Nnamdi Azikiwe University
JOURNAL OF INTERNATIONAL LAW AND JURISPRUDENCE
Volume 9 (2) September, 2018

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NNAMDI AZIKIWE UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND JURISPRUDENCE

Volume 9 (2) SEPTEMBER, 2018

NNAMDI AZIKIWE UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND JURISPRUDENCE

Volume 9 (2) September, 2018



A BIANNUAL PUBLICATION OF
THE DEPARTMENT OF INTERNATIONAL LAW
AND JURISPRUDENCE, FACULTY OF LAW,
NNAMDI AZIKIWE UNIVERSITY, AWKA

Citation: (2018) 9 (2) NAUJILJ

© The Department of International Law and Jurisprudence, Faculty of Law, Nnamdi Azikiwe University, Awka

Published, September, 2018

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ISSN: 2276-7371

Printed and Published by:
Amaka Dreams Ltd.
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Awka, Anambra State.
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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.

direct bearing, influence or effect on the tax matters and tax administration as it affect both the taxpayers and tax authorities. In this category, what we have are Primary and Secondary Legal Right, Primary and Secondary Administrative Rights. Primary legal rights are those granted by constitutions and international legal instruments. Secondary legal rights on the other hand are rights contained in conventional legislation which comprises of both substantive and procedural law. Primary administrative rights are in the same nature as secondary legal rights, except, that they are based on administrative regulations and subsidiary legislation issues by the relevant authorities. Secondary administrative rights on the other hand are the right that the tax administration recognises as necessary to be respected but not worth being made the subject of regulations.[3]

Either general or specific, the mere fact that legislation requires Revenue Authority to act reasonably and responsibly in the way and manner they carry on their duties is an important safeguard for taxpayers right, however the non justiciability of tax issues under the Nigerian law seems to constitute a clog in exercising the taxpayers right even when same is tramped upon by the Tax authorities. Structured in to four sections, an overview of taxpayers' rights under the Nigerian law is in the second section, while section three focuses the analysis of refunds in taxation as a right. The paper ends in section four with conclusion and recommendations.

2. An Overview of Taxpayers' Rights under the Nigerian Law

Right is a Universal Phenomenon and the emergency of human rights law in international sphere is one of the most significant developments that have taken place since the end of the Second World War.[4] As part of socio-political and civic responsibility of every nation, the social doctrine obliges every state to jealously protect the rights of its citizens without exclusion of any.[5] The United Nations Universal Declaration of Human Rights of 1948 eloquently describes fundamental rights as the inalienable and inviolable rights due to all members of the human race.[6] Similarly in the Nigeria case of *Ransom-Kuti vs A.G Federation*,[7] Eso JSC said of fundamental human rights thus:

> It is a right which stands above the ordinary laws of the land and which in fact is antecedent to political society itself. It is a primary condition to civilized existence… and what has been done by our constitution --- is to have these rights enshrined in the constitution so that the rights could be immutable to the extent of the immutability of the constitution itself.

The concept of human rights has been an evolving idea all through human history. It has formed the basis of almost all attempts at people and welfare oriented legislation in history. The formation of the United Nations Organization (UNO) Charter, 1945, and the promulgation and adoption of the Universal Declaration of Human Rights,(UDHR) adopted and proclaimed by General Assembly Resolution[8], provided a firm foundation for the historical developments and globalization of human rights. The

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[3] D. Bentley, *Taxpayers' Right: Theory, Origin and Implementation* (Kluwer Law International, 2007) pp.110-137, as cited in O. D. Akintoye, 'Examination of the Powers of the Federal Inland Revenue Service and Taxpayers' Right in Nigeria', an Unpublished Ph.D. Thesis, Faculty of Law, University of Ilorin, 2015.

[4] R. Adimula *et.al* 'In search of Protection for Child Right: A Diagnostic Appraisal of Child Brides in Africa,' (2012) *Nigerian Journal of Food, Drug and Health Law*, at 55.see also S. M. Olokooba, J. O. Olatoke & N. O.A. Ijaiya 'A Dignistic Appraisal of the Clogs in the Enforceability of Prisoners Rights under the Nigerian law' *Journal of Public Law, and Constitutional Practice* 4(2), 2012,p.102

[5] Olokooba, op.cit, p.105

[6] A. O. Ewere,'Discrimination: A Bane of the Fundamental and Reproductive Rights of HIV/AIDS Victims' (2012) 4(1) *Port Harcourt Law Journal,* at 284.

[7] (1985)2 NWLR (Pt. 6)211

[8] 217 A (III) of 10, December, 1948

UDHR 1948 represents a bold attempt by the UN to elaborate on and give concrete and authoritative expression to the imprecise and ambivalent definition of human rights contained in the UN Charter[9]. So important is the concept of human rights that virtually all constitutions the world over make provisions for human rights either in the preamble or in the substantive provisions. In Nigeria, beginning from the post-independence era, due attention has always been given to the issue of human rights. [10] Although, at present there is no separate legislation specifically addressing the issue of taxpayers' rights protection in Nigeria, but certain general rights can be gleaned from the provision of the Federal Inland Revenue Service Establishment Act, the Nigerian 1999 Constitution and the African Charter on Human and Peoples' Rights (African Charter). In the United States of America, there is what is called the Taxpayer's Bill of Rights passed by the congress on the 3rd day of January, 1996.

Under the Fundamental Objective and Directive Principles of State Policy, the Second generation rights, consisting of social and economic standard are a necessary condition for the enjoyment of the civil and political rights. In Nigeria, Chapter four of the 1999 Constitution guarantees a number of Fundamental Rights. They are essentially, the civil and political rights guaranteed in major International Human Rights Instruments. The rights as contained in the 1999 Constitution are; Rights to life, Rights to Dignity of the Human Person, Rights to Personal Liberty and Rights to Fair Hearing. Others are Rights to Private and Family Life, Freedom of Thought, Conscience and Religion, Freedom of Expression and the Press, Peaceful Assembly and Association, Freedom of Movement, the Rights to Acquire and own immovable property anywhere in Nigeria and the Rights to Receive Prompt Compensation for compulsory Acquisition of Property[11]. These rights, which are guaranteed in the Constitution, are not privileges, they are rights, which the Executive, the Legislature and the Judiciary are all enjoined to protect and any violation by any of the organs is liable to be called to order. Where the violation has occasioned injury which could be compensated in financial terms, courts are duty bound to make orders of reparation in monetary terms.

Section 46, 1999 Constitution which gives expression to these rights empowers any person who alleges that any of the rights has been, is being or is likely to be contravened in relation to him, to seek redress in any high court and the court has the jurisdiction to make an appropriate order and issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the rights. The earlier constitutions also made provisions for these rights to be judicially enforced. The remedy for human rights infractions according to the Constitution is for any aggrieved per to apply to the High Court for redress. It is a disturbing fact that human rights violations still occur all over the world, and in Nigeria, the picture is not less disturbing.

Juxtaposing human rights with the concept of taxpayers' rights, it will appear that they are interrelated, particularly to the extent in which the principle of human rights are embedded in taxpayers' rights. These will include rights to privacy, confidentiality and secrecy, rights not to be subjected to human degradation when executing search warrants or forcible entry and rights to information on tax obligations and to be heard while objecting to tax assessment or appealing against same.

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[9] A. J. Dada, 'Human Rights under the Nigerian Constitution: Issues and Problems, quoting R. Schifer in Forty Years of the Universal Declaration of Human Rights,' *Bulletin of Human Rights*, UN New York, 1988 at 92

[10] See i). 1960 Independence Constitution, Cap 11, ii) 1963 Republican Constitution, Cap 11, Section 18 to 40; iii) 1979 Constitution, Section 30 to 39; iv) 1999 Constitution (as amended) Cap 2 and 4.

[11] See: S.33, 34, 35, 36, 37, 38, 39, 40, 41 and 42, 1999 Constitution.

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]

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[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]

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[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>