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THE LEGAL REGIME OF CAPITAL GAINS TAX IN NIGERIA

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Abstract

The idea of taxation of Capital Gains Tax in Nigeria for the first time started in 1967 by the Capital Gains Tax Decree No. 44 which was consolidated and re-enacted in Cap 42 of the Laws of the Federation of Nigeria 1990 (now Capital Gains Tax Act Cap. C001 LFN 2004). This remains the current law as far as Capital Gains Tax is concerned in Nigeria. The tax is administered by the Federal Board of Inland Revenue Service. The Capital Gains Tax Act (CGTA) is universally applied to all taxable corporations in Nigeria. It is important to note that the Nigerian Capital Gains Tax Act appears to be similar to that of the United Kingdom. This paper examines the legal regime of Capital Gains Tax in Nigeria from inception to date.

Introduction

Capital Gains Tax or CGT is charged on capital gains, that is, the profit realized on the sale of an asset that was previously purchased at a lower price.[1] Capital Gains Tax is usually charged from the profits of any asset that has been disposed by a taxpayer.

According to Ayua, Capital Gains may be defined as gains resultants from increase in market value of assets to a person who does not regularly offer them for sale and in whose hands, they do not constitute stock in trade. They may be 'paper' gains in which the assets appreciate in value, while still in the hands of the owner or may be 'realized' gains, when the assets are sold or disposed of. The chief assets that usually give rise to capital gains include stocks, shares and securities, land and building, plant and machinery and other business assets such as goodwill and secret processes and so on.[2]

While, Ariwodola defines it as ,the taxation of gains accruing from the disposal of assets. They are administered under a separate Act the Capital Gains Tax Act i.e. CGTA. Such gains are not taxed as part of income of the beneficiary, but taxed separately at the rate of 20% of the net gains up to 31/12/93[3]. With effect from January 1st 1994, the rate was reduced to 10%[4].

Thus, there are certain conditions for a liability to capital gains tax to arise:

1. there must be a disposal of a type relevant to CGT;
2. of an asset of a type relevant to CGT;
3. by a person chargeable to the tax;and

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[1] Dr. S.B. Adeyemi and M.T. Babington Ashaye "Re-Introduction of Capital Gains in the Nigerian Capital Market" See <http://www.secure.irs-ogun.org/downloads/c>accessed on 21 November 2011.

[2] Ayua, I.A.; *The Nigerian Tax Law*, 1st ed., Spectrum Law Publishing, a division of: Spectrum Book Limited Ibadan, 1996, p. 211.

[3] Ariwodola, J.A.; *Companies Taxation in Nigeria*, 2nd ed., JAA Nigeria Limited, 1995, p. 43.

[4] See Section 2(1) of the Capital Gains Tax Act, 2004. The rate of Capital Gains Tax, which was formerly twenty percent has been amended to ten percent through Decree No. 18 of 1998.

4. on which a chargeable gain is computed under the Act arises.[5]

The legislation intends to distinguish a gain from a chargeable gain. It is only the latter that is subject to tax. The legislation does not specify how a gain should be computed. It only specify what costs can be deducted from the consideration.[6] The effect of this is that capital gains would not arise where these conditions are absent. It is the excess of the proceeds derived from the disposal of the asset over and above the cost of acquiring and enhancing the assets by the owner of the asset that is subject to capital gains tax.[7]

The Need for Capital Gain Tax

Before the adoption of Capital Gains Tax in Nigeria, there was controversy as to its adoption in Nigeria, that there should not be a separate tax for the capital gains.

However this same questions was encountered by the Royal Commission of (England), 1955 and in their Memorandum of Dissent, they gave the first two points of the six underlisted reasons as to why there must be capital gain tax; while the remaining four are those of Ayua.[8]

(i) Capital gains increase a person or person's taxable capacity by increasing his power to spend or save and;

(ii) Since capital gains are not distributed among the different members of the tax paying community in fair proportion to their taxable incomes, but are concentrated in the hands of property owners (and particularly the owners of equity shares) their exclusion from the scope of taxation constitutes a serious discrimination in tax treatment in favour of a particular class of taxpayers;

(iii) Since the capital gains are only enjoyed by a particular group of people, if their profit is exempted from taxation, it will widen the gap between the rich and the poor;

(iv) If capital gain is not taxed it will be a burden on the income of those who do not enjoy capital gains;

(v) Through economic development plans, lucrative chances for the realization of capital gains by the private sector have been considerably enhanced, so their capital gains must be taxed; and

(vi) If capital gains are not taxed, it will be an avenue for tax evasion and avoidance.

Argument Against Capital Gains Tax

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[5] Abdulrazaq M.T., *Revenue Law and Practice in Nigeria*, 2nd ed., Malthouse Press Limited, Lagos, 2010, p. 152.
[6] Ibid and See generally Sections 12-16 Capital Gains Tax Act, 2004.
[7] The Chartered Institute of Taxation of Nigeria (CITN) Tax Guide and Statutes, 2009 p.75.
[8] Ayua, Op.Cit., p. 212. The Royal Commission on the Taxation of Profits and Income, Final Report Command, 9474, 1955, p. 365.

There are arguments against the reintroduction of Capital Gains Tax in Nigeria. It is sometimes claimed that Capital Gains Tax in conjunction with Income Tax is a case of double taxation. This theory further argued that the value of capital relates to the future income that the capital is expected to produce. Any increase in the value of capital hence relates to an unexpected increase in future income. However this additional future income is already subject to income tax so the capital gains is already taxed. It means that no Capital Gains Tax applies if ownership of the capital (that will produce future income) does not change hands. In other words, Capital Gains Tax does not apply if the Capital Gain is not realized through a sale[9].

Taxes on investment income have a major effect on the functioning of capital markets, and the capital gains tax is believed to have a detrimental effect on the ability of capital to finance the most profitable investment opportunities. This particular tax has been proved as discouraging to the supply of risk capital for business start- up and for a small and medium-sized enterprises (SMEs). This type of financing is primarily provided by financially sophisticated individuals (angels) or venture capitalists that operate outside of a tax –sheltered environment. Their choices of business are very sensitive to capital gains tax on their investment income. Their income is most likely to come in the form of capital gains rather than dividend income or interest income.

Another converse argument put forward is that capital gains has a lock-in-effect on investment behaviour. For example, an investor wanting to sell a portion of his or her assets and reinvest the proceeds into better performing stock or shares must pay a tax on the capital gains just to change from one asset to another even though the proceeds are not ever used for consumption purposes. Thus, fewer funds are available for this new investment, resulting in a lower effective rate of return. The effect of this is that it reduces the flow of investment, which is not in the interests of developing countries like Nigeria where there is the need for greater investment mobility[10].

There is also the taxation of illusory income, for instance shares bought few years ago in an average representative company on the Nigerian Stock Exchange would increase in value at the same rate as the increase in consumer prices. In real terms there is no gain and the taxation of capital gains does not recognize this fact[11].

Rationality of Capital Gains Tax as a Form of Tax

The Capital Gains Tax in developing countries like Nigeria, involves two problems, namely;

(a) Taxation of capital accruing from the shares of corporate enterprises.

(b) The taxation of capital gains arising on real estate such as houses and land[12].

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[9] Dr. S.B. Adeyemi and M.T. Babington Ashaye 'Re: Introduction of Capital Gains in the Nigeria Capital Market' see <http://www.secure.irs-ogun.org/downloads/C>accessed on 21 November, 2011.

[10] Ibid p. 6 and Ayua, Op.Cit., p. 213.

[11] Ibid at p. 212.

[12] Ibid at p. 213. Also, See Juanita. U. Ainatong, "Taxation of Capital Gains in Development Countries". In "Reading on Taxation in Developing Countries. (The Johns Hopkings University Press, Batlimore and London, 1975) at p. 253.

There was this argument that a developing country such as Nigeria may not be able to maintain a different tax due to administrative machinery or it should be levied as gifts and death taxes. The alternative of gift and death taxes were defeated as inappropriate. It is not expedient or practicable to tax capital gains (arising in shares and real estate) under the gifts and taxes. According to or as Tipcart observed:

> "It will not be possible to tax gains on equity shares by methods such as gift and death taxes, as these may not synchronize with the appreciation in capital values. These taxes are not effective even for taxing capital gains on real estate"[13].

Also, there was the problem of distinction between a capital and income profit in which it is still valid with capital attracting a lower rate of tax and to Economists, there must be no distinction between capital gains and revenue income for the purpose of taxing companies profits. In *Strick v. Regent Oil Co. Ltd*[14], *Lord Upjohn* observed:

> "I suppose that, no part of our law of taxation presents such almost insoluble conundrums as the decision, whether a receipt or outgoing is capital or income for tax purposes. Parliament wisely, has never given any general statutory guidance in the matter. It has been contented to leave the determination of these difficult matters, to the common sense of the tribunals and judges, before whom these matters are brought.

According to this school of thought, there should be no distinction between capital gains and revenue income for the purpose of taxing companies profit. While C.S. Ola, also in support of this stand, argued that, there should be no distinction between capital gains and revenue income, as this constitutes a distinction between the poor and the rich, with different taxing rate. He argued further that, the higher rate of tax that will be collected from the income of the gains and normal income for tax purpose would be avoided and that:

"A profit is a profit by whatever name so called"[15].

To him also, the rich will secure more advantage from this, by way of engaging in manipulation of all kinds, so as to convert revenue income into capital gains[16].

However, this argument according to Economists will have serious effect of hindering the free flow of securities in the capital market, which is a necessary prerequisite for industrial development. Consequently, this will discourage further investments in new enterprises and this is what the Capital Gain Tax is intended to address.

Gains and Assets That are Chargeable

The tax captured any gain made on disposal of assets on or after April 1, 1967. Section 6 of the Act provides that, subject to any exception provided by it, a disposal of assets occurs, where any sum is derived from a sale, lease, transfer an assignment, a

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[13] See Ayua, Op.Cit., p. 215, citing Public Finance in Underdeveloped Countries, p. 144.
[14] (1965)W.L.R.571.
[15] See Dr. Ola, C.S. *Income Tax Law and Practice in Nigeria*, Ibadan: Heinemann Educ. Book Ltd., 191, p. 242.
[16] Ibid. p. 243.

compulsory acquisition, or any other disposition of assets, notwithstanding that no asset is acquired by the person paying the capital sum:

(a) Where the capital sum is derived by way of compensation for any loss of office or employment;

(b) Where any capital sum is received under a policy of insurance and the risk of any kind or damage or injury to or the loss or depreciation of assets;

(c) Where any capital sum is received as consideration for the use or exploitation of any assets;

(d) Without prejudice to (a) above, where any capital sum is received in connection with or by virtue of any gain from any trade, business or vocation;and

(e) Where any capital sum is received in return for forfeiture or surrender of rights, or for retraining from exercising rights.

The capital sum is defined in the Act to mean any money or money's worth which is not excluded from the consideration taken into account in the computation under Section 11 of this Act.

Chargeable assets are all assets not specifically exempted and whether or not within Nigeria[17]. Assets that are specifically mentioned as chargeable assets under the Act are[18]:

(a) Options, debts and incorporeal property generally;

(b) Any currency other than Nigerian currency; and

(c) Any form of property created by the person disposing of it, or otherwise coming to be owned without being acquired.

The Nigerian Legislation distinguishes a gain from a chargeable gain like the United Kingdom's Statutes. It is only the latter that is subject to tax. Stocks and shares were originally removed from the list of chargeable assets possibly to accelerate capital market development and to encourage investors to invest in these types of assets[19].

Since the conclusion of indigenization exercise, the revenue accruing from the Capital Gain Tax on the Gains from the sale of shares and stocks has virtually become zero because Nigerians mostly buy shares and stocks and keep[20].

Though, Section 4 exempts disposals of non-Nigerian assets by non-resident individuals or companies or disposals of assets of "non-resident" trusts.

See Section 3 CGTA 1990 as amended 2004.

See Capital Gains Tax Decree 44 of 1967. Though, there are lots of arguments for and against introduction of Capital Gains Tax in the Nigerian Capital Market.

Sanni Abiola "Tax Reform in the Capital Market – A Welcome Development" (Paper presented at a seminar organized by the Ogun State Board of Internal Revenue, Abeokuta 2007) 12.

In responses to the demand to exempt stocks and shares so as to encourage investment in that sector, Section 31 of the Capital Gains Tax Act, 2004 now exempts gain from sales of stocks and shares from taxation as follows:

31 (1) Gains accruing to a person from a disposal by him of Nigerian Government Securities, Stocks and Shares shall not be chargeable gains under the Act; and

(2) In this section, Nigerian Government Securities include Nigerian Treasury Bonds issues under the Savings Bonds and Certificate Act.

The issue now is whether this is in line with what is obtainable in other part of the world. A good tax system must be equitable not only in the quantum of the income being asked for, but also ensures that incomes from different sources are treated in a similar way. Therefore, the exclusion of stocks and shares of every description from capital gains chargeable from 1st January, 1998 is an aberration to the tax principles of equity and fairness. It gives undue advantage to traders/investors in stocks trading who are excluded from paying taxes on capital gains on stocks and shares compared to other taxpayers who generated their incomes from other sources[21].

Assets

The meaning of assets has been subjected to some judicial decisions. For instance, in the case of O'Brien v. Benson's Hosiery (Holdings) Ltd[22]. The court held that the series of rights of an employer under a service agreement was an asset for Capital Gains Tax (CGT) so that a sum received to secure the release of the employee was derived from that asset and thus become liable to CGT.

It was also held in the case of A.G. v. Murray[23] that an agreement that is legally unenforceable cannot be an asset for any CGT. The court further held that the proceeds of an insurance policy were not part of the deceased's estate for the purpose of estate duty and therefore renders the insurance policy void.

With regard to assets situated outside Nigeria disposed by non-resident individual or trustee of any trust or settlement or a company that is controlled outside Nigeria, capital gain tax is chargeable on any gains received or bought into Nigeria[24]. Likewise, capital loss on the disposal of any asset is not deductible from capital gains on disposal of any other asset even if both are of the same type[25].

Disposal

There is no concrete definition of disposal. But the Act provides that a disposal of assets by a person is deemed to take place where any capital sum is derived from a sale, lease, transfer, an assignment, a compulsory acquisition of any other disposition of assets, notwithstanding that no asset is acquired by the person paying the capital

[21] Dr. Adeyemi S.B. and Babington Ashaye M.T., "Re-Introduction of Capital Gains in the Nigerian Capital Market"- See <http://www.secure.irs-ogun.org/downloads/c> accessed on 21 November 2011.
[22] [1979] STC 735 [1980] AC 363 [1979] 3 ER 652..
[23] [1904] IKB 165.
[24] See Section 4 of the CGTA 2004.
[25] See Section 5 CGTA, 2004.

claim[26]. Disposal of an asset could be any legal or equitable alienation or transfer of beneficial interest or title to an asset by a person to another person that acquires the interest.[27] A disposal by a trustee of shares in the course of administration is clearly a disposal on this definition since beneficial title passes to the purchaser and the fact that the purchaser is not a beneficiary is quite irrelevant.[28]

The general issue in respect of disposal of assets are related to the consequences such disposal might have on any given capital gains transactions. In some cases, the disposal may yield gains or in other situation, it may create a loss. Such types of transactions includes; hire purchase, contract and consent order from the courts among others.

The Position of Trustees and the Real Owner of Assets in Relation to the Purposes of Capital Gains Tax

As regard any asset held long by a person as nominee for another person or as trustee for another person who is absolutely entitled as against the trustee the property will be treated as vested in the real owner and the acts of the nominee or trustee in relation to the assets will be attributed for the purposes of the Act to the real owner. Thus, the purpose of this provision is to tax the beneficial owner of the asset, thereby preventing the use of the trust as a means of avoiding capital gain tax.[29]

So, where creditors acquired the property of a debtors for failing to pay back the debt, and the property is being disposed off by the creditor, he will be liable to capital gains tax on the capital gains that is being accrued to him on the basis that, he acquired the property for a consideration equal to the amount of the debt or that part thereof. So, by doing this, the amount of the debt is not included in the chargeable gain for Capital Gains Tax Purposes.

Consideration for Acquisition and Disposal of Asset

As it is under the Law of Contract, consideration under the Act is the market value of the asset, regardless of whether the asset has been acquired otherwise than by way of bargain made at arm's length; or where the asset was acquired wholly or partly for a consideration that cannot be valued.[30] In such a situation, the consideration will be money's worth or market value of such asset.[31]

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[26] See Section 6 (1) CGTA, 2004.
[27] Abdulrazaq, Op. Cit., p. 157.
[28] Ibid and See the case of Re Paradise Motor Co. Ltd (1968) 2 All ER 625.
[29] See Section 7 (30 CGTA, 2004.
[30] See Section 7 (1) (b) CGTA, 2004.
[31] Under Section 22 of the Act, the market value in relation to any asset is defined to mean the prices, which the assets might reasonably be expected to fetch in a sale in the open market with no deduction to be made on the assumption that all the assets are to be placed on the market at the same time. Thus, the idea behind this seems to prevent artificial variation in the market prices of assets in order to obtain a tax advantage.

However, where a person acquired the property by way of gift from someone, the consideration will be the market value of such asset or in case where the asset was last disposed of at a consideration at arm's length which is ascertainable, for a consideration equal to that amount and in any other case, for a consideration equal to the market value of the asset on the date of that disposal. Thus, the purpose of this section is to ensure that the correct chargeable gains of the assets are ascertained for the purpose of the Act.[32]

In addition, any receipt could be treated as consideration as was decided in the case of *Stanton v. Dryton Commercial Investment Co. Ltd.*[33]

In a situation where the consideration includes an asset that will be valued at the date of first disposal, the value of the disposal and consideration will become the acquisition cost of the asset. In some instances, disposal of assets that are discovered to be fictitious or artificial could be held to be for consideration equal to the market value of the asset.[34]

Computation of Capital Gains

In the computation of any chargeable gain such gains as may be chargeable to tax shall be the difference between the consideration accruing to any person on the disposal of the asset and any sum of the total consideration and expenses paid for acquiring the asset.[35] Thus, the following should be deducted from the net consideration received for the disposal of an asset:

(a) The amount or value or acquiring the asset;

(b) The income of the owner of the asset charged Under Personal Income Tax;

(c) Allowances incurred wholly, exclusively and necessarily for the acquisition of the asset;

(d) Expenditure for the improvement /enhancement of the value of the asset;

(e) Any expenditure for the establishment, preservation and defending of the title of the asset; and.

(f) The incidental costs of the disposal of the asset. Section 5 provides that, on the computation of chargeable gains, the amount for any asset shall not be deductible from the gains accruing to any person on a disposal of such asset.

However, this is a very curious provision which seems to be self-contradictory. The intention of the provision is presumably to disallow a loss on the disposal of one asset being offset against an accruing on disposal of another. This is simply a case of

[32] See Section 7(2) CGTA, 2004.
[33] [1982] STC 585.
[34] See Section 22 CGTA, 2004.
[35] See Sections 12-16 CGTA, 2004 and See further Oserogho and Associates "Legal Alert, Capital Gains Tax and You" <http://www.oseroghoassociates.com/new/new...> accessed on 06-07-2012.

defective drafting, the intention still being to prevent offsetting of capital losses against capital gains.

Partial Disposals

Where there is a part disposal of an asset or where the transferor holds any interest therein, there is for the purposes of the Act a part disposal.

According to section 6 (2) of the Act there is a part disposal of assets where:

(a) An interest or right in or over the assets is carried by the disposal, as well as where it subsists before the disposal; and

(b) On a person making a disposal, any description of property derived from the assets remains undisposed-off.

Therefore, a disposal of asset under the Act might be a part disposal, and a part disposal in the sense that the original owner does not divest himself of the total interest in the property, where all the proprietary rights or interests over the assets have not been disposed off or where part of the assets is not disposed of. The gain is then computed by apportioning the cost of acquisition in the following formula:

$$\frac{A}{A+B} \times C$$

Where:

A = Sale proceeds (consideration) of the part disposed- off.

B = Market value of the part not disposed- off.

C = Cost of acquiring the whole asset.

Gains or Transactions Exempted from Capital Gains Tax

The CGTA 2004 provides for exceptions of certain bodies from Capital Gains Tax at the disposal of capital assets. These are:

(a) Charitable Institutions;

(b) Statutory or Registered Friendly Societies;

(c) Co-operative Societies;

(d) Trade Unions;

(e) Gains Accruing to any Local Government Council or to any Company; and

(f) Gains accruing to Diplomats or diplomatic bodies[36].

Exempted Gains are:

[36] See Sections 27-28 and Section 40 CGTA, 2004.

Gains accruing from the disposal of decorations awarded for valour or gallant conduct,[37] acquired otherwise than for consideration in money or moneys worth from;

- Private residence of an individual.
- Life insurance policies.
- Chattels disposed off for not more than ₦1,000 in any year of assessment including motor cars suitable for private use.
- Retirement benefits schemes and government securities.

The Act provides reliefs in connection with replacement business assets, compensations for assets cost or destroyed and in connection with delayed remittances from abroad[38].

Business assets entitled for relief consists of building and lands occupied and used solely for the purpose of the trade, excluding those owned by developers or dealers, fixed plant or machinery, ships, Aircrafts and good will.

- Asset acquired by way of gift and disposed of in similar manner[39].

Business Assets' Replacement

Under this situation, where a company in course of its business uses the consideration accruing to that company on the disposal of assets as a consideration to acquire another asset in replacement, for the Capital Gains Tax purposes, it will be treated thus:

(a) The consideration arising from the disposal was such as neither a loss nor a gain accrued to it; and

(b) The consideration for the acquisition of the new asset was returned by the excess of the actual consideration arising from the disposal of the old assets over the consideration deemed under the immediately preceding paragraph[40]. In this situation the company will be given relief, in order to avoid double taxation when the asset is finally sold.

However, this will not be applicable, where only a part of the consideration is re-ploughed into new asset[41]. However, when the only part of the consideration, which is not so reinvested, is less than the gain accruing from the disposal, then the company will be entitled to the relief but proportionately to the amount it has reinvested. The purpose of this is to prevent the abuse of the tax relief by raising only part of the consideration in acquiring new replacement asset. This referred to as rollover relief[42].

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[37] See Section 30 CGTA.
[38] Section 32 (1) CGTA 2004.
[39] Section 39 CGTA 2004.
[40] See Section 31 of CGTA, 2004.
[41] See Section 32 (2) of CGTA, 2004.
[42] A rollover relief is by way of deferral of the tax liability to some future date when the asset newly acquired is eventually disposed.

For the purpose of this relief, business asset have been divided into several classes. These are:

(a) Building and land occupied and use solely for the purpose of the trade excluding those owned by developer or dealers;

(b) Fixed plants or machinery;

(c) Aircraft ;and

(d) Goodwill.

Thus, this business assets replacement relief can be very useful to a company from the standpoint of cash flow implications and also for the replacement of old assets thereby lading hopefully to enhanced business efficiency.

Any asset falling outside the above classes cannot be used to obtain rollover relief.

Compensation for Lost /Destroyed Assets

Under the Act[43] if an asset, whether under a policy of insurance or otherwise, is lost or destroyed and a capital sum received by way of compensation is applied within three years of receipt in acquiring another asset in replacement of the lost or destroyed and a capital sum received by way of compensation is applied within three years of receipt in acquiring another asset in replacement of the lost or destroyed asset, the owner/company may claimed rollover relief. Where the owner utilizes only part of the Money Received To Acquire New Asset, He May Not Claim The Relief.

Artificial /Fictitious Transactions

In order to realize the purposes of the Act, the Federal Board of Inland Revenue is given wide powers to disregard artificial or fictitious transactions. Hence, under the Act[44], where the Board is of the opinion that any disposition is an artificial or fictitious transaction or where any capital gains tax is artificial or fictitious, the Board shall disregard such disposition and may direct that such adjustments, be made with respect to the liability of any person for the payment of Capital Gains Tax as it considers appropriate, so as to counteract with such transaction and shall be assessed accordingly.

Also section 23 of the Act,[45] substitutes market value for the consideration expressed, if the transaction gives rise to a gain, in between "connected person". Hence, and for this, a person is said to be connected with another company, when;

(a) the same person has control of both companies or a person had control of one and persons connected with him, have control of the other or

(b) a group of two or more persons has control of each company and the group either consists of the same persons by treating (in one or more

[43] See Section 19 of CGTA, 2004.
[44] See Section 21 CGTA, 2004.
[45] See Section 24 (5) CGTA, 2004.

cases) a member of either group as replaced by a person with whom, he is connected[46].

However, transaction that are between connected companies and between a company which are connected with another person (presumably an individual) are deemed artificial or fictitious, which can therefore be impeached unless, there is a contrary evidence. Therefore, as the step is aimed at curbing tax avoidance devices, the above provisions constitute important checks on tax avoidance by tax payers, 'though, any checked tax payer who does not agree with the direction, which the Board is empowered by the Act, to make in the like manner as though, such direction were an assessment to Capital Gains Tax, can appeal against it"[47].

Tax Rate Effect so Investment

In Nigeria, the Capital Gains Tax is at the rate of 10%, which is very low, compare to the other forms taxation. This make it possible for investment to be shifted from the activities which yield ordinary income, which attracts higher rate of tax such as dividends, interest and so on to those which create capital gains that will be taxed at much lower rates.

In view of the above, and according to Ayua,[48] the preferential treatment gives room for tax avoidance. Many people tend to manipulation of all kinds to conceal ordinary income by converting it into capital gains. Also, he went further, by quoting the word of Professor Wheatcroft, thus:[49]

> "But, if capital gains are to be taxed at substantially lower rates than income, the legal and accountancy professions will doubtless also.... Devote much time and thought of devising method of turning income gains into capital gains".

Therefore, it should be emphasized that, this may probably result into any shareholder preferring their profits to be retained in their companies rather than be distributed to them, which policy has the undesirable effect of reducing the funds available for investment in new enterprises and other risk-taking activities.[50] However, the lower rate of Capital Gains Tax could enhance people to liquidate their businesses and re-plough their money into another investment.

Inflationary Effect on Taxation of Capital Gains

There arouse the argument as to whether, there should be a distinction between the increase, after allowances for inflation has been made and that the appreciation of capital assets during the inflation is merely non-existent profit[51]. This is because, inflation increases the nominal value of the assets without corresponding increase in their real value and the argument that, the increase money value of assets under

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[46] Ibid, Section 24(5) CGTA, 2004.
[47] See Section 21(2).
[48] p.232.
[49] Ibid, p.232.
[50] Ibid, p. 233.
[51] Ibid.

inflationary conditions is not changeable gain for the purposes of Capital Gains Tax, is difficult to comprehend. Thus, if the value of assets has been within that period, one fails to understand why, it should not be taxed as a gain. However, it was suggested that indexation should be introduced to allow for price inflation, but this is not appropriate for a developing country like Nigeria where there is no efficiency as regards tax administration[52].

Conclusion

In this paper, having examined everything that pertains to the legal regime of Capital Gains Tax in Nigeria, it is obvious that, it is a good form of taxation, if it is fully utilized. However, it is apparent that, many organizations use capital gains to avoid or evade tax and as a result of the lower rate of tax, that is being charged on capital gains, which is considerably lower when compared with other forms of taxation. Thus, many people preferred their income to be taxed as capital gains in order to reduce the tax burden. Also, since the lower classed people do not hold assets, capital gains only accrue to the middle and upper classes.

Therefore, in order to avoid any large scale tax evasion or avoidance on capital gains it is suggested that records of property held, the length of time being held, original cost and related costs are to be kept so as to prevent a situation where, several gains remained untaxed. Also the tax administration machinery should be made effective, in order to achieve the desired aims for which the tax is introduced.

In addition, more efforts should be directed towards enhancing the difficult provisions of CGTA by reorganizing and amending the unwieldy areas from time to time. For example, because of its inherent complications, it becomes difficult to interpret most of its provisions such as meanings of disposal of assets, consideration and market value, arms length transactions, fictitious and artificial transactions among other things.[53]

On the issue of the exemption of stock and shares from Capital Gains Tax in Nigeria, the abrogation of the provision of the Capital Gains Tax Act in taxing capital gains from stocks and shares in Nigeria as chargeable assets may be quite appropriate in 1988 for reasons raging from the encouragement of foreign investment for economic growth, developing the capital market to raising capital in establishing mega industries and due to the negligible revenue generated on stock activities then. The same cannot be said twenty-four years after. The financial burdens placed on modern states today are far higher than in previous times but the world economy is far beyond what it was then in terms investment and business activities. We believe that there is need to reintroduce the taxation of capital gain from stocks and shares in Nigeria in line with the practices in the United Kingdom. Nigeria laws need to be dynamic and fine-tuned to measure up to the country's current economic conditions and realities.

Finally, in view of the increasing number of incorporated companies in Nigeria, there is the need to administer CGTA meticulously, taking note the industrial developments nationwide so as to obtain more revenue from the tax rather than the heavy reliance on crude oil for revenue generation.

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[52] Ibid, p. 233.

[53] See Sections 3, 5, 6,7,21-24 etc. of CGTA, 2004