governmental Organizations like Save the Children,[78] the impact and effect of tax avoidance also constitute a political problem.[79] It is argued that the impact of revenue lost to tax avoidance has a direct impact not only on the quality of development, but also on people's lives such as high mortality rate and health risks.[80]

It can therefore be posited that the negative effect of tax avoidance in developing countries is much more than revenue loss. The impact and effect of tax avoidance on the economies of developing countries such as Nigeria is well encapsulated by Baker,[81] who describes tax avoidance as the ugliest chapter in global economic affairs since slavery and is still one of the worst problems affecting developing economies.[82]

Legal mechanisms to counter tax avoidance in Nigeria

Generally, the traditional approach to counter tax avoidance has been for countries to include anti-tax avoidance provisions in their domestic income tax legislations to prevent taxpayers from exploiting the loopholes in the tax law to reduce or minimize their tax liability.[83] This can be in the form of a Specific Anti-Avoidance Rule (SAAR) or a General Anti-Avoidance Rule (GAAR).[84] Both SAAR and the GAAR provisions are regarded as the most common domestic legislative measures that are used and relied upon by countries to counter act of tax avoidance schemes.[85] Specific Anti-Avoidance Rule (SAAR) provisions are enacted for the sole purpose of preventing a specific known tax avoidance scheme.[86] This type of anti-tax avoidance provision is normally targeted at a specific avoidance scheme and provides for many consequential adjustments.[87] Example of SAAR in Nigeria is the Income Tax (Transfer Pricing) Regulations 2018 introduced by the FIRS pursuant to its powers under s.61 of the Federal Inland Revenue Service (Establishment) Act No. 13 2007. The Regulation was meant to provide specific transfer pricing regulation in Nigeria.[88]

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[77] Mohammed Taofeeq Abdulrazaq, *Principles and Practice of Nigerian Tax Planning & Management* (2nd ed., Stirling-Horden Pub. Ltd. Ibadan 2013), 133.

[78] Save the Children also known as the Save the Children Fund International is an international non-governmental organization that promotes children's rights provides relief and support children in developing countries. It was established in the United Kingdom in 1919 in order to improve the lives of children through better education, health care, and economic opportunities, as well as providing emergency aid in natural disasters, war, and other conflicts, <http://www.savethechildren.net/>, accessed on 12 March 2022

[79] World Finance Magazine, 'The true costs of tax avoidance' <http://www.worldfinance.com/strategy/the-true-costs-of-tax-avoidance> accessed on 15 April 2022.

[80] Ibid.

[81] The founder and President of the Global Financial Integrity, <http://www.gfintegrity.org/about/> accessed on 15 April 2022.

[82] Raymond Baker, 'The Ugliest Chapter in Global Economic Affairs Since Slavery' <http://www.taxjustice.net/cms/upload/pdf/Baker_070628_Conference_speech.pdf> accessed on 15 April 2022.

[83] Mohammed Taofeeq Abdulrazaq, *Principles and Practice of Nigerian Tax Planning & Management* (2nd ed., Stirling-Horden Pub. Ltd. Ibadan 2013) 135.

[84] Ibid.

[85] Shaa'bani Tavakol, 'Anti-tax avoidance measures in OPEC-member countries' (2011) 7(11) Journal of American Science 106.

[86] Ibid, 126.

[87] Ibid, 129.

[88] Ahmed Olatunji Isau, 'Transfer Pricing: The Nigerian Perspective' (2014) 2 (2) International Journal of Accounting and Taxation 26 <http://aripd.org/journal/index/ijat/vol-2-no-2-june-2014-current-issue-ijat> accessed on 9 July 2022.

General Anti-Avoidance Rule (GAAR) provisions are usually a set of rules within a country's income tax legislation designed to prevent or counteract an avoidance of tax.[89] GAAR provisions are normally of general application, vesting the tax authority with broad, all-embracing rules and wide-ranging powers to deny the taxpayers of any tax benefits of any transaction or arrangement that is believed not to have any economic or commercial substance or any purpose other than to avoid payment of tax. The primary policy objective of the GAAR is to deter taxpayers from entering into any arrangements that would lead to avoidance of tax and where taxpayers proceed with such an arrangement, the GAAR operates as a mechanism to deny any tax benefit which the taxpayer is trying to achieve.[90] In essence, the ultimate purpose of a GAAR provision is to stamp out tax avoidance.

In Nigeria, there are GAAR provisions in various tax legislations in the country to safeguard the tax base of the country from being eroded through various forms/schemes of tax avoidance. Section 22 of Companies Income Tax Act (CITA)[91] is widely considered as a GAAR provision in this regard. There are corresponding provisions in other tax laws such as the Personal Income Tax Act (PITA),[92] the Capital Gains Tax Act (CGTA)[93] and the Petroleum Profits Tax Act (PPTA).[94] Section 22 of CITA, which is similar in content with the provisions of s.17 of PITA, s.20 of CGTA and s.15 of PPTA is reproduced hereunder:

> 'Where the Board is of opinion that any disposition is not in fact given effect to or that any transaction which reduces or would reduce the amount of any tax payable is artificial or fictitious, it may disregard any such disposition or direct that such adjustments shall be made as respects liability to tax as it considers appropriate so as to counteract the reduction of liability to tax affected, or reduction which would otherwise be affected, by the transaction and any company concerned shall be assessable accordingly.'

The above provision qualifies as a GAAR provision as it satisfies all the possible features of a GAAR. First, the provision identified a scheme to include any disposition which in the opinion of the FIRS is not given effect to or any transaction, which then reduces or would reduce the amount of any tax payable. Second, the provision identified tax reduction as the sole and dominant tax benefit of such transaction. The provision is therefore an omnibus anti-avoidance provision that empowers and invests the FIRS with the powers to disregard any artificial or fictitious dispositions and transaction meant to reduce tax payable and direct any adjustment in that regard. GAAR provision in s.22 of CITA specifically empowers the FIRS with powers to: 1) disregard any disposition which in its opinion is not given effect to; 2) disregard any artificial or fictitious transaction which reduces tax; and 3) direct adjustment in respect of the tax liability of such disposition and transaction as it considers appropriate to counter act the tax reduction.[95]

Due to its broad and general nature, the provision of s.22 of CITA occupies a critical position in the country's anti- tax avoidance armoury as it represents an attempt to make provisions to prevent future manifestations of unacceptable tax avoidance schemes in a situation where

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[89] Ernst and Young, 'GAAR rising mapping tax enforcement's evolution' <http://www.ey.com/publication/.../GAAR.pdf> p. 2 accessed on 20 July 2022.
[90] HMRC, 'HM Revenue and Customs (HMRC) General Anti Abuse Rule (GAAR) guidance' <https://www.gov.uk/.../2_HMRC_GAAR> accessed on 14 July 2022.
[91] Companies Income Tax Act CAP. C21 LFN 2004 (as amended).
[92] Section 17 Personal Income Tax Act CAP P8 LFN 2004.
[93] Section 20 Capital Gains Tax Act CAP. PC1 LFN 2004.
[94] Section 15 Petroleum Profits Tax Act CAP. P13 LFN 2004.
[95] Mohammed Taofeeq Abdulrazaq, *Principles and Practice of Nigerian Tax Planning & Management* (2nd ed., Stirling-Horden Pub. Ltd. Ibadan 2013), 135.

the tax avoidance scheme is not covered under any enactment.[96] It can therefore be seen that the powers conferred on the FIRS in s.22 of CITA is very wide and it is applicable to all possible tax avoidance schemes that may be conceived.[97] However, using the GAAR provision in s.22 to deter tax avoidance is not without its own challenges. It has been argued in this regard that the language of the GAAR provision is too vague and imprecise in nature. For example, according to Ayua,[98] the language of the GAAR provision places an enormous burden on the interpretative skills of tax officials requiring them to examine every transaction, which can sometimes be a very difficult task. The author contends that due to the level of training of the FIRS officials, the tax officials are usually reluctant to apply the GAAR provision to strike down tax avoidance in the country. This has affected the significance and the usefulness of the GAAR provision and explains why the FIRS is yet to test the GAAR provision in court.[99]

The situation is further compounded with the history of Nigerian courts, which have consistently and religiously resolved any ambiguity in the tax legislations in favour of the taxpayer.[100] The effect of this is that due to the ambiguous nature of its language, if tested in court the GAAR provision is most likely to be resolved against the FIRS and in favour of the taxpayer. Courts in Nigeria usually confine themselves to the strict letter of taxation statute and consider tax as an imposition depriving citizens of their financial liberty. They are therefore traditionally hostile to statutes seen as encroaching on a citizen's property or liberty and any ambiguity in the tax law is usually resolved against the government and in favour of taxpayers.[101] It can therefore be posited that the GAAR provision in s.22(2) (b) of CITA cannot effectively on its own prevent tax avoidance in the country. That is why despite its presence in the CITA, the country continue to lose huge amounts of tax revenue to various tax avoidance schemes, which necessitated the need to introduce a regulation on transfer pricing.[102] However, notwithstanding its defects, in theory the GAAR provision in s.22 provides the country with an extensive means of preventing tax avoidance in the country due to the fact that it can be extended to disallow all forms of conceivable tax avoidance scheme.[103]

Conclusion

The article has provided an understanding of the concept of tax avoidance. The article revealed that tax avoidance involves the legal utilization of the tax regime to reduce the amount of tax that is payable by means that are within the law. The article further revealed that while tax avoidance is not entirely illegal, it is considered to be immoral, improper, abusive and against the spirit of the law.

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[96] Derek Obadina, 'Fighting Aggressive Tax Avoidance in Nigeria: An Agenda for Reform'<https://www.academia.edu/10805766/Tackling_Aggressive_Tax_Avoidance_in_Nigeria_an_agenda_for_reform> accessed on 22 July 2022

[97] Ibid

[98] Ignatius Ayua, *The Nigerian Tax Law* (Spectrum Law Publishers, Lagos 1996) 261.

[99] Mohammed Taofeeq Abdulrazaq, *Principles and Practice of Nigerian Tax Planning & Management* (2nd ed., Stirling-Horden Pub. Ltd. Ibadan 2013) 143.

[100] *Federal Board of Inland Revenue v. Integrated Data Services Limited* (2009) 8 NWLR (PT.1144) 615, at 637 para H, 638 paras C-E; *Mobil Oil Nigeria Limited v Federal Board of Inland Revenue* (1977) 3 S.C 53.

[101] *F.B.I.R v. American International Insurance Company (Nig.) PLC* (1999) 1 N.R.L.R. 50, at 56.

[102] Mohammed Taofeeq Abdulrazaq , *Principles and Practice of Nigerian Tax Planning & Management* (2nd ed., Stirling-Horden Pub. Ltd. Ibadan 2013) 144.

[103] Ibid, 123.

The article examined the feature of tax avoidance transaction from the notions of 'form', 'purpose' and 'policy' and found that any transaction or scheme whose sole purpose to minimize tax liability and defeat the intention of parliament will be regarded to constitute tax avoidance. The article also found that apart from revenue loss, tax avoidance has a direct negative impact on the lives of the people living in developing countries such as Nigeria. The finding of the article revealed that tax avoidance is countered through both Specific Anti-Avoidance Rules (SAAR) or General Anti-Avoidance Rules (GAAR). It is the recommendation of this author that the Nigerian government and its policy makers should endeavour to strengthen the GAAR provision in the various tax legislations in the country to overcome its defects in order to be more effective in preventing all forms and schemes of tax avoidance in the country.