# TAXPAYER'S RIGHT TO REFUND UNDER THE NIGERIAN LAW: A RIGHT IN FACT OR PRIVILEGE IN CAMOUFLAGE?*

***Abstract***

*The need for a fair, equitable and legitimate taxation is paramount to the protection of human rights and national development. Unfortunately, a practical analysis of human rights issues in the Nigerian tax system seems to leave one in the limbo and confusing situation as to whether the so called taxpayer's rights especially right to refund as stated in the Nigerian tax laws are actually a right or at best describe a mere privileges. The jurisprudence of this paper therefore is an examination of the actual legal status of the taxpayer's rights to refund as stated in the Nigerian tax laws. Using doctrinal research method, the paper found that the said rights are curtailed and the practicability of most of them is difficult there by allowing for a breach with impunity by the tax authorities. To check this, the paper proffers some solutions in form of recommendations.*

***Keywords:*** *Taxpayer's Right, Nigerian Law, Privilege, Fact, Camouflage*

## 1. Introduction

Tax is a civic responsibility of both individual as well as corporate organisations, it is also a key and integral to human rights and national development. In order to achieve the maximum actualisation of those civic responsibilities, the Nigerian tax laws spelt out some rights as well as obligations of taxpayers and tax authorities in the various sections of the law. An exorbitant or unjust taxation laws are infringement on the property and the rights to life of an individual. In any tax regime, while it is expected of citizens to carry out the civic responsibilities towards the state, the same law gives some rights to the taxpayers to explore when the need arises. The problems however is that apart from payment of tax which is a common obligation, most taxpayers are not abreast with the statutory rights at their disposal with regard to tax matter. The reason for this ignorance is that, most of these rights even though are in the Nigerian tax laws are not handy, nor treated under common heading but rather scattered in various tax laws. Aside this fact, an officer of the service in Nigeria is entitled to protection under the Public Officers Protection Act,[1] thus, a tax collector shall not be liable in any action or proceeding, whether civil or criminal for anything done or said by him in the lawful exercise of the power.[2]

Rights with regards to tax matters could be divided broadly into two categories – the general rights and specific rights. The general rights are the rights enshrined in the Nigerian Constitution as well as in the other Universal declarations, Laws and Charter on human rights. Both the taxpayers and tax authorities are entitled to all these rights. The other categories of rights that are specific are the rights that have

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[1] See Section 38 FIRS Act, 2007

[2] Section 106 PITA 2004. Section 102 of PITA contains detail definitions and functions of tax collector.

In addition to the above rights, some of the visible taxpayers' rights that can be distilled as in tandem with human rights are:-

- Rights to ownership of property - Sections 43 and 44 of the Constitution; Article 14 of the African Charter
- Collective rights to natural resources and property - Article 21(1) of the African Charter
- Rights to a court order before sale of immovable property - Section 33(6) of Federal Inland Revenue Services Establishment Act; Section 86(6) of Companies Income Tax Act; Section 104 of Personal Income Tax Act
- Rights to refund of excess tax - Section 23 of the Federal Inland Revenue Services Establishment Act; Sections 49(1) and 50(1) of Petroleum Profit Tax Act; Section 90 of Companies Income Tax Act; Section 16(1) (b) of Value Added Tax Act
- Rights to be searched only by a person of the same gender - Section 36(4) of Federal Inland Revenue Services Establishment Act
- Rights to information - Freedom of Information Act, 2011
- Rights to private life - Section 37 of the Constitution; Section 29(5) of Federal Inland Revenue Services Establishment Act
- Rights to fair trial - Section 36(1) of the Constitution; Article 7 of the African Charter.
- Rights of appeal - Section 59 of Federal Inland Revenue Services Establishment Act; Section 32(2) of Petroleum Profit Tax Act; Section 43(2) of Capital Gains Tax Act
- Rights to object to a revised assessment – Section 69 of Companies Income Tax Act

**3. Analysis of Tax Refund under the Nigerian Law**

In Nigeria, despite the guarantee of a tax refund by Section 23 of the Federal Inland Revenue Services Act and Section 16(1) (b) of the VAT Act, from available evidences, the Federal Inland Revenue Services do not always comply with these provisions as it always fails to refund excess tax whether in the form of VAT or arising from the withholding tax system.[12] One devastating impact of non-remittance of excess tax is the constant reduction in the cash flow of the company or individual businesses. This attitude is a flagrant breach of taxpayers' right and a huge infraction on the legal and constitutional rights of taxpayers in Nigeria. As stated earlier, Nigeria operates a Withholding Tax System (WHT),[13] which means that in qualifying transactions the paying party is required to deduct at source any payment due to a taxable persons or companies. Where a taxpayer has overpaid tax (which usually is due to the WHT regime), he is by right entitled to either a refund of the excess tax or set off against a future tax.[14]On this, Federal Inland Revenue Services Establishment Act in section 23 provides as follows:

> (1) There shall be refunded to taxpayers, after proper auditing by the Service, such overpayment of tax as is due.
>
> (2) 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.
>
> (3) Any tax refund shall be made within 90 days of the decision of the Service made pursuant to subsection (2) of this section, with the option of setting off.

[12] Nigeria @ 50: Top 50 Tax Issues October 2010 from <http://www.pwc.com/en_ng/ng/pdf/nigeria-top- 50-taxissues> see also <http://www.ngex.com/business/public/newsinfo.php?nid=2>

[13] Sections 60, 61 & 62 of CITA and Sections 68,69,70 & 71 provides for deduction of tax at source from rent, interest, dividend and directors fees.28

[14] B. O. Oke, 'Taxpayers Rights Protection in Nigeria Taxation' (Law, Administration and Practice) (Tax) Institute of Advanced Legal Studies School of Advanced Study University of London. p. 27

(4) For the purpose of tax refund, the Accountant-General of the Federation shall open a dedicated account into which shall be paid monies for settling such refunds.
(5) The Service shall administer the dedicated account as created by virtue of section 23(4).
(6) For the purpose of the dedicated account, the Service shall prepare an annual budget for tax refund to be funded from the Federation Account as may be approved by the National Assembly.

This provision of section 23 of the Federal Inland Revenue Services Establishment Act is one of the most innovative provisions of the Act. However, despite the existence of these provisions and rights in the Act, Federal Inland Revenue Services are not always inclined to put same into operation. This has placed countless taxpayers in a precarious position that often involves taxpayers having millions of naira and dollars standing to their credit. Presently in Nigeria, the Federal Inland Revenue Services does not have an effective system for tax refund and hundreds of companies, businesses and individuals have billions of naira in credit with it. Section 23 of the Federal Inland Revenue Services Act gives an option to affected companies and businesses to institute legal action against the Federal Inland Revenue Services compelling it to set up the necessary machinery for tax refund.[15]
On Value Added Tax, the law requires that whenever input VAT exceeds output VAT, the party obligation to pay VAT by right shall be entitled to a tax refund. On this, Section 16(1) (b) of the VAT Act provides:

A taxable person shall, on rendering a return under subsection (1) of section 15 of this Act –
(a) if the Output tax exceeds the Input tax, remit the excess to the Board; or (b) if the Input tax exceeds the Output tax, be entitled to a refund of the excess tax from the Board on production of such document as the Board may from time to time require.

This provision re-enforces the provisions of section 23 of the Federal Inland Revenue Services Act on refund of excess tax. Unfortunately this has not been effectively enforced. This is indirectly a violation of the rights to property of the taxpayer as guaranteed in both the Constitution and in the African Charter. Nonpayment of tax refund is posing a grave financial threat to many private as well as public companies in Nigeria.[16]

### 3.1 Taxpayer's Refunds under the Nigerian Tax Law as a Right

Since Nigeria is operating withholding Tax system (WHT) which means a system whereby taxpayers money are deducted at source[17] by the employer and remitting same later to the tax authority, there are probabilities of overpayment and a time underpayment. Where there are underpayment, the tax authority are oblige to call for the balance through notice of additional assessment procedure, while in the case of overpayment, the tax authority are to refund the taxpayer any of such overpayment.[18] And any tax refund shall be made after proper auditing by the service to decide on who is eligible for such refund and it shall be made within 90 days of the decision of the service.[19]

[15]<http://www.citn.org/others/nigeria_speak_tax_paper2.pdf>
[16]<http://www.pwc.com/ng/en/press-room/diversity-of-vat-laws-make-compliance-difficult-formultinationals.jhtml
[17] See Section 73 & 74 PITA for Penalty for Failure to Deduct Tax
[18] See Section 23(1) – (6) FIRS Act 2007
[19] See Section 33(3) FIRS Act 2007

Necessity or reasons to refund taxpayers may occur in many ways. One of such ways is when a taxpayer overpaid his payable tax sum, in such circumstances; the taxpayer is entitled by right to refund of the excess by the service. According to the Act,[20]

(1) There shall be refunded to taxpayers, after proper auditing by the service, such over payment of tax as is due. The procedure for refund of the over-payment by the service is stated in subsection 2 and 3 of the Act.[21] In the words of the Act;
(2) 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; and
(3) Any tax refund shall be made within 90 days of the decision of the service, made pursuant to subsection (2) of this section with the option of setting off against future tax by the taxpayer.

To guarantee the availability of fund for the refund of overpayment, The Accountant-General of the Federation shall open a dedicated account into which shall be paid monies for settling such refund.[22] Another instances where the issue of refund may occur in taxation is where a taxpayer supplied wrong information due to error in filling a return and which lead to incorrect tax assessment such taxpayer by reason of error may seek relief through application to the Board in writing within a period of six years after the end of the accounting period to which it relates.[23] The same relief is allowing for companies which paid excessive tax by reason of some error or mistake in the return filled. Hence,

> If any company has paid tax for any year of assessment alleges that any assessment made upon if for that year was excessive by reason of some error or mistake in the return statement of account made by or on behalf of the company for the purpose of the assessment, it may, at any time not later than six years after the end of the year of assessment within which the assessment was made, make an application in writing to the Board for relief. A determination by the Board under this section shall be final and conclusive.[24]

Other reliefs in respect of error or mistake which can be remedied and refunded if the taxpayer made an application in writing to relevant tax authority for relief are outline in section 83(1)(2)(3)(4).[25] Similarly, a taxpayer is entitled to a relief due to error or mistake done by tax authority which leads to excessive assessment. To enjoy this relief a taxpayer must file a request through application to the relevant tax authority not later than six years after the end of the year of assessment within which the assessment was made[26]. On Value Added Tax, it is the requirement of the law that, an excess VAT payment by right should be refunded to the taxpayers. Therefore, a taxable person shall, on rendering a return under subsection (1) of section 15 of the VAT Act,

a. If the output tax exceeds the input tax, remit the excess to the Board, or

[20] In Section 23(1)(2)(3) FIRS Act, 2007
[21] FIRS Act, 2007
[22] See Section 23(4) FIRS Act, 2007
[23] See Section 49(1) of the Petroleum Profits Tax Act (PPTA) Cap P13, Laws of the Federation of Nigeria, 2004. Section 50(1) of the same law however provides that...if the board disputes any such claim, it shall give to the claimant notice of refusal to admit the claim and the provision of Section 36 of the PPTA shall apply with any necessary modifications.
[24] Section 90 Companies Income Tax Act, Cap C21 Laws of Federation of Nigeria, 2004
[25] Personal Income Tax, Cap P8 Laws of the Federation of Nigeria, 2004
[26] See section 83(1) (2) (3) (4) of .....

b. If the input tax exceeds the output tax, be entitle to a refund to the excess tax from the Board on production of such document as the Board may from time to time require.[27]

**4. Conclusion and Recommendations**

Either corporate or individual, the problem most Nigerian taxpayers are facing is the non-workability of the Nigeria tax system with regard to taxpayers' rights. Ordinarily under the law, the taxpayers are having some rights to exercise but most times, the bureaucratic technicalities as well as the institutional barriers in the realization of the practicability of those rights are clogs. Thus, exercising same is impracticable thereby turning a right to mere privileges. To make the matter worst, the Nigerian government lately carried out wide ranges of review of the Federal Inland Revenue Services powers without addressing how same affects the taxpayers' rights. All these are actually relinquishing taxpayers' rights to the background in the Nigeria tax administration. For instance, the Personal Income Tax Act[28] has undergone a number of amendments with the enactment of the Personal Income Tax (Amendment) Act, 2011.[29] Studying this Amendment Act, one can see that there is an extension of the Powers of the Federal Inland Revenue Services in many sections but little has been done in the area of safeguarding the rights of the taxpayer *vis-à-vis* the new powers bestowed upon the Service. To check these excesses and effect the legal status of taxpayer's right to refund as envisaged by the legislations, the following are commended. There should be imposition of interest on any unpaid sum held by the Federal Inland Revenue Services. This will compel the Federal Inland Revenue Services comply with the express provision of the law. Realizing the amount of interest that is likely to be claimable from it, the FIRS will be forced to set-up the needed machinery to comply with the law. Apart from a general overhauling of the Nigerian laws as regard taxpayer's right, there should be an intensive Enlightenment programme for the taxpayers on their rights as enshrined in various tax laws. There should also be adequate respect for constitutional provision on Taxpayers Right by all the stakeholders in the Nigerian Tax affairs. Any breach by the tax authorities should attract adequate and severe sanction. Adequate enforcement of Section 23 of the Federal Inland Revenue Services Act which gives an option to affected companies and businesses to institute legal action against the Federal Inland Revenue Services compels it to set up the necessary machinery for tax refund.[30]

[27] Section 16(1)(a)(b) of the Act Cap VI Laws of the Federation of Nigeria, 2004
[28] PITA (ACT) Cap P.8 Laws of the Federation of Nigeria, 2004
[29] Enacted by the National Assembly of the Federal Republic of Nigeria, dated June 14, 2011.
[30] <http://www.citn.org/others/nigeria_speak_tax_paper2.pdf>