AN ANALYSIS OF REGULATORY REGIMES FOR THE TAXATION OF ELECTRONIC COMMERCE IN NIGERIA

BY

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P14LACM8002

A DESERTATION SUBMITTED TO THE SCHOOL OF POST GRADUATE STUDIES, AHMADU BELLO UNIVERSITY, ZARIAIN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF A MASTER DEGREE IN LAW (LL.M)

DEPARTMENT OF COMMERCIAL LAW,

FACULTY OF LAW,

AHMADU BELLO UNIVERSITY, ZARIA,

NIGERIA

JUNE, 2018

DECLARATION

I declare that the work in this Dissertation entitled: 'An Analysis of Regulatory Regimes for the Taxation of Electronic Commerce in Nigeria' has been carried out by me in the Department of Commercial Law. The information derived from the literature has been duly acknowledged in the text and a list of reference provided. No part of this dissertation was previously presented for another degree at this or other institution.

_____ _____

Oloruntoba Job Elisha Signature Date

CERTIFICATION

This Dissertation titled: "*An Analysis of Regulatory Regimes for the Taxation Of Electronic Commerce in Nigeria"* by Oloruntoba Job Elisha, meet the regulation governing the award of degree of master of laws- LL.M of the Ahmadu Bello University, and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This work is dedicated to the almighty God, the author and keeper of life who saw me through this program. I give Him all the glory.

ACKNOWLEDGMENTS

The path to the successful completion of this work has been rough. This is not unconnected with the fact that combining academic with legal practice has not been easy. But at last glory to God.

With all sense of humility and great joy in my heart, I appreciate God for His unfailing love, kindness and care for me throughout this program. I am alive today because He kept me.

I wish to acknowledge, with all sense of humility, the fatherly supervisory role of Prof. D. C. John and Dr. K. M. Danladi in the course of this work. I would have been half-baked without their contributions to my grooming. They read everything with microscopic eye and corrected me any time I was off the track. I will ever be grateful to you sirs.

The genuine concern and prayer of my mother, Mrs. Elizabeth Alonge is beyond measure. Mum, you are acting in two capacities; you are a mother to me, and you have never allowed me to feel the vacuum the death of my father occasioned. It is my prayer that you live to reap the fruit of your labour in good health and with long life.

I am equally grateful to all my lecturers who have contributed to my grooming in one way or the other to make this work a reality. They includes but not limited to: Prof. Yusuf Aboki, Prof. M. T. Ladan, Prof Y.Y. Bambale, Prof Agom, Prof A.I. Bappah, Dr. A M. Madaki, the incumbent Dean, Dr. I. F. Akande, Dr. S. Apinega, Dr. Onuh, S K MusahEsq and other lecturers not mentioned. I appreciate you all.

My appreciation also goes to my brother, Elder Ajayi who is a father to me, my younger brother Mike, my dear sisters Lydia and Rebecca, my friend Aro Gabriel, Brother Sanya Titus and Brother Shola Titus, Brother Mike, I appreciate you all. May God whom I serve bless you in Jesus Name. I also appreciate the support of all my colleagues: Mr John SalawuEsq, Eteya OganaEsq, God bless you all.

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16. United Nations Commission on International Trade Law (UNCITRAL)…. 28
17. The Value Added Tax Act…….. 8, 17, 52

TABLE OF ABBREVIATION

1. ATM (Automated Teller Machine) ….……..……...……..105

2. CEN (Capital Export Neutrality)…….……..73

3. CIN (Capital Import Neutrality)…….73

4. CFA (Committee on Fiscal Affairs…..……..……68, 69

5. CAMA (Companies and Allied Matters Act)…….14

6. EDI (Electronic Data Interchange)……25

7. EMV (EuropayMastercard Visa)……. 41,

8. FIRS (Federal Inland Revenue Service)……94

9. ICT (Information Communication Technology)…….2, 83

10. LGRC (Local Government Revenue Committee)…….94

11. NFIU (Nigerian Financial Intelligence Unit)……..50

12. OECD (Organization of Economic Co-operation and Development)……..…106, 112

13. PAYE (Pay as You Earn) …….96

14. PCIDSS (Payment Card Industry Data Security Standard)…….46

15. PE (Permanent establishment)…….80

16. PIN (Personal Identification Numbers)…….44

17. SME (Small-Scale Enterprises)…….13

18. SBIR (State Board of Internal Revenue)……..94

19. UNICITRAL (United Nations Commission on International Trade Law)…....38, 104

20. VAT (Value Added Tax) - - - - - - - -6

ABSTRACT

No doubt, the advent of Information and Communication Technology (ICT) has greatly impacted human interaction ranging from political, religious, social and business transaction. The Information and Communication Technology (ICT) has contributed in a no small measure to the advancement in business transaction as it has taken the manner and channel of commercial transaction beyond the traditional method. Electronic Commerce, though a terminology recently introduced to the psyche of the Nigerian commercial transaction, it is fast gaining ground as it has contributed to the Gross Domestic Development. However, instead of government at national and at international levels to be benefitting from e-commerce in term of revenue to the government, the reverse is the case. Globally, taxation is a vexed question, and taxing electronic commerce creates additional challenges. This notwithstanding, electronic commerce holds tremendous potentials as a formidable source of governmental revenue in the light of globalization and increasing automation of commercial transactions in Nigeria. National and states tax authorities are struggling to find mechanisms to collect the anticipated significant revenues derived from taxing e-commerce profit. Government is yet to feel the impact electronic commerce in terms of revenue generation to the government. Therefore, this work examined the factors proved to be responsible for this ugly situation ranging from the fact that there is no extant law regulating electronic commerce in Nigeria to the archaic law on taxation which makes it practically difficult if not impossible to bring cyber income within the tax box, the ubiquitous nature of cyberspace where this electronic commerce takes place is being exploited as an avenue to evade and avoid tax payment, non-characterisation of electronic commerce to e-commerce in tangible products, intangible products and in services. The work employed the doctrinaire research methodology in analysing some tax statutes relating to taxation, examining the challenges in taxation of e-commerce which includes difficulties in exercising jurisdiction to tax cyber income, displacement of physical presence in electronic transactions, difficulties in assessment and computation of cyber income and lack of wherewithal on the part of the tax authorities in tracing of electronic commerce. It is quite unfortunate that there is no extant law regulating e-commerce in Nigeria the result of which is loss of revenue to the government. The worked was concluded by recommendations which are as a matter of necessity required for effective and efficient means by which e-commerce can be taxed.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study

From the down of history, co-existence among human beings has always been shaped and reshaped by certain events. These range from natural events and most of the times, events brought about by man in a quest for better life.

Man's quest for a better life has brought about Information and Communication Technology (ICT) which has greatly affected all aspects of human endeavours. It is a regime that has shaped various aspect of human behaviour in way that is unprecedented.

The breakthrough in science which led to Information and Communication Technology (ICT) has led to a world whereby business transactions can be carried out without the parties involved having to come together physically for negotiation, performance and payment for the goods bought or the services rendered. This of course is a system that was not contemplated at the making of our law on business transaction and taxation in Nigeria which has become a challenge to the government on revenue generation.

There is hardly any government today that does not rely on taxation measures not only to provide the much needed revenue for socio-economic development but also to reduce the inequalities in wealth distribution in the society[1]. Thus the need to finance and sustain government and its machinery in the discharge of it responsibilities has been the traditional connotation of taxation.[2] In Nigeria like many other countries, the proceeds from taxation which includes taxation of income profits, capital gains, property, entertainment, merriment, sales or purchase of goods and services, stamp duties, excise duties, export

[1]Adeoye *I* (2008), *Significance of Taxation in a Nation,* Journal of Private and Commercial Law, Department of Private and Commercial Law, Faculty of Law, University of Ado-Ekiti Nigeria; Vol. 1, p.1

[2] Akanle O(1991), The Government, The Constitution and The Tax Payer. In Akanle O.(ed.) *Tax Law and Tax Administration*, Nigeria Institute of Advance Legal Studies, Lagos, p1

duties etcetera constitute major sources of revenue for the government.[3] It is therefore means that we are in the era of tax consciousness among the various governments of the Federations[4] for each government from the state to Federal government is conscious of the tax it is entitled to under the law.[5]

Tax collection and administration in Nigeria in this digital age poses challenges to both practitioners and administrators. This is not unconnected with the facts that billions of transactions are carried out monthly through internet or to put properly transaction in the cyberspace without the knowledge of the tax authorities.

However, it is most unfortunate that electronic commerce was not in contemplation at the time making of tax statutes which poses challenges to the tax authorities in Nigeria.

It is a common knowledge that the world wide adoption of Information and Communication Technology (ICT) has immensely altered and enhanced human interaction and our way of life for the past three decades.[6] The world's transition to information age has indeed changed the mode and increased the pace of global socio-cultural and economic activities through the tool of Information and Communication Technology (ICT) and adoption of electronic commerce.[7] This adoption of e-commerce is in no doubt poses new challenges to the practitioners and tax authorities in Nigeria. It cannot be gainsaid that a lot of challenges are facing legal regulations and taxation of electronic commerce in Nigeria.[8]

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[3] Okorodudu M (1991), Analysis of Federal and State Taxing Powers: In Akanle O.(ed) *Tax Law and Tax Administration in Nigeria,* Nigerian Institute of Advanced Legal Studies, Lagos p 49

[4] Oladunjoye O. (1991), Tax Administration; The Problems of Assessment and Collection: In Akanle O. (ed) *Tax Law and Tax Administration in Nigeria*, Nigerian Institute of Advanced Legal Studies, Lagos p 97

[5] Parts 1,11 and 111 of the Schedule to the Taxes and Levies (Approved List Collection) Act, Cap T2 LFN 2004.

[6] Indigbe A (2010), *Legal and Institutional Framework for E-Commerce in Nigeria* – www.punuka.com/uploads/cbn-paper-on-legal-institution-framework-for-e-commerce-in-Nigeria (Accessed 7/09/2015)

[7] Ariyoosu D (2012), *An Examination of the Legal Regulations and Taxation of Telecommunications and Electronic Commerce in Nigeria*; https//www.unilorin-edu.ng.draduate these/law/law-ch-2012-ariyoosu.pdf. (Accessed 7/09/2015) P 260

[8] Ibid p 262

The various tax authorities in Nigeria[9] are grappling with the challenges of tax collection on electronic commerce. The Tax legislations in Nigeria have not been amended to accommodate the trend of transaction brought by the Information and Communication Technology (ICT). One of such challenges posed by application of ICT to commerce or e-transactions is tracking transaction for the purposes of taxation.[10]

The drive towards growing non-oil revenue (through fiscal optimization) and eliminating leakages are not mutually exclusive objectives.[11] Thus, the process of diversifying the revenue base on the economy can only be further complemented by the choices the Federation makes to arrest leakages from the digital economy.[12] The challenges with e-commerce is numerous on the ground that the need for physical presence is removed or at best diminished and this creates the problem of how to determine the right to tax profits that are derived from electronic commerce. Then a further question is whether a website or a server owned or used by a foreign company can create a fixed place of business and hence a taxable transaction?[13]Electronic commerce is still in its infancy.[14] And there is dearth of direct legislations on e-commerce and their virtual natures have made it difficult for the government to establish the real and acceptable mechanism of taxing e-commerce.[15]Therefore there is a need for a research in this area in order to know the effect of e-commerce on taxation of taxable incomes as provided by our laws.

1.2 Statement of Problem

[9] The Federal Inland Revenue Service at the Federal; The State Board of Internal Revenue at the state level.
[10] Faitai F. et al, Why Should Tax be on digital Flight from Nigeria? www.deloitte.com/ng/en/pages/tax/articles/inside-tax-articles/why-should-tax-be-on-digital (Accessed on 7/09/2015)
[11] Ibid p1
[12] Ibid p2
[13] Bolaji O.(2009), Findings from Review of Laws for Social and Economic Development in Nigeria (paper presented at the Working Session of SPFPEL at the Nigeria Bar Association Annual General Conference on Tuesday August 18, 2009 at Ocean view Expo-centre, Eko Hotels & suites, Victoria Island, Lagos (Nigeria). Quoted in Ariyoosu D. Op cit P 300
[14] Ariyoosu D. *Op Cit* p300
[15] Ibid p300

There are many challenges with the taxation of E-commerce in Nigeria and as such the problems to be discussed in this study includes:

a. Many trading entities engaging in e-commerce, especially multinationals operate as virtual organizations with little or no physical presence in any particular jurisdiction which could have determined the country having jurisdiction to impose tax on them.
b. The traditional commercial laws, some of which are derived from the common law of England are still the major laws regulating commercial transaction and this of course cannot cope with the modern system of commercial transaction.
c. Those who engage in electronic commerce device all means to avoid and evade payment of tax since their identity cannot easily be ascertained and assessment of their taxable profits derived from e-commerce cannot be made.
d. Electronic commerce being a modern way of commercial transaction requires technical skills for appropriate taxation which the bodies saddled with the responsibilities of collecting taxes in Nigeria are lacking.
e. Taxes and Levies (Approved List of Collection) Act clearly spells out what are subject to taxes by each tax authorities. This of course relates to tangible products and not digital product which is a vital aspect of electronic commerce.

The natural consequence of the problems posed by electronic commerce is huge revenue loss to the government. A government without adequate revenue cannot adequately protect life and properties and where security of lives and properties cannot be guaranteed, life is bound to be brutish, nasty and short. Thus the questions are:

1. Whether Nigeria is losing huge revenue as a result of the trading entities engaged in e-commerce operating as virtual organisation with little or no physical presence in a particular jurisdiction?

2. Whether various tax laws in Nigeria make adequate provision for taxing e-commerce and whether various tax authorities have the necessary machineries for proper taxation of e-commerce?
3. Whether e-commerce by its very nature, is not a veritable avenue for tax avoidance or evasion despite various laws designed to prevent tax evasion and avoidance?
4. Whether there the tax authorities in Nigeria have the technical skill required in taxation of electronic commerce?
5. Is there a need to develop new norms and tenets of interpretation to determine the nature and character of income from cross-border commercial transaction?

1.3. The Aim and Objectives of Study

The main aim of this study is to examine the legal issues confronting taxation of electronic commerce in Nigeria. There are varying degrees of challenges with taxation of e-commerce such as tax avoidance and tax evasion, multiple taxation and even application of the present tax legislation to electronic transaction. Therefore, the main objectives of this research are as follows:

1. To solve the problem of revenue loss posed by trading entities doing business across jurisdiction with little or no physical presence in a particular place.
2. To point out the loopholes in Nigeria law relating to taxation with a view to suggesting way forward that will have impact on the way of conduct of electronic transaction and tax collection in Nigeria.
3. To point out why e-commerce is an avenue for tax evasion and avoidance and to suggest how the tax authorities can block tax evasion and avoidance
4. To point out why the tax authorities are ineffective and unable to brace up to the challenges posed by electronic commerce to tax collection in Nigeria.

5. To examine the applicability of our tax legislations to digital products as same is a vital aspect of electronic commerce.

For the above stated objectives to be achieved the work will examine the laws regulating commercial transactions and taxation, observations of scholars and practitioners shall be used as the basis of analysing the suggested solutions to be raised in this work. The work therefore focuses on answering the questions raised in the statement of problem in order to proffer solution to the problems associated with taxation of e-commerce.

1.4. Justification of Study

This research is necessary at this moment especially with the drop in oil price which has been the backbone of Nigerian economy, and the fact that the Federal Government is now looking beyond oil revenue to grow the economy. The research no doubt will further the knowledge of tax authorities and administrator on how to block leakages in revenue generation occasioned by emergence of electronic commerce.

The research will benefit the government in that the application of the knowledge and recommendations in the work will drastically reduce short fall in the revenue accrued to the government from taxation of profits derived from commercial transactions.

The research will be of utmost importance to all stakeholders involved in the making of tax legislation and the bodies or agencies involved in the administration of tax in Nigeria. It will be of utmost importance to the Federal Inland Revenue Service, The State Board of Internal Revenue in coming up with policies and regulations which will be viable tools in curbing tax evasion and avoidance as a result of electronic commerce.

1.5. Scope and Limitations of the Research

There is no gainsaying the fact that this research takes place in Nigeria and as such geographically, the scope of this work is Nigeria. The work will examine the nature,

workability of taxation of electronic commerce in Nigeria. However, the world is a global village. Consequently, reference is bound to be made to other jurisdictions.

This research is bound to take into consideration mainly the position of the Nigerian law on taxation of electronic commerce especially as the world is grappling with the fall in oil price and desire of the government to look beyond oil revenue to grow the economy. The work is limited to regulatory regime for taxation of electronic commerce in Nigeria because taxation is vital to income generation of Nigeria as a nation and taxes are matters of statutes.

1.6. Research Methodology

A legal research of this nature requires a doctrinal research methodology. The doctrinal research methodology employed in this work therefore involves the primary and the secondary sources of law. The primary source includes the constitution of the Federal Republic of Nigeria, 1999 (As Amended), statutes and various statutory instruments both in Nigeria and outside Nigeria and case laws relating to the topic of this work.

With regard to secondary sources, these include textbooks, journals, seminar papers, theses, internet materials, conference papers, newspaper reports and because of the novelty of e-commerce in Nigeria, internet source shall mainly be relied on.

1.7. Literature Review

There are few literatures on the subject matter because of its novelty and few or no law governing e-commerce. This is not to say that there are no enough legislation on taxation generally in Nigeria as the issue of tax is purely statutory. It is taxation of e-commerce, being the focus of this work that there are few literatures.

Scholars and academics have published works in the field commerce. Several works have also been published in the area of taxation. However there are few literatures in the area of electronic commerce taxation due to its novelty.

Different writers have written textbooks, articles both in local and international journals on taxation generally. However, their writings do not address challenges to the taxation of electronic commerce in Nigeria.

Ayua,[16] opines that the Nigerian Legal System offers an investor three form of business organization. These are the sole proprietor, partnership and corporate body with or without limited liability. However, his work did not address taxation of the income these business organization derived from electronic commerce.

Okauru,[17]wrote that tax policy can only be described as successful when it leads to effective tax administration, that such tax policy recognizes that sufficient and accurate information is the major requirement needed for effective and efficient tax administration which is not always voluntarily provided by tax payers. However, he did not go further to discuss how tax authorities can have this information even without being supplied by the taxpayers. The information about the payer who gets their taxable income from electronic transaction was not discussed in his work.

Ladan,[18] wrote on cyber law and policy on information and communications technology in Nigeria and ECOWAS. His work is limited to the laws regulating information and communication technology and the institutions of government saddled with the responsibility of ensuring compliance with ICT law in Nigeria. Apart from reference he

[16] Ayua I (1996), *Nigerian Tax Law*, Spectrum Law Publishing Lagos, p. 93
[17]Okauru I (2012),*Federal Inland Revenue Services and Taxation Reforms in Democratic Nigeria*, Safari Books Ltd, Ibadan, p 87
[18] Ladan M. T. (2015) , *Cyberlaw and Policy on Information and Communications Technology in Nigeria and ECOWAS*, Ahmadu Bello University Press Limited, Zaria, p 108

made to the Electronic Commerce (Provision of Legal Recognition) Bill 2008, how electronic commerce can be taxed is not discussed in his work.

Adesola[19], wrote on taxation of income of professional and vocation, how professional receives fees, salary or wages as their reward in the course of their profession and as such, such fees, salary or rewards are subject to tax. He however did not address the fact that many of these professionals can be practicing without any physical office. That is, some are practicing their profession through internet.

Layede.[20] wrote on Capital Transfer Tax. He posited that for Capital Transfer Tax Act to be effective, there must be identification of the property, tracing of the property, valuation of the property and exaction of the tax thereon. However, his position is limited only to tangible properties whereas it is possible to inherit or transfer electronic transaction to another person.

Abdulahi,[21]wrote on taxation of multinational companies. The multinational companies he referred to are those that have physical presence in more than one jurisdiction. He however, did not explain how those that carry on electronic transactions can be taxed

Adeoye[22] opines that the government imposing tax on whom it is to be imposed must be having a thing in common particularly there must be a link between the government and the payer by which the government will have authority on the payer and the payer will accept authority of the government imposing the tax. He did not however explain to what extent

[19] Adesola S (1986), *Income Tax Law and Administration in Nigeria* 2nd Edition, University of Ife Press Ltd, Ife, p 98
[20] Layade P(1991), Towards An Administrable Capital Transfer Tax:InAkande O.(ed) *Tax Law and Tax Administration in Nigeria;* Nigeria Institute of Advanced Legal Studies, Lagos p. 194
[21]Abdulahi I (1991), Tax Treatment of Business concerns with International connections. In Akanle O. (ed) *Tax Law and Tax Administration in Nigeria*. Nigeria Institute of Advanced Legal Studies, Lagos p. 249
[22] Adeoye O (2008), *Significance of Taxation in a Nation.* Journal of Private and Commercial Law; Faculty of Law, University of Ado-Ekiti, Vol. 1, p 1

does a government exercise the authority on the payer in the course of their electronic transaction since it is carried out within the cyberspace.

Abdularazaq,[23]wrote on the discretion of the judiciary in the construction of tax statutes. He is of the view that the incidence of tax avoidance just like its twin factor, tax evasion, is rampant in Nigeria, that the general trend which can be discerned is a conscious judicial side -tracking on technical grounds. His position however does not envisage electronic commerce which harbours potential for perpetual tax avoidance and tax evasion unless there is a strong legal and institutional framework.

Mohammed,[24]wrote on the legal formwork for operation of E-Commerce. In his work, various laws having connection with commercial transaction were made reference to. According to him, internet and e-commerce are verifiable tools for rapid development of the Nigeria economy. However, how the e-commerce which he submitted is a veritable tool for rapid development can be taxed is not discussed in his work.

Isallah[25] wrote on the slow pace of computerization and poor internet connectivity as a challenge to the Federal Inland Revenue Service. His work does not cover how the income generated from electronic commerce can be assessed and taxed.

Oyemumi[26] wrote on the ICT Revolution and Commercial Sectors in Nigeria in which he discussed the legal validity of the contract concluded on line, the validity of ICT related commercial transactions, their admissibility in evidence, and the issues of conflict of law where those commercial transaction are carried out between person who are connected to

[23]Abdularazaq (2001), *Judicial Discretion and the Interpretation of Taxing Statues in Nigeria.* In Nigeria Journal of Private and Commercial Law, Faculty of Law, Olabisi Onabanjo University , Ago Iwoye, *Osun State* Vol., p. 366

[24]Mohammed N (2014), *Analysis of the Legal Framework for the Operation of E-Commerce: A Nigeria Perspective*, Ahmadu Bello University Journal of Private and Comparative Law, Zaria, Vo. 6 & 7 p. 275
Isallah H (2014), *The challenges of Nigeria Federal Inland Revenue Service in Tax Revenue Collection*. Nigeria Journal of Tax Studies, FIRS, Abuja, Vol. 2 No. p 87

[26]Oyewumi A (2012), *The FCT Revolution and Commercial Sectors in Nigeria: Impacts and Legal Intervention*, University of Ibadan Law Journal Vol. 2 No. 1, p 206

different countries. His work however falls short of discussion on how the ICT related commercial transaction can be taxed.

Orifowomo[27] discussed electronic commerce and electronic banking and went on to discuss various forms of e-banking which includes telephone banking and PC Banking. However, his work does not cover taxation of electronic commerce.

Adedokum,[28] wrote that technological advancement, particularly and communication technology, (**ICT**) has made it possible for a tax payer to transact substantial business activities and make huge profits in many countries on-line without necessarily having some contact with the taxing jurisdiction of those countries. His work does not address how these tax payers that do online business can be taxed.

Sanni,[29] wrote on taxing power of the Federal, State and Local Government. However, his research does not cover how this taxing power can be exercised on electronic commerce in so far as electronic commerce is not limited by geographical location.

Ariyoosu,[30] wrote on legal regulations and taxation of telecommunications and electronic commerce, he argued that since e-commerce is imminent in meeting Global Standard in Business transaction, a new tax regime is necessary[31]. He did not however discussed about how the tax authorities can effectively administer tax in such a manner that profits gained from e-commerce can be taxed.

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[27]Orifowomo O (2003–2005), *The Challenges of Electronic Banking in Nigeria: An Opinion.* Ahmadu Bello University Journal of Commercial Law Vol. 2 No. 1, p.159

[28]Adedokun K (2010–2011), *The Exercise of Jurisdiction Taxing Powers and the Dynamics of Electronic Commerce in Nigeria. Legal Perspective*. Ahmadu Bello University Journal of Private and Comparative Law, Zaria Vol. 4 & 5, p 52

[29]Sanni A (2001), *Issues in Local Government Taxation in Nigeria.* Nigeria Journal of Private and Commercial Law, Faculty of Law, Olabisi Onabanjo University , Ago Iwoye, Osun State Vol. 2 p. 329.

[30] Ariyoosu D. An Examination of the Legal Regulation and Taxation of Telecommunication and Electronic Commerce in Nigeria. https//www.unilorin-edu.ng.draduate these/law/law-ch-2012-ariyoosu.pdf. (Accessed 7/09/2015)

[31] Ibid p 260

Charls[32] wrote on the prospects of E-commerce Implementation in Nigeria. According to him, E-Commerce offers a level playing ground for large business as well as small-scale enterprises (SMEs) to operate in the global market-place. His work is limited to how e-commerce thrives and the place of e-commerce in the global market. How the large and small scale businesses involving in e-commerce can be taxed is not addressed in his work.

Opara,[33] wrote on tax challenges of E-commerce in Nigeria. According to him, e-commerce is a significant way to revenue leakages. This leakage is from e-commerce at the assessment stage where the tax payers are either not assessed at all or they are improperly assessed.[34] His work however does not proffer any solution to the challenge of revenue leakage occasioned by electronic commerce.

Shahriari,[35]wrote on the advantages of E-commerce and opined that e-commerce will benefit organizations, customers and the society at large. However how the society will benefit from e-commerce through tax was not discussed in his work.

Azam,[36] wrote on e-commerce taxation and cyberspace law. His work centres on international response to international taxation of e-commerce. National response to taxation of e-commerce was however not discussed in his work.

Joe and Efiok[37] wrote on impediments of electronic commerce as a tax revenue facilitator in Nigeria, their work however is limited to the legal impediments the identified.

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[32] Charles A, The Prospects of E-Commerce Implementation in Nigeria. www.arraydev.com/commerce/JIBC/2006-12/Ayo-E-Commerce.asp (Accessed 22/9/2015)
[33] Opara L, Tax Challenges of E-Commerce in Nigeria: The Panacea for Legal Jurisprudence. www.eajournals.org/wp-content/uploads/tax-challenges-of-E-Commerce-in-Nigeria-the-panacea-for-legal-jurisprudence.pdf (Accessed 22/09/2015)
[34] Ibid p 3
[35] Shahriari S *et al (2015), E-Commerce and it Impacts on Global Trend and Market*. International Journal of Research, Granthaalayah Vol.3 P4. Also Available at http://www.granthaalayah.com (Accessed 25/4/16)
[36] Azam R (2007), *E-Commerce Taxation and Cyberspace.* Virginal Journal of Law and Technology, Vol 12 No.2, Virgina P2 Also Available at http://www.vjoit.net (Accessed 20/4/16)

David[38] wrote on old and new issues in the taxation of electronic commerce. His work centres on the sources based taxation, that electronic commerce should be taxed by the country in which the enterprise earns its income. However, the nature of e-commerce is such that cannot be fixed to a particular jurisdiction.

Shivani wrote that the e-commerce raises tax administration problems, to him e-commerce brings with it a paperless environment, hence, many traders may not be issuing paper invoices and transactions may not be traceable.[39] He opines that in e-commerce compliance checking and monitoring of transaction are made too complex for a taxation authority to handle. He however, did not address how electronic transaction can be changeable to tax. He merely wrote about the challenges of taxing electronic commerce without more.

Emiko,[40]in his article "An analysis of Federal/State Taxing Powers analysed the taxing power of the Federal and the states government tracing their jurisdiction to collect tax from 1951 constitution. He however did not cover their power of taxation of electronic commerce which is the focus of this work.

The limitation in all the works and cases referred to forms the basis of discourse in this dissertation and this work provides a comprehensive material in relation to taxation and electronic commerce as far as Nigerian experience is concerned. The works of authors and scholars both local and foreign mentioned are either with no implications on Nigerian situation or they are only aspects of taxation or e-commerce.

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[37] Joe D *et al* (2013), Impediments of Electronic Commerce as a Tax Revenue Facilitator in Nigeria. Journal of International Business Research, Vol.6 No.6, Canada. p153 Also Available at www.ccsnet.org/ibr (Accessed 23/4/16)

[38] David F, Old and New Issues in the Taxation of Electronic Commerce, Berkeley Technology Law Journal, Vol.14 Issue2. Also Available on http://scholarship.law.berkeley.edu./btlj (Accessed 22/4/2016)

[39] Shivani H (2014), *Challenges of Value Added Tax on International E-commerce in Electronic Goods and Services in Kenya,* Research Journal of Finance and Accounting ISSN2222-1697 (paper) ISSN 2222-2847 Vols. No. 7, 2014 also available In www.iiste org(Accessed on 7/9/15)

[40] Emiko G (1991), An Analysis of Federal/State Taxing Powers: In Akanle O. (ed) *Tax Law and Tax Administration in Nigeria,* Nigeria institute of Advance Legal Studies, Lagos p. 12

1.8. Organizational Layout

This research is made up of five chapters. Chapter one commences with the general introduction. This segment includes the background of the research, research problem, alms and objectives of the research, scope of research and research methodology. It also includes literature review, justification of study and organizational layout.

Chapter two focuses on conceptual clarification. This includes the concept of E-Commerce, the concept of taxation, taxable income and the concept of cyberspace, cyber jurisdiction, internet and cyber taxation.

The focus of chapter three is on the legal regulation of companies and individuals engaging in electronic commerce. It also includes tax administration in Nigeria and the international legal response to taxation of e-commerce, assessment of cyber income for tax purpose and the possibility of cyber taxation in Nigeria.

Chapter four deals with the challenges to taxation pose by electronic commerce. This of course includes challenge of infrastructures, lack of skill needed in taxation of electronic commerce; cyber jurisdictional problem, the issue of residence as a basis for tax and electronic commerce will be discussed under this chapter. Tax avoidance and evasion, high and double taxation, challenge of assessment and computation tax of electronic commerce will be x-rayed.

Chapter five concludes this work as it collates the work in a succinct form with the aim of addressing the objectives of this dissertation. In consists conclusion, findings and recommendations

CHAPTER TWO

THEORETICAL AND ANALYTICAL DISCOURSE ON E-COMMERCE IN NIGERIA

2.1 Introduction

Defining a concept offers an insight into the phenomenon sought to be ascertained.[1] However, it is to be noted that the nature of law itself makes it very flexible when it comes to definition of terms.

It is important to clarify certain concepts so as to bring to the readers, the clear picture of a subject matter. This of course helps in many ways. For the scholars, definitions provide the basis for understanding the subject matter, for regulators a clear understanding provides the strategic position to make laws that are responsive to a need. For the judiciary, a conceptual clarification of a subject is important to bring it within the interpretation of a particular legislation.[2]

Electronic commerce and its associated terms will require clarification in order to situate them within the context of the topic of this work. This of course will go a long way to further the understanding of the reader of importance of this work at this moment.

Some words, key terms are employed in the course of this dissertation. These word and key terms are technical in nature and they are central to any discussion on the topic of this dissertation. These terms are not within the domain of the public as this work itself ventures in a novel area of law. These terms are generally not found in the English Dictionaries and where they are found, they are technical and registered expression that cannot easily be understood.

[1]Agom A, (2015), *The Concept Of Company* (Unpublished) LLM Lecture Note, Faculty Of Law, Ahmadu Bello University, Zaria. p1
[2] Ibid p1

Therefore, the objective of this chapter is to clarify and analyse the key concepts germane to e-commerce taxation. Thus a discussion on how these concepts have been defined by scholars, statute, and judicial definition where applicable.

2.2 Nature and Scope of Internet.

When the computing era took a major lead in the 80s, it was all just about the operating system and the programming languages. People were getting carried away over the heavy technology revolution thinking that this is the one that the world needed to get over the bounds of time and space, and as usual, they were wrong. It was not long after the computer revolution that a tide, Electronic Communication, arrived. This technology now makes the computers look lifeless if they don't have it. Connecting the corner of the cobwebbed world even from its remotest corner is internet.[3] The internet grew at a fast pace in the 1990s as the general population discovered the power of the new medium. A significant portion of the net's content is written text in the form of both electronic mail (e-mail) and articles posted in an electronic discussion forum. In the mid-1990s the appearance of the world-wide web made the internet even more popular. The world-wide web is a multimedia interface that allows for the transmission of text, pictures, audio, and video together, known as web pages, which commonly resemble pages in a magazine. Together, these various elements have made the internet a medium for communication and for the retrieval of information on virtually any topic[4].

Internet is a computer system that allows millions of computer users around the world to exchange information[5]. It is a global computer network which allows people from all over

[3]Ablimanyu M (2009), *Internet: What is Internet*. www.engineergarage.com/article/what-is-internet/.history/working (accessed 13/06/2016)
[4] Ibid
[5] Longman contemporary English for advanced learners 6th edition, p 921

the world to communicate and transact business with one another within seconds.[6] It is a means of connecting a computer to any other computer anywhere in the world via dedicated routers and servers.[7] It is a global communication network that allows computers worldwide to connect and exchange information.[8]It is a public network of networks that can be accessed by any computer equipped with a modem.[9]

Internet is a global collection, of computer networks that are linked together by devices called routers and use a common set of protocols for data transmission known as tcp/ip transmission control protocol / internet protocol[10]. It is a vast multinational framework comprised of more than 150,000 individual networks and used by more than 304 million people around the globe.[11]

It should be noted that defining a subject matter most of the time is influenced by the background of the author. Take for instance, the encyclopaedia of America defines internet as a network of computers linking the United States with the rest of the world.[12] The various element such as transmission of text, pictures audio, and video together, known as web pages have made the internet a medium for communication and for the retrieval of information on virtually any topic.

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[6]Adedokun K (2011), The Exercise Of Jurisdiction Taxation Of Powers And the Dynamics of Electronic Commerce In Nigeria: Legal Perspectives, (2010-2011) *Journal Of Private And Comparative Law*, JPCL Vols 4 & 5, Zaria, Ahmadu Bello University, Zaria, p 550

[7] Business Dictionary.Com 20/4/16

[8] Http:Www.Businessdictionary.Com/Definition/Internet Concept

[9]Orifowomo O (2005), The Challenges Of Electronic Banking In Nigeira: An Opinion, *Ahmadu Bello University Journal Of Commercial Law* (ABUJCL) Vol. 2. No. 1 Zaria. p. 156

[10] Bod P, Basic Internet Tools, Roseburg Public Schools. http: www.roseburg.ICIZ or us/depts./tech/steffdev/int4ed/resources (accessed on 20/04/2016

[11] Steven J., (2002), Electronic Commerce: A Taxing Dilemma, Mercer University, Atlanta, P.1 Simon-sj@mercer.edu.com (accessed 20/4/16)

[12] West's Encyclopaedia Of America (2005) encyclopaedia.com (Accessed On 13/6/2016)

Oyewumi defines it to mean a content distribution network comprising of a global system of interconnected computer networks through which data is interchanged.[13]Internet has also been defined to be a public network of networks that can be accessed by any computer equipped with a modem[14].

Therefore, internet can be defined as the network of computers through which data are collected, stored, processed and transmitted. The categories of activities that can be performed on the net are never closed.

In term of nature, its reality is beyond dispute as its widespread conquest over the world is evident. It has practically destroyed territorial boundaries and revolutionised the way of business across the word. [15]

2.3 Definition and Nature of Cyberspace

The term cyberspace was first used by the American – Canadian author, William Gibson in 1982 in a story published in Omui magazine and then in his book, Neuromancer. In this science- fiction novel, Gibson described cyberspace as the creation of a computer network in a world filled with artificially intelligent beings.[16]

It has been argued that the word "cyber" should not be used as a verb nor should it be used as a noun that can stand on its own and should not automatically connote a cyberspace attack nor should it drive one immediately to assume that cyberspace activity is all about spying, espionage, crime or challenging our right to privacy[17]. The term cyber is most useful as part of the compound word cyberspace and cyberspace is simply the man-made

[13]Oyewumi A. (2012). The ICT Revolution and Commercial Sectors In Nigeria: Impact And Legal Interventions.*University Of Ibadan Law Journal*, Vol. 2 No. 1, Ibadan p. 203
[14]Orifowomo*Op Cit* p. 159
[15] Adam K (2008), E-Commerce: Issues and Challenges for the Nigerian Law, *University of Ilorin Law Journal* Vol.1, Ilorin, p 96
[16] Ibid
[17] Ibid.

domain created when we connect all of the computers, switches, routers, optic cables, wireless devices, satellites and other components that allow us to move large amounts of data at very fast speeds.[18]The term cyberspace is the virtual geography created by computers and networks.[19]

Cyberspace, amorphous, supposedly "virtual" world created by links between computers, internet- enabled devices, services, routers, and other components of the intern's infrastructure[20]. As opposed to the internet itself, cyberspace is the place produced by these links.

Where then is cyberspace? The answer to this question seems to approach the metaphysical: It is everywhere and invisible. It exists in the smallest bursts of matter and energy and is called forth only by the presence of man through the intercession of an internet provider[21].

The word 'cyberspace' has stormed into our language and invaded our collective consciousness like no other. As technology improves and ownership of home computers increases, we competently navigate our way around cyberspace, downloading information reading and writing to newsgroups, and receiving and sending emails. Cyberspace therefore represents the new medium of electronic communication which is fast outmoding or even replacing, more traditional method of communication.[22] It is simply the man- made domain created when we connect the entire computer, switches, routers, fibre

[18]Brett W. (2014), *Cyberspace: What Is It, Where Is It And Who Cares?* Armed Forces Journal- http://armedforcesjournal.com/cyerspace-hwat-is-if-and-who-cares (accessed on o6/7/2016)
[19]Gringras C (2008) ,*The law of the internet* .2nd (ed) Butterworth's LexisNexis, London p. 456
[20]Bussell J (2016), *Cyberspace*, Britannica online, http://www.britannica.com/topic/cyberspace (accessed on 18/6/2016)
[21] Darrel M(1998), *Jurisdiction in Cyberspace: A Theory of International Space*http://www.mttlr.org/volfour/menthe.html (Accessed on 25/06/2016)
[22] Bryant R. (2001),What Kind Of Space Is Cyberspace?*An Internet Journal Of Philosophy V*ol. 2, 2001, available at http://www.u/ie/philo/vol5/cyberspace html (accessed on 6/7/2016

optic cables, wireless devices, satellites and other components that allow us to move large amounts of data of very fast speeds.[23]

It is a domain characterised by the use of electronic and electromagnetic spectrum to store, modify and exchange of data via networked systems and associated physical infrastructures.[24]

Cyberspace is another important element of information technology.[25] It is used to denote the apparent or virtual location within which electronic activities are undertaken. For example, in a telephone call, each party's words will be received by the other and although legal provisions exist to resolve the issues such as the time and place when a contract may be considered to have been made, the overall conversation does not occur at either end of the connection. It is thus defined as the imaginary location where the words of the parties meet in conversation.[26]

According to the Canada's cyber security strategy, cyberspace is the electronic world created by interconnected networks of information technology and the information's on those networks, it is a global commons where more than 1.7 billion people are linked together to exchange ideas, services and friendship.[27]

Under the United States law, cyberspace is defined as the interdependent network of information technology infrastructures, and it includes the internet telecommunications

[23] Brett W. (2014), Cyberspace: What Is It, Where Is It And Who Cares*?Armed Forces Journal*-http://armedforcesjournal.com/cyerspace-hwat-is-if-and-who-cares (accessed on o6/7/2016)
[24]Sai Y (2008), International Taxation of E-Commerce Issue in Cyberdpace. http://www.un.org/esa/ffd/tax/2014TBP/ p 2
[25]Abubakar O (2008), *Compendium of Laws under the Nigerian Legal System*, Maiyati Chamber 2nd Edition, Vol.2,Lagos p 368.
[26] Ibid
[27] Canada's Cyber Security Strategy, 2010 Available http:www.public safety gl.ca/prg/nsicbr-fi/LCSS-SCC-peng.pdf (accessed 20/07/2016)

networks computer systems, and embedded processors and controllers in critical industries.[28]

Cyberspace therefore is the virtual space or virtual domain created in which electronic activities are taking place. It exists though cannot be touched, felt or sensed by the human sense organs but the activities taking place there have direct impact on human life.

2.4 Definition and Scope of Cyber Jurisdiction

The borderless nature of cyberspace makes the issue of jurisdiction very important. Jurisdiction addresses questions relating to which country will hear a dispute, resolve it and enforce the contractual terms.[29]The question of jurisdiction is very crucial in litigation and particularly so in dispute relating to electronic transaction that transcends territorial boundaries. Issues of jurisdiction are decided based on the laws of jurisdiction and multinational conventions concluded between various regional blocks and associations.[30]The issue of jurisdiction however becomes more complex with the advent of modern technology in which border is no longer a barrier to commercial transaction and businesses are now being concluded via the application of modern technology. The issue of jurisdiction and choice of law is a very important one in e-commerce. The problem is which court assumes jurisdiction in a dispute between parties arising from an e-commerce transaction. Further, which law is to be applied by that court? This is due to the fact that the parties may reside at different locations with different legal systems.[31] Although one may say that Nigeria has one legal system, however one is not oblivious of the fact that

[28] Cyberspace Policy Review, Jan. 2008 available at http://www.whitehouse.gov/.assets/documents/cyberspace policy review wfinal.pdf (accessed 20/06/2016)
[29] Adam K (2008),E-Commerce:Issues and Challenges for the Nigeria Law,*University of Ilorin Law Journal,* Vol. 1, Ilorin p 102
[30] Ibid
[31]Indigbe A (2010), *Legal and Institutional Framework for E-Commerce in Nigeria* – www.punuka.com/uploads/cbn-paper-on-legal-institution-framework-for-e-commerce-in-Nigeria (Accessed 7/09/2015)

different states in Nigeria are coming up with their own tax legislations on matters or items they have the authority to collect tax.

Again the issue of timing may determine the issue of jurisdiction or choice of law if the sender and addressee reside in two different countries or different state within Nigeria. Since cost effectiveness and improved productivity facilitated through e-commerce remains key attraction to small and medium enterprises (SMES) seeking to leverage the internet to boost their businesses,[32] the issue of jurisdiction becomes apposite as these small and medium enterprises carried on through are done across jurisdiction

Due to the novelty of this area of study, there are few literatures, on taxation of electronic commerce and as such, there are few authors that have made attempt to define the term "cyber jurisdiction".

According to Ladan, cyber jurisdiction or jurisdiction in cyberspace refers to physical governments' power and court's authority over net users or their activities in cyberspace.[33]

The phrase 'Cyber jurisdiction' therefore is the authority or power of a sovereign state to determine what happens within her cyberspace; the authority of a state to exercise sovereign power within its cyberspace.

2.5 Definition and Nature of Electronic Commerce

Electronic commerce, commonly known as E-commerce, is trading in products or services using computer networks such as the Internet.[34] Electronic commerce draws on technologies such as mobile commerce, electronic funds transfer, supply chain management, Internet marketing, online transaction processing, electronic data

[32] Jonah W (2015), *Convenience Remains Major Driver of SMEs into E-Commerce*, Vanguard, Monday, September 28, p 35

[33] LadanM.T.(2014), *Cyber Law And Policy On Information And Communications Technology In Nigeria and ECOWAS,*Ahmadu Bello University Pres Ltd, Zaria p .109

[34] Shahrzad S. et al (2015), E-Commerce and its Impacts on Global Trend and Market, *International Journal Of Research* ,Grant HeqlayahVol 3, Vol 4 P. 49 Also Available at http://www.granheqlayah.com (accessed on 24/4/2016

interchange (EDI), inventory management systems, and automated data collection systems. Modern electronic commerce typically uses the World Wide Web for at least one part of the transaction's life cycle, although it may also use other technologies such as e-mail. In the simplest case, it can be defined as doing business transactions in an electronic format.[35]

According to Orifowomo[36], electronic commerce is defined to be a term applied to activities involving the exchange of goods or services for value over a computer network or automated system.

Adedokun[37] adopted the black's law dictionary's definition of computer when he defined electronic commerce as operating business transactions and commercial activities by means of electronic instrument. Typically, it involves the use of computer, website, internet service provider.

Steven defined electronic commerce in line with the Internet Tax Freedom Act.[38] According to him, electronic commerce includes any transaction conducted over the internet or through internet access, comprising the sale lease, license, offer or delivery of property, goods, services or information whether or not for consideration, and includes the provision of internet access.[39]

It is a term for any type of business or commercial transaction that involves the transfer of information across the internet[40]. It covers a wide range of different types of businesses,

[35] Ibid
[36] Orifowomo *Op Cit* p. 157
[37] AdedokunA. *OpCit* p. 51
[38] Internet Tax Freedom Act 47 USC, 1998
[39] Steven J, (2002) Electronic Commerce: A Taxing Dilemma. Mercer University, Atlanta, USA Simon-sj@mercer.edu (accessed 20/4/16)
[40] What is E-Commerce – www.network solution.com/education/what-is-ecommerce(Accessed 20/09/2016)

from consumer based retail site, through auction or trading goods and services between corporations.[41]

According to the online business dictionary, electronic commerce is defined as business conducted through the use of computer, telephone, fax machines, barcode readers, credit cards, Automated Teller Machine (ATM) or other electronic appliances whether or not using the internet without the exchange of paper based documents.[42] It includes activities such as procurement, order entry, transaction processing, payment, authentication and non-repudiation, inventory control, order fulfilment and customer support[43].

E-commerce refers to the use of communications technology particularly internet to buy, sell and market goods and services to customers or end- users.[44] Electronic commerce generally refers to commercial activities based upon the processing and transacting of digitalise data, including text, sound and visual images, which ultimately results to an exchange of value across [45]telecommunications network. It is commonly perceived as the buying and selling of products or services over electronic system such as the internet and other computer networks, products are marketed, advertised, sold, paid for and delivered through services of a website via the internet.[46]

Electronic commerce commonly known as e-commerce consists of the buying and selling of products or service, over electronic system such as internet and other computer network.[47]

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[41] Ibid
[42]www.business dictionary.com/definition/electroniccommerce-e-commerce.html (23/09/2016)
[43] Ibid
[44] Opera L, (2014),Tax Challenges Of E-Commerce In Nigeria: The Panacea For Legal Jurisprudence,*Global Journal Of Politics Snad Law Research Vol.* 2 No. 4 p. 2 Also Available on www.eajournals.org. Accessed 22/09/2015)
[45] Ibid p.2
[46] Ibid
[47]Ariyoosu D (2012), *An Examination of the Legal Regulations and Taxation of Telecommunications and Electronic Commerce in Nigeria*; https//www.unilorin-edu.ng.draduate these/law/law-ch-2012-ariyoosu.pdf. (Accessed 7/09/2015) p.46

However, the concept and forms of electronic commerce at the European and International level is to the effect that e- commerce is the occurrence of transactions via internet, other networks (intranet, extranet) or other applications (electronic press e-radio, e-television (etc.).

At international level, e-commerce is defined as applying to any kind of information in the form of a data message used in the context of commercial activities[48] or conducted over computer-mediated networks.[49] Electronic commerce is the buying and selling of goods and services on the internet especially the World-Wide Web (WWW).[50] It is the sharing of business information, the maintaining of business relationships and the conducting of transactions by means of telecommunications network.

The United Nations Commission on International Trade Law (UNCITRAL) has defined electronic commerce as commercial activities conducted through an exchange of information generated, stored, or communicated by electronic, optical, or analogous means.[51]

The U.S. Department of the Treasury defines it as "the ability to perform transactions involving the exchange of goods or services between two or more parties using electronic tools and techniques.[52]

It is commercial transaction, involving both organization and individuals, that are based upon the processing and transmission of digitalised, including text, sound and visual images and that are carried out over open networks (like the internet).[53] It is the

[48] Article 1, UNCITRAL, Model Law on Electronic Commerce
[49] OECD Measuring The Information Economy 2002, Annex 4 Par, 2002 P. 89http://www.oecd.org/publications/Pol_brief/9701_pol.htm>) (Accessed 19/04/2016)
[50]Ariyoosu Op Cit p181
[51]*See* OECD, *OECD Policy Brief No. 1-1997* (from http://www.oecd.org/publications/Pol_brief/9701_pol.htm (Accessed 14/12/2015)
[52] Ibid
[53] Organization of Economic Co-operation and Development<http://www.oecd.org/publications/Pol_brief/9701_pol.htm (Accessed 04/12/2015)

production, distribution, marketing, sale or delivery of goods and services by electronic means.[54]

There is no extant law in Nigeria that defines electronic commerce. Even the cybercrime (Prohibition, Prevention) Act, 2015, does not define e-commerce. It instead defines financial transaction[55]. It defines financial transaction to mean-

a. a transaction which in any way involves movement of funds or other electronic means;
b. involves one or more monetary instruments
c. involves the transfer of title to any real or personal property

This definition, it is submitted falls short of any acceptable definition of electronic commerce as electronic commerce is not limited to monetary aspect of human transaction alone. Although the Electronic Commerce (Provision of Legal Recognition) Bill, 2011 is not yet a Law, for the purpose of academic reference can still be made to the Bill. The said does not define e-commerce instead it defines electronic.[56]

Electronic commerce therefore is all that commercial transactions which are carried out either in whole or in part with the aid of Information and Communication Technology (ICT) such as internet.

The benefits of e-commerce include the speed of access, a wider selection of goods and services, accessibility, and international reach. It is perceived downsides includes sometimes-limited customer service, not being able to see or touch a product prior to purchase, and the necessitated wait time for product shipping. To ensure the security,

[54]Sacha V (2002), *Outstanding WTO Issues and Deliverable in Respect to Electronic Cross-Border Trade of Digital Products*. Available at www.cid.harvard.edu/cidtrade/Papers/Wunsch_WTO.pdf (Accessed on 26/05/ 2016)
[55] Section 58, Cybercrime (Prohibition, Prevention ETC) Act, 2015
[56] Section 24

privacy and effectiveness of e-commerce, businesses should authenticate business transactions, control access to resources such as webpages for registered or selected users, encrypt communications and implement security technologies such as the secure sockets layer.[57] Electronic commerce involves the use of computer networks to facilitate the production, distribution, sale, and delivery of goods and services. Most e-commerce involves business-to-business transactions, and a substantial portion of business to business transactions involves digital content.

Electronic commerce causes problems primarily when it crosses boundaries between taxing jurisdictions. Take for instance, between the constituent units in Nigeria on the one hand and Nigeria with other countries on the other hand.

E-commerce is, by its nature, a truly global process and no tax jurisdiction, acting in isolation, can resolve all the issues it raises. The successful administration and application of taxes will to a great extent depend on, *inter ali*a, achieving an international consensus.

It is also necessary to distinguish between three types of e-commerce: ecommerce in tangible products, e-commerce in intangible products, and e-commerce in services. All three types of e-commerce are *global*, in the sense that e-commerce takes place on the globe without real meaning given to territorial borders between countries. Ecommerce ignores or even destroys territorial borders. All types of e-commerce are also *virtual*, in the sense that their existence is on the Internet and their physical existence outside the Internet is limited. The right answer to the question of where e-commerce occurs is "on the Internet." It is very artificial to pinpoint the location of e-commerce in terms of a geographical location outside the Internet. The last feature of all types of ecommerce is its

[57]Shahrzad S.*et al* (2015), E-Commerce and it Impacts on Global Trend and Market.*International Journal Of Research Grant* Heqlayah Zaria, Vol 3, Vol 4 p. 49 Also Available at http://www.granheqlayah.com (accessed 19/5/2016)

anonymity, in the sense that the e-commerce transaction, its parties, and its details are at least partially anonymous.

However, the three types of e-commerce differ in terms of the extent to which each is global, virtual, and anonymous. Generally, e-commerce in tangibles is less global and less virtual than e-commerce in intangibles, and e-commerce in services is somewhere in between. This difference has tax consequences—as the global or virtual nature of the e-commerce increases, the tax challenges become more difficult. Likewise, anonymity is always present to some extent but varies between the different types of e-commerce. The level of anonymity depends on the architecture of the Internet and on the available locations technologies. As the level of anonymity increases, the tax challenges become harder.

The right answer to the question of where e-commerce occurs is "on the Internet." It is very artificial to pinpoint the location of e-commerce in terms of a geographical location outside the Internet. The last feature of all types of ecommerce is its anonymity, in the sense that the e-commerce transaction, its parties, and its details are at least partially anonymous.

The electronic commerce is carried out through various means which some authors have regarded as instruments of e-commerce.[58]

Marc Bacchetta, listed the instruments of e-commerce. According to him, six main instruments can be distinguished. The telephone, the fax, television, electronic payment and money transfer system, electronic data inter change and the internet. This is the broad

[58]Marc B et al (1998), *Electronic Commerce and the Role of the WTO*. World Trade Organization Geneva,https://www.wto.org/english/res_e/publications_e/special_studies2_e.htm p.5 (Accessed 20/08/2016)

definition of the term, "electronic commerce".[59]It is the firm view of this writer that the categories of instruments of e-commerce are never close as these may include social media like facebook and whatsapp.

2.6 The Concept and Nature of Tax

The introduction of a tax on income was not accompanied by a definition of tax.[60]

A tax is not an assessment of benefits; it is a means of distributing the burden of the cost of government. The only benefit to which a taxpayer is constitutionally entitled is that derived from his enjoyment of the privilege of living in an organised society, established and safeguarded by the devotion of tax to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principle of government that it exists primarily to provide for the common goods".[61]

The impact of revenue for sustainable national development cannot be overemphasized. From time immemorial, nations have been incurring expenditure on infrastructure, education, health, law and order aimed at improving the quality of life of the people[62]. Every sovereign nation needs to collect revenue from its people, particularly in a democratic system of government such as Nigeria's and spend same in providing democratic dividends including social and economic objectives to them. Therefore taxation is the practical means of raising the revenue to finance government spending on the goods and services that most of us demand.[63]

[59] Ibid p.5

[60] Davies F (1980), *Introduction to Revenue Law,* Sweet and Maxwell, London. p.15

[61] Commonwealth Edison –V-Montana (453 U.S 609, 1981) Quoted by Steven J. Note. p.36

[62]Isallah H (2014), The challenges of Nigeria Federal Inland Revenue Service in Tax Revenue Collection.*Nigeria Journal of Tax Studies, FIRS,* Abuja, Vol. 2 No. p 79

[63]Ibid

A tax is a financial charge or other levy imposed upon a tax payer (on individual or legal entity) by a state or the financial equivalent of a state such that failure to pay or evasion of or resistance to collection is punishable by law.[64]

Tax means a monetary charge imposed by the government on persons, entities, transactions, or property to yield public revenue.[65]In its broad sense, tax embraces all governmental impositions on the person, property, privileges, occupations, and enjoyment of the people, and includes duties, import and exercise.[66]It is also defined as a compulsory levy imposed on a subject or upon his property by the government having authority over him or the property.[67]

According to Akanle, two elements are inherent in the definition of taxation. The first element is that the levy must be compulsory and not voluntary or subject to the receipt or conferment of any benefit on the payer. The second element is that it is imposed by government.[68] It is a compulsory contribution under the authority of a legislation or directive of constituted authority for the public purposes.[69]

Taxation is thus a compulsory levy by the government on the income of individuals, properties and corporate bodies for the upkeep of the government.[70].

2.7. The concept of Cybertaxation

Clearly, as the importance of the internet as a channel of commerce continues to grow, states will have to decide whether to institute sale taxes.[71]The problem lies in the outdated

[64]Opara L. *Op Cit* p.1
[65]Ariyoosu D. *Op.Cit* p. 50
[66] Bryan A., Black's Law Dictionary 8th Ed. West Publishing Co, USA P. 1496
[67]Akanle O (1991), The Government, the Constitution and the Taxpayer. In Akanle O.(ed.) *Tax Law and Tax Administration*, Nigeria Institute of Advance Legal Studies, Lagos, p1
[68]Ibid
[69]Mathew v. Chicory Marketing Board (1938) 6 CLR 263,270
[70] John D (2013), Evaluation of Judicial Attitude Towards Tax Offences and Penalties: Cases, Analysis and Recommendations.*Ahmadu Bello University Journal of Private and Comparative Law,* Zaria, Vo. 6 No.1 p119

tax systems of the most states, which were designed to tax tangible goods whereas tangible goods are not the object of cybertaxation. Cybertaxation has to do with the taxation of intangible goods and electronic services. What then is cybertaxation?

Despite the fact that many authors have attempted the definition of e-commerce and taxation, there is no author known to this writer that has attempted the concept of cybertaxation. Even Arisoosu,[72] rather than defining cybertation, he defined tax ortaxation and closed it.Cyber Taxation therefore can simply be defined as the imposition of tax on cyber income. These cyber incomes are derivable from buying and selling through the employment of the Information Communication Technology (ICT). It may be buying and selling of goods or services.

2.8. Conclusion

In this chapter, certain key terms employed in this dissertation has been defined and clarified. E-commerce and its nature have been extensively examined. It has been discovered that cyberspace where e-commerce takes place is global, virtual and most of the time gives room for anonymity. It has been discovered that cyber-jurisdiction is peculiar as it not affected by geographical limitation and as such pose challenges to the taxation of e-commerce.

[71] Anderson A (2007), Authur Anderson Report on Cybertaxationwww.benlore. Comfile/emaaz./.html (Accessed 22/03/2017)
[72]Ariyoosu *Op Cit* p 50

CHAPTER THREE

REGULATORY REGIMES FOR E-COMMERCE TAXATION IN NIGERIA

3.1. Introduction

The emergence of Electronic E-commerce has revolutionised the traditional business transactions[1]. With the aid of the World Wide Web (www), the world has become a global village with business transactions being made in billions of dollars within a twinkle of an eye.[2] The budding phenomenon of e-commerce has left the domain of the developed economies; it has extended its strength to developing economies, Nigeria economy inclusive.

Consequent upon emergence of e-commerce in Nigeria coupled with the fact that its implementation is just emerging, same have brought about serious legal issues that need urgent legislative intervention.

History of legal regulation of E-commerce taxation dates back to the introduction of e-commerce transaction into Nigeria commercial system. Thus notwithstanding, the various tax legislations both at the Federal and at the state level falls short of addressing taxation of Electronic commerce. Cyber income, for tax purpose is a phrase unknown to Nigerian legal terminology.

Historically, commercial transactions were undertaken with the traditional perception of a market in mind and taxation of these market activities has been a source of government revenue.[3]Global industrialization and efficiency in the factors of production and services has significantly altered the primordial perception of a market from being a designated

[1]Ariyoosu D.An Examination of the Legal Regulation and Taxation of Telecommunication and Electronic Commerce in Nigeria.121 https//www.unilorin-edu.ng.draduate these/law/law-ch-2012-ariyoosu.pdf. (Accessed 7/09/2015)
[2] Ibid
[3] Genevieve H (2013), E-Commerce Income Tax Regime in Nigeria genevieve.henshaw@stillwaterslaw.com (Accessed 29/09/2015)

location for exchange of goods and services to boundless geography underpinned by daily human interaction in search of way to meet their basic needs. This trend is the same with both developed and developing economies like Nigeria.

Unsurprisingly, technology has led the way in providing a platform for these voluminous and boundless transactions to happen leading to the birthing of a system of a trade known as e-commerce which has made the traditional trade easier, faster and less cumbersome while at the same time boosting the per capital income of participants therein.

Not without its casualties, the law of taxation in several jurisdictions have fallen prey of the fluidity of such transactions making it apt to give the subject a critical examination

Therefore this chapter examines the position of the relevant laws, guidelines and regulations on e-commerce taxation in Nigeria such as the Companies and Allied Matters Act (CAMA), Central Bank of Nigeria (CBN)'s Guidelines on Automated Teller Machines, Guidelines on Card Issuance and Usage in Nigeria, The Federal Inland Revenue Services (Establishment) Act, 2007, Personal Income Tax Act, Company Income Tax Act and the Guidelines by the Organization of Economic Co-operation and Development to determine the possibility of regulation and taxation of e-commerce in Nigeria.

3.2. Regulation of E-Commerce under the Companies and Allied Matters Act

The company and Allied Matters Act[4] provides extensively for the registration of Business Name,[5] Incorporation of company[6]and Registration of Registered Trustees under part C[7].

[4] CAP C20, LFN 2004
[5] Section S.73 of Companies And Allied Matters Act
[6] Section 18
[7] Section S90

The law has also saddled the corporate Affairs Commission with the power of Registration, Regulation and even deregistration of Companies if need be[8].

However, with the development in business transaction, most especially in this age of Information and Communication Technology (ICT), there appears to be a wide gap between the law and practice of modern commercial transaction.

The companies and Allied Matters Act which provides the statutory framework for the operation of companies in Nigeria was enacted in 1990 when e-commerce was still at its very low ebb globally.

In the world of e-commerce, boundaries are displaced and the law regulating companies in Nigeria[9] and other countries do not operate to have extra-territorial effect. This unfortunate position presents conflicts of law situation whereby the persons doing business from different countries are subject to different law.

Section 18 of the Companies and Allied Matter Act provides that as from the commencement of this Act, any two or more persons may form and incorporate a company by complying with the requirements of the law in respect of registration of such company. Any person for the purpose of the law includes both Nigerian and Non-Nigerian[10]. The law also provides for the capacity of individuals wanting to join in the formation of a company.[11]

A person who wants to form a company will have to decide on the particulars of the company in the light of circumstances, need and his instructions, if he is an agent.[12] He

[8] Section 7 of CAMA
[9] CAMA
[10] Section 20 (4) of the Companies and Allied Matters Act
[11] Section 20 (1) (2) (3)
[12] OrojoO(2008), *Company law and practice in Nigeia;* Lexis Nexis, Nigeria p. 37.

will have to consider the requirement of the Act and other statutes. He will consider matter of practical importance like the name,[13]the memorandum and article of associations[14].

The nature of the business which the company intends to do is required to be stated in the memorandum of Association[15] and the registered office of the company which must be Nigeria[16].

How these companies are to carry out the business is not contemplated by law as the law was made based on the traditional mode of commercial transaction. Electronic commerce is carried out by a press of Button which does not require the presence of the parties involved. How then can the Corporate Affairs Commission monitor the activities of the Companies engaging in electronic commerce? The Act leaves this question unanswered. It is the humble view of the writer that it requires strong synergy between service providers and the Corporate Affairs Commission. This of course will also require synergy between the Federal Inland Revenue Services and the Corporate Affairs Commission, the latter, for proper record and regulation of companies engaging in online transaction and the former for proper determination of taxable income.

Corporate organisation is bodily classified into Business and non-business organisations.[17] But for the purpose this work emphasis is on business organisation. This may be in form of a limited liability company or a business name that engage in electronic commerce. It is also include individuals who are not registered but engage in e-commerce.

[13] Sections 29, 30 and 31
[14] Section 27
[15] Section 27 (1) (c)
[16] Section 27 (1) (b)
[17]Ogbuanya N (2010), *Essential of Corporate Law Practice in Nigeria*, Novena Publishing Ltd., Lagos p.51

3.3 Central Bank of Nigeria; Guidelines on Electronic Commerce

The Banks and other Financial Institutes Act confers on the Governor of the Central Bank of Nigeria to make such regulations as he deems fit for financial institutions[18] and sequel to this, the Central Bank of Nigeria has made several regulations and policies all aimed at making the banking sectors a strong one. One of such regulations is the Guidelines on Electronic Banking in Nigeria,[19] Guidelines on Automated Teller Machine (ATM),[20] and Guideline for Card Issuance and Usage in Nigeria.[21]

In playing its role in regulating and formulating policies for Financial Institutions in Nigeria, the Central Bank on several occasions has made several guidelines few relating to the topic of the work are the focus in this part of the work which includes Standards and Guidelines on Automated Teller Machine (ATM) operations in Nigeria and Guidelines for Card Issuance and Usage in Nigeria.

3.3.1 Guidelines on Automated Teller Machine (ATM) 2010

The Central Bank of Nigeria exercised the power conferred on it by Central Bank of Nigeria Act (as amended)[22]by issuing guidelines, rules and standards for the maintenance of adequate and reasonable financial services for the public in order to ensure good conduct and management of the financial systems in Nigeria.[23] The purpose of the guideline can be gleaned from its preamble which is to ensure the efficacy of ATM services and convenience as well as protection of customers.[24]

[18] Section 57 of the Bank and other Financial Institutions Act, Cap B3, Law of the Federation of Nigeria, 2004.
[19] 2003
[20] 2010
[21] 2014
[22] Section 28 (1) of the Central Bank of Nigeria Act 2007 (as amended)
[23] Preamble to the Guidelines
[24] Ibid

The guidelines spell out the Standard on ATM technology and specification.[25] These include compliance with Payment Card Industry Data Security Standard (PCIDSS).[26] What was developed by the major credit card companies as a guideline to help organisations that process card payments prevent credit card fraud and various other security vulnerabilities and threat,[27] all ATM must be able to dispense all denominations of Naira,[28] all ATM shall have audit trail and logs capabilities, comprehensive enough to facilitate investigation, reconciliations and dispute resolution.[29] It is also specific that all card readers shall have symbols that identify the direction for which the card should be inserted into the readers.[30]

The guidelines also take into consideration the peculiarity of the key population such as visually impaired customers when it provides that 2 per cent of the ATMs deployed shall have tactile graphic symbol for the use of visually impaired customers which should be complied with within five years from the release of the guidelines.[31]

However, the guideline provides that all ATMs shall be able to dispense all denominations in Naira. This may be far from reality as one can hardly see any other denomination in ATMs apart from N500 (Five Hundred Naira) and N1000 (One Thousand Naira). It also in doubt whether six years after the making of the guidelines whether any bank has complied with the specification on tactile graphic symbol for the use of visually impaired customers.

There may be consortia between some institutions with card scheme or card operator or their designated settlement agent for acceptable and settlement of all transactions at the

[25] Art 2(1)
[26] Art 2 (1) (a)
[27] Appendix 1 (i) to the Standard and Guidelines on Automated Teller Machine (ATM) Operation in Nigeria, 2010.
[28] Art 2 (1) (c)
[29] Art 2 (1) (d)
[30] Art 2 (1) (e) (i) (ii)
[31] Art 2 (1) (f)

ATM.[32] Banks are prevented from deploying ATMs outside their premises without consent of CBN and ATMs transactions in Nigeria must be processed by a Nigerian company operating in Nigeria.[33]

On ATMs operation, the ATM downtime must not be more than Seventy-Two (72) hours consecutively[34] and all charges are fully disclosed to customers and except for balance enquiry, the ATMs must be able to issue receipts if requested by customers and receipt prints and screen display must be legible.[35]

On the security, basics and other institution deploying ATMs are duty bound to install camera which shall view and record persons using the machines and every activity at the ATM but must not be able to record the key stroke of customers[36] and where a surveillance camera is used, it should be kept secretly to avoid thieves removing or damaging or compromising it.[37]

Where cardholders complain arising from irregularities in the account of an ATM, such complaint shall be treated within a maximum of 72 hours from the date of receipts of the complaint.[38]

The Guidelines also provide for liability and shifting of same where fraud occurs.[39] Where a non Europay Mastercard Visa (EMV) card is used on a non EMV terminal and a fraud occurs, liability is on either the cardholder or card issuer. Proof has to be established on which party compromised card details.[40] Where a non EMV card is used on an EMV

[32] Art 3 (a)
[33] Art 3 (b) (c)
[34] Art 3 (2) (a)
[35] Art 3 (2) (c) (d) (e)
[36] Art 3-4 (a)
[37] Art 3..4 (b)
[38] Art 3.5 (a)
[39] Art 3.6
[40] Art 3.6 (a)

Terminal and fraud occurs, liability is on the card issuer.[41] Where an EMV card is used on a non EMV Terminal and fraud occurs, liability is on the acquirer.[42] Where an EMV card is used on an EMV Terminal and fraud occurs, liability is on the cardholder or the issuer. However, the onus is on the cardholder to prove that their PIN had not been disclosed to a third party willingly or negligently.[43]

These provisions are provided in order to determine the liability with operation, deployment and use of ATM machine and ATM card. And institutions which operate Automated Teller Machine are duty bound to file an updates list of their ATMs, including the detail location of their addresses with Banking and payment system, Department of the Central Bank of Nigeria for compliance monitoring.[44]

Failure on the part of any institution engaging in the acquisition and processing of ATM to comply with Guidelines attracts both monetary penalties and suspension.[45]

3.3.2 Guidelines for Card Issuance and Usage in Nigeria.

The trend of offering goods and services over the web or internet has made the greatest change to businesses throughout the world.[46] Business transactions are being processed at a touch of a button.[47] This ranges from formation of contract to payment for the goods bought through application of Information Communication Technology (ICT). It is in the light of this that made the Central Bank of Nigeria to release an exposure Draft on the

[41] Art 3.6 (b)
[42] Art 3.6 (c)
[43] Art 3.6 (d)
[44] Art 4 (a)
[45] Art 5
[46] OrifowomoOrifowomo O (2003–2005), *The Challenges of Electronic Banking in Nigeria: An Opinion.* Ahmadu Bello University Journal of Commercial Law Vol. 2 No. 1, p. 156
Nurudeen M. Mohammed N (2014), *Analysis of the Legal Framework for the Operation of E-Commerce: A Nigeria Perspective*, Ahmadu Bello University Journal of Private and Comparative Law, Zaria, Vo. 6 & 7 p. 255

Guidelines for Card Issuance and Usage in Nigeria.[48] These Guidelines were issued in exercise of power conferred on the Central Bank of Nigeria by law.[49]

The objectives of the guidelines includes to provide minimum standards and requirements for the issuance and usage of payment cards in Nigeria,[50] to enable issuing banks, financial institution, processor and cards schemes upgrade and maintain their card operations to ensure optimum security, efficiency cost effectiveness and customer friendliness,[51] to serve as a tool for banks and other financial institution to assess their card issuance portfolio, to ensure that customers that carry Nigerian issued cards operate within acceptable standards and finally to encourage the use of Nigerian issued cards locally and internationally.

The Guidelines apply to all licensed banks and other financial institutions that participate in the issuance and processing of debit, credit, store value/prepaid, virtual cards, either directly or through their boundaries, affiliated companies or third party associated company.[52]

It is only the banks licensed by the Central Bank of Nigeria with clearing capacity[53] that can issue payment cards to consumers and corporations in Nigeria. Banks without clearing capacity can only issue payment card in conjunction with those with clearing capacity.[54]

However, all banks must seek the approval of the Central Bank of Nigeria for each card brand and type they wish to issue.[55] The payment to be issued can be a "pay now" such as debit card and prepaid or a "pay later" such as credit.[56]

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[48] This Guidelines was issued on the 3rd of February 2014 and signed by DipoFatokun, the Director Banking & Payment System Department, Central Bank of Nigeria.
[49] Section 47 (3) Central Bank of Nigeria Act, 2007 (as amended)
[50] Art B (i)
[51] Art B (ii)
[52] Art B (iii) (iv) (v)
[53] Art (1)
[54] Section 3 (1)
[55] Section 3 (2)

The card holder may, in agreement with the issuing bank customize the usage limit, select transaction channels and other customizable features to suit their personal risk preference. However, the payment card transactions shall be subject to current Nigerian Financial Intelligence Unit (NFIU) reporting requirements.[57] The payment card issued by bank or any other institution must be EMV compliant (i.e. Chip and PIN enabled), such card may be issued in Nigeria Naira or in any other convertible currency.[58] Banks are given the liberty to define the limit of their international usage provided this does not exceed the total combined amount of foreign currency that each individual can access via Business Travel Allowance (BTA) and Personal Travel Allowance (PTA) per annum which is currently $150,000 per annum.[59] For inclusion in the National Statistics of Payment, card issuers are to render monthly returns to the CBN on the volume of transactions and gross amount of transactions done internationally using their card[60] and before payment card or other products offered along with be a written consent of the customer and the information to the customer must be explicit and not implied.[61]

The contractual conditions and terms prior to activation of the card must be disclosed by the card issuers to the cardholder which shall include: fees and charges, withdrawal limit, billing cycles, termination procedures and consequences of default, theft and misuse of cards.[62] The card issuers are also mandated to ensure that the process of card issuance is completely separated from the process of PIN issuance.[63]

The Guidelines also provides for standard to be complied with when a card is to be used abroad which is that the issuing bank must have done full KYC (Know Your Customer)

[56] Section 3 (3)
[57] Section 3 (8) (b)
[58] Section 3(8) (a)
[59] Section 3 (10)
[60] Section 3 (11)
[61] Section 3 (18)
[62] Section 3 (19)
[63] Section 3 (23)

on the customer, as reflected in the CBN KYC manual and Money Laundering (Prohibition) Act.[64] They must also ensure that they understand the rule of acceptance of their cards internationally and must disclose the information to their customers.[65]

The issuer of card must provide authorization Response which will meet the Assured Transaction Response Standard for national and international cards, participate in the card verification services operated by the Card Association, not systematically or permanently send a Decline Response to an Authorization Request for any of the following.[66]

1. Mail/phone order transaction
2. Electronic commerce transaction
3. Transaction from specific country

It is the duty of card issuers to ensure that they issue cards from only the cards schemes that have demonstrable fraud management systems[67] and in the event that the acquirer operates in an environment where EMV compatibility is not in force, the Nigerian Issuer must set limits, in order to reduce the issuer and the cardholder's exposure[68] and the issuer shall take full liability for any fraud from a fall back transaction that occurred as a result of improperly produced chip cards.[69]

It is also incumbent on the card issuer to implement system validation to detect potentially suspicious transactions[70] and to also deploy robust fraud monitoring tools that have the capacity to monitor customer transaction trends, real-time operations and option of blocking suspicious transactions.[71]

[64] Section 4(11)
[65] Section 4 (16)
[66] Section 4 (24)
[67] Section 4 (43)
[68] Section 4 (45)
[69] Section 4 (46)
[70] Section 4 (47)
[71] Section 4 (49)

3.4 Assessment of the Power and Function of Federal Inland Revenue Service (FIRS) Under Federal Inland Revenue Service (Establishment) Act of 2007

The Nigerian Federal Inland Revenue Service (FIRS) as it is now known was first created in 1943[72]. It was carved out from the erstwhile Inland Revenue department that covered what was then the Anglophone West Africa (including Ghana, Gambia, and Sierra Leona) during the Colonial Era[73]. In 1958, the Board of Inland Revenue was established under the Income Tax Ordinance of 1958 and its name was changed in 1961 when the Federal Board of Inland Revenue was created under Section 4 of the Companies Income Tax Act No. 22 of 1961. It was operated as a department in the Federal Ministry of Finance.[74]

The Federal Board of Inland Revenue was later dissolved by the Company Income Tax (Amendment) Act 2007[75]. This Federal Board Inland Revenue gave way for the Federal Inland Revenue Services as established under the Federal Inland Revenue Services (Establishment) Act of 2007.[76]

The Federal Inland Revenue Services is established by the National Assembly and charged with powers of assessment, collection of and accounting for revenues accruable to the Federal Government[77].

The Services is established by the Act to be a body corporate with perpetual succession and a common seal,[78] may sue and be sued in its corporate name[79], may acquire, hold or dispose of any property, moveable or immovable, for the purpose of carrying out any of its function under the Act.[80]

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[72] Ariyoosu *Op Cit* p194
[73] Ibid
[74] ibid
[75] Section 2(2)
[76] Section 1
[77] This is contained in the preamble to the Act
[78] Section 1(2) (a)
[79] Section 1(2) (b)
[80] Section 1(2) (c)

The objective of the Act is for the service to control and administer the different taxes and laws relating to taxes collectable by the Federal Government[81].

The Board of the Services is composed of the Executive Chairman who must be knowledgeable in taxation, six members with relevant qualifications and expertise representing each geo-political zones, the representative of the Attorney-General of the Federation, the Governor of Central Bank or his representative, a representative of the Minister of Finance not below the rank of a Director, the Chairman of the Revenue Mobilization and Fiscal Commission or his representative who shall be any of the Commissioner representing the 36 state of the Federation, the Group Managing Directors of the NNPC or his representative not below the rank of Group Executive Director, the Controller-General of the Nigerian Custom Service or his representative not below the rank of Deputy Controller-General, Registrar-General of the Corporate Affairs Commission or his representative not below the rank of Director and the Chief Executive Officer of the National Planning Commission or his representative not below the rank of a Director.

It is only the Executive Chairman that is a full-time, all other Officers are Part-time members[82] and each member holds office for four (4) years renewable once apart from ex officio members[83]. The law also provides for the circumstances for the cessation of membership of the Board.[84] The Act provides for the powers of the Board which includes[85].

[81] Section 2
[82] Section 3(3)
[83] Section 4(a)
[84] Section 5
[85] Section 7

a. Providing the general policy guidelines relating to the functions of the Services.
b. Managing and superintending the policies of the service on matters relating to the administration of the revenue assessment, collection and accounting system under the Act or any other law.
c. Reviewing and approving the strategic plans of the services.
d. Employing and determining the terms and conditions of service including disciplinary measures of the employees of the service.
e. Stipulate remuneration, allowance, benefits and pensions of staff and employees in consultation with the National Salaries, Income and Wages Commission.
f. Do such other things as may be necessarily incidentally to the functions of the services.
g. The Act[86] also provides extensively for the functions of the service which includes but not limited to:

1. Assess persons including companies, enterprises chargeable with tax;
2. Assess, collect, account and enforce payment of taxes as may be due to the Government or any of its agencies;
3. Collect, recover and pay to the designated account, any tax under any provision of this Act or any other enactment or law;
4. In collaboration with the relevant Ministries and agencies, review the tax regime and promote the application of tax revenues to stimulate economic activities and development;
5. In collaboration with the relevant law enforcement agencies, carry out the examination and investigation with a view to enforcing compliance with the provisions of this Act;

[86] Section 8

6. In collaboration with the relevant law enforcement agencies, carry out the examination and investigation with a view to enforcing compliance with the provisions of this Act;
7. Make, from time to time, a determination of the extent of financial loss and such other losses by Government arising from tax fraud or evasion and such other losses (or revenue foregone) arising from tax waivers and other related matters;
8. Adopt measures to identity, trace, freeze, confiscate or seize proceeds derived from tax fraud or evasion;
9. Adopt measures which include compliance and regulatory actions, introduction and maintenance of investigative and control techniques on the detection and prevention of non-compliance;
10. Collaborate and facilitate rapid exchange of information with relevant national or international agencies or bodies on tax matters;
11. Undertake exchange of personnel or other experts with complementary agencies for purposes of comparative experience and capacity building;
12. Establish and maintain a system for monitoring international dynamics of taxation in order to identity suspicious transactions and the perpetrators and other persons involved;
13. Provide and maintain access to up to date and adequate data and information on all taxable persons, individuals, corporate bodies or all agencies of Government involved in the collection of revenue for the purpose of efficient, effective and correct tax administration and to prevent tax evasion or fraud.
14. Maintain database, statistics, records and reports on persons, organisations, proceeds, properties, documents or other items or assets relating to tax administration including matters relating to waivers, fraud or evasion;

15. Undertake and support research on similar measures with a view to stimulating economic development and determine the manifestation, extent, magnitude and effects of tax fraud, evasion and other matters that affect effective tax administration and make recommendations to the Government on appropriate intervention and preventive measures;
16. Collate and continually review all policies of the Federal Government relating to taxation and revenue generation and undertake a systematic and progressive implementation of such policies;
17. Liaise with the office of the Attorney-General of the Federation, all Government security and law enforcement agencies and such other financial supervisory institutions in the enforcement and eradication of tax related offences;
18. Issue taxpayer identification number to every taxable person in Nigeria in collaboration with States Boards of Internal Revenue and Local Government Councils;
19. Carry out and sustain rigorous public awareness and enlightenment campaign on the benefits of tax compliance within and outside Nigeria;
20. Carry out oversight functions over all taxes and levies accruable to the Government of the Federation and as it may be required, query, subpoena, sanction and reward any activities pertaining to the assessment, collection of and accounting for revenues accruable to the Federation; and
21. Carry out such other activities as are necessary or expedient for the full discharge of all or any of the functions under this Act.

All these functions are to be performed by the Service in order to ensure prompt payment of taxes collectable by the Federal Government and to ensure blockage of leakages in

revenue generation. However, it is in doubt despite these elaborate functions of the Service, there no leakages in the system.

The Act also established a Technical Committee[87] the members of which are the Executive Chairman, all the Directors and Head of Departments of the Services, legal adviser of the Service and the Secretary of the Board[88] and may co-opt from the Services such staff as it may deem necessary for the effective performance of its functions[89].

The Technical Committee is saddled with the responsibility of considering tax matters that require professional and technical expertise, advising the Board on any aspect of the functions of the Services and to attend of such other matter the Board may refer to it.[90]

The Act makes mandatory for the Board to appoint a secretary[91] but makes it optional to appoint consultants, including tax consultants, or accountants and agents to transact any business required to be done by the Service.[92]

It is the Board that is saddled with the power to regulate matter relating to the conditions of services of the staff such as appointment, promotion, and termination, dismissing and discipline of staff and also make provision concerning appeals by tax payers.

The Service is also empowered to establish a fund which shall consist and to which shall be credited, a percentage as determined by the National Assembly of all non-oil and gas revenue collected by the Service which may be appropriated by the National Assembly for the capital and recurrent expenditures of the Services[93]. The fund shall be credited with any of the money the Service is entitled to under the Act[94].

[87] Section 9
[88] Section 9 (1) (a-d)
[89] Section 9 (2)
[90] Section 10
[91] Section 12 (1)
[92] Section12 (4)
[93] Section 15 (a)
[94] Section 15 (b-d)

The Service is saddled with the power to administer tax laws as are contained in the first schedule to the Act and any other enactment or law on taxation in respect of which the National Assembly may confer power on the Service[95] and the Service may subject to the approval of the Minister appoint any government agency to collect revenue pursuant to the power of the Service[96].

In term of administering tax law to achieve the aim of its establishment, the Federal Inland Revenue Services is collaborating with banks to provide more payment channels to taxpayers.[97] The e-payment channel is one of the several tax payment channels now available to tax payer.[98]This new channel offers convenient self-services to tax payers, thereby reducing the risk of errors in their identity and transaction details while promoting transparency and payment reconciliation whenever the need arises[99].

The Service may give notice to any person, body corporate or organization requiring him or it to within a specified time to complete and deliver to the Service any return specified in the notice, to appear personally before the service for examination in respect of profits or income, to produce for examination books or documents, to give information either oral or in writing to the Services[100].

The time specified in the notice must not be less than seven (7) days[101] and any person who gives false information or who contravenes the law on notice spelt out under Section 2(1) is liable to a fine of 100 percent of the amount of the tax liability upon conviction.[102]

It is interesting to note that banks are mandated to prepare, upon demand by the Service, quarterly returns specifying in the case of an individual, all transactions involving the sum

[95] Section 25 (1)
[96] Section 25 (2)
[97] Opera Leonard (2003), Tax Challenges of E-Commerce in Nigeria: The Panacea for Legal Jurisprudence. www.eajournals.org/wp-content/uploads/tax-challenges-of-E-Commerce-in-Nigeria-the-panacea-for-legal-jurisprudence.pdf (Accessed 22/09/2015) p 4
[98] Ibid
[99] Ibid
[100] Section 26 (1) Federal Inland Revenue Service Vice (Amendment) Act 2011
[101] Section 26 (2)
[102] Section 26 (3)

of Five Million Naira (N5,000,000.00) and above[103] and in the case of body corporate, all transaction involving the sum of Ten Million Naira (N10,000,000.00) and above. It is must also furnish the Service with the names and addresses of all customer having connection with the transaction[104]. The name and address of new customers of the bank shall be forwarded to the Service.[105]

The provision of Section 28 of the Federal Inland Revenue Service (Establishment)

Act is a device to aid the Service in knowing the volume of money that pass through the account of their customers. This does not in the view of this researcher *ipso facto* help to know whether those moneys are derived from taxable profits or incomes as the case may be. Although it may help the Service to monitor income, it is only when the Executive Chairman specifically gives a notice to the bank that they can disclose further information about their customers be it individual or corporate body.[106]

The Act gave the service enforcement power in order not to leave it a toothless dog and the potent too for enforcement of tax payment in Nigeria is the power to distrain.[107]The provision of the Act[108] has the same effect with the provision of the Company Income Tax Act, 2004 on the power of the Service to distrain.[109]Distrain is executed by an officer of the Service with the warrant of distrain and if necessary break open any building or place in the day time for the purpose of levying such distrain[110]. The thing distrained will only be sold fourteen (14) days after distrain if the defaulter refuses to pay.[111] Where thing

[103] Section 28 (1) (a)
[104] Section 28 (1) (b)
[105] Section 28 (1)
[106] Section 28 (2)
[107] John D. C. (2013), Evaluation of Judicial Attitude Towards Tax Offences and Penalties: Cases, Analysis and Recommendations. *Ahmadu Bello University Journal of Private and Comparative Law, Zaria,* Vo. 6 No.1 p 60
[108] Section 33 FIRS (Establishment) Act
[109] Section 86 of CITA
[110] Section 33 (3) FIRS (Establishment) Act
[111] Section 33 (4)

distained is an immovable property, it shall only be sold by the order of the Federal High Court.[112]

The service is also empowered to by notice in writing appoint any person to be the agent of a taxable person where such an agent is in custody of the money of the taxable person.[113]

The Service also has the power to bring civil action for recovery against any person in respect of any sum due to it as same constitute debt due to the Services.[114]

The Act also provides for special purpose Tax Officers that assist law enforcement agency in the investigation of any offence under the Act.[115] This is without prejudice to the power of the Service to carry out investigation to any company in order to ascertain compliance by tax payers[116]. The Service can also co-opt the assistance and cooperation of any of the law agency for the purpose of effectively performing its function under this Act.[117]

From the provisions of the Act, there is no provision yet as to how the Service can monitor the activities carried on online to determine whether they are taxable or not. Although the Act compels the bank to file a return on its customers, it is only when the Executive Chairman request that the bank disclose such additional information about its customers.

3.5. Assessment of E-Commerce Taxation under Value Added Tax Act

Value added Tax is a type of indirecttax imposed by the government on goods and services. It is imposed on what the Act referred to as taxable goods and services other than all medical and pharmaceutical products, basic food items, books and educational

[112] Section 33 (6)
[113] Section 31 (1) (2)
[114] Section 34 (1)
[115] Section 35 (1)
[116] Section 36 (1)
[117] Section 28 (2)

materials, baby products, fertilizer, locally produced agricultural and veterinary medicine, farming machinery and farming transportation equipment[118] etcetera.

It was Mourice Laure, joint director of the French Tax Authority, the *Direction generale des impots,* that first introduced VAT on 10th April, 1934.[119] Initially directed at large businesses, it was extended overtime to include all business sectors.[120]

Value Added Tax (VAT) or in some climes goods and service tax (GST), is a consumption tax[121] levied on value added. Some other jurisdiction call Value Added Tax as Goods and Services Tax but under the Nigerian Law, it is regarded as Value Added Tax.

The Value Added Tax Act was amended in 2007 by Value Added Tax (Amendment) Act, 2007 and certain innovations were introduced.The amendment retains the rate of taxat 5 per cent as it is in the principal Act.

The principal Act provides that the tax shall be computed at the rate of 5 per cent on the value of all taxable goods and eservices as determined under section 5 and 6 of the Act.[122]

In terms of administration, VAT is administered by the Federal Inland Revenue Services.[123]

A Taxable person is required to register with the FIRS within six months of commencement of business[124] and upon default by a taxable person to get registered with FIRS within six month of commencement of business, such a taxable person shall liable to

[118]Section 2 And 3 Value Added Texr Act
[119]Oyedokun G.E (2016) Nigerian Value Added Tax System and the Concept of Basic Food, https://.www.research.net/publication/317995386-Nigeria-Value (Accessed 03/06/2018)
[120] Ibid
[121] Ibid
[122] Section 4, Value Added Tax Act, 1993
[123] Section 7
[124] Section 8 (1)

pay penalty of ₦10,000 for the first month in which the failure occurs[125] and ₦5,000 for each subsequent month in which the failure continues.[126]

The Act also provides for the registration with the FIRS by the Government Ministry, Statutory Body and other Government Agency as agents of the FIRS for the purpose of VAT Collection.[127] Before any contractor can transact business with the government ministry, statutory body or other government agency, such a contractor must produce evidence of registration with the Service.[128] The Act also makes provision for a non-resident company that carries on business in Nigeria to register with the FIRS using the address of the person with whom it has a subsisting contract, as its address for purposes of correspondence relating to the tax and such a non-resident company shall include the tax in its invoice and the person to whom the goods or services are supplied in Nigeria shall remit the tax in the currency of the transaction[129]

The transaction refers to in the above provisions of the Value Added Tax Act relates to tangible goods which is just a minor aspect of e-commerce. Also, it is practically difficult in e-commerce transaction for a company to be mandated to get registered with the FIRS before they can engage in e-commerce whether resident or non-resident company. It then means that this law may not be applicable to e-commerce which can be done without the actors having connection with a particular geographical location.

125 Section 8 (2) (A)
126 Section 8 (2) (B)
127 Section 9 (1)
128 Section 9 (2)
129 Section 10 (1) And (2)

It is also apposite to state that in the conventional commercial transaction, paper-based documentation is the order of the day. Companies engaging in e-commerce operate as virtual organizations[130] and therefore the need for paper documentation is easily displaced.

The Value Added Tax Act provides that any person who is registered under section 8 of the Act shall keep such records and books of all transactions, operations, imports and other activities relating to taxable goods and services as are sufficient to determine the correct amount of tax due under the Act.[131] In essence, the effect of this provision is that the registered person shall make proper documentation of transactions, activities and their operations relating to the goods or services subject to VAT. This provision of the law may not cope with e-commerce as persons engaging in e-commerce may not necessarily register as an entity before they transact business across-borders and the documentation or record may not necessarily be paper-base which makes it a difficult situation for them to be brought within tax net.

The Act establishes a Value Added Tax Technical Committee which comprise of a Chairman, who shall be the Chairman of Service, all the Directors in the FIRS, the Legal Adviser to the FIRS, a director in the Nigerian Custom Service; and three representatives of the state Governments who shall be members of the Joint Tax Board.[132]

In term of functions, the committee is saddled with the responsibilities of considering all the tax matters that require professional and technical expertise and make recommendations to the service;[133] advise the Service on the duties specified in section 7

[130]Shahrzad S. etal (2015); E-Commerce and Its Impacts on Global Trend and , Market.International Journal of Research, Grant HeqlayahVov.4 p.49. Also available at http:// www.granheqlayah.com(Accesses 24/04/2016)
[131] Section II
[132]Section 21
[133]Section 22 (2)

of the Act[134] and attend to such other matters as the service may, from time to time, refer to it [135]

The Act also makes provisions for penalties where a person produces, furnishes or sends a document which is false in any material particular or furnishing information to the Service and makes a statement which is false in any material particular. Such a person is guilty of an offence and liable on conviction to a fine of twice the amount under-declared.

It is humbly submitted that the penalty provided by the provision of this section[136] should be made stiffer since giving false information or misleading information itself to a public officer is an offence under our penal law.[137] The punishment under this Act should be in addition to the offences provided under the penal code which attracts one year imprisonment or fine which may extend to forty naira or both on conviction.[138]

The Act also provides for recovery of tax by the FIRS through proceedings in the Value Added Tax Tribunal Established in the second schedule to the Act.[139]

It is however to be noted that Value Added Tax Act is an Act of the National Assembly and is only applicable to individuals and corporate entities who trade in goods and services subject to the Value Added Tax in Nigerian. E-commerce which is the focus of this work takes place across borders and Nigerian laws can only be enforced on goods and services having connection with Nigeria.

3.6 Assessment of Cyber Income under the Personal Income Act

The Act imposing tax on person was enacted under the military regime in 1993 and it is regarded now as Personal Income Tax Act.[140] This was amended in 2011 by Personal

[134]Section 22(b)
[135]Section 22 (c)
[136]Section 25 (a) and (b)
[137]Ibib
[138]Section 140 Penal Code LawCap 105
[139]Section 20, Value Added Tax Act

Income Tax (Amendment) Act, 2011. The 2011 Amendment Act was officially gazetted on Tuesday 31st January, 2012 with an effective date of 14th June, 2011.[141]

Personal Income Tax ("PIT") according to Decree No.4 of 1993 is a tax imposed on the incomes of individuals, communities and families. It is also charged on the incomes due to a trustee or an estate. Since the enforcement of personal income tax through Decree No.4 of 1993, amendments have been made to this decree almost on 10year basis all in the effort to overcome challenges that are identified with the actualisation of the objectives of the tax regime.[142]

This amendment has brought innovative means to the law of taxation of personal income in Nigeria. The law provides for the electronic mail and courier services to the existing means of delivery assessment notices.[143] The new Acts amended section 57of the Principal Act which provides for the means of delivering assessments notices by adding two separate means which are electronic mails and courier services.

It is however quite unfortunate that despite the new amendment, the new Act does not take into consideration the facts that electronic mail is a new ways of carrying out commercial transaction and how the profits derived from these transaction can be determined, assessed and taxed is not provided for.

The Act provides for taxable income in Nigeria which includes gain profit from any trade, business, profession or vocation, for whatever period of time been carried on or exercised.[144] It also includes any salary, wage, fee, allowance or other gain or profit from employment including compensations, bonuses, premiums, benefits or other perquisites

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[140] CAP P. 8, Law of the Federation of Nigeria, 2004 and the Personal Income Tax (amendment) 2011.
[141]Oyedele T. (2012), *The Personal Income Tax (Amendment) Act, 2011: Implementation and matter Arising*- http:www.purc.com/ng/en/pdf/pita; amendment –mark- 2012 pdf
[142]Akhidime A (2013), Nigeria Personal Income Tax (Amendment) Act 2011: Implication for Tax Administration and Enforcement.*www.afrrevjo.net/ijah* (Accessed 26/04/17)
[143] Section 13 personal income tax (amendment) Act, 2011
[144] Section 3(1) @ Personal Income Tax Act, Cap P.8, LFN, 2004

allowed, given or granted by any persons[145] to an employee other than the ones stated in Section 3(1) (b) (i) to (xii) of the Personal Income Tax Act.

The first thing to note about the Personal Income Tax (amendment) Act, 2011 is that it only provides for tax authorities to deliver assessment notices via electronic mails and courier services but it is not clear as to whether the tax payer have the corresponding leverage to respond via same means most especially where the tax payer has any objection to the assessment.[146] This, it is submitted may be left to the court to interpret whenever the opportunity presents itself as this appear to be a *lacuna* in the new amendment.

Coming to the issue of cyber income for the purpose of Personal Income Tax Act, it may be dicey to formulate a rule to tax and how much to tax the individual or the companies in relation to the transaction made under the e-trade or e-commerce.

Since we are in the era of tax consciousness among various governments, the income tax practitioners both at the private and public sectors of the economy and tax payers already have a wave of this consciousness.[147]

Despite this consciousness, it has been pointed out that to identify income for tax purpose has always been problematic.[148] This is further buttressed by the modern mode of commercial transaction, e-commerce. Despite this, since electronic commerce is defined as involving Electronic Transfer of funds, supply chain management, internet marketing, online transaction processing, Electronic data exchange, inventory management systems and automated Data collection systems,[149] any profit or gain made from any of these is a

[145] Section 3 (1) (b) of PITA
[146] Oyedele Op Cit
[147] OladunjoyeO. (1991), Tax Administration; The Problems of Assessment and Collection: In Akanle O. (ed) *Tax Law and Tax Administration in Nigeria*, Nigerian Institute of Advanced Legal Studies, Lagos p 95
[147] Parts 1,11 and 111 of the Schedule to the Taxes and Levies (Approved List Collection) Act, Cap T2 LFN 2004.
[148] Ibid
[149] Idigbe A *Op Cit* P.1

taxable income for the purpose of Personal Income Act.[150] It is therefore the firm view of this researcher that the problem is not with the law as it applies to taxable income, but the enforcement of same and for the purpose of this work, emphasis is therefore on the 1st leg of section 3 of the personal income tax Act.

It is common these days that very many people's major source of income derived majorly from electronic commerce, such income derived from such activities are taxable income.

However, the Act does not define taxable income. It rather defines taxable person to mean individual or body of individual (including a family, a corporation sole, trustee or executor) having any income which is chargeable with tax under the provision of the Act.[151]

However, earned income is defined in the first schedule to mean income derived by an individual from trade, business, profession, vocation or employment carried on or exercised by him and a pension derived by in respect of a previous employment.[152]

The incomes derived from e-business, e-trade for the purpose of the Act, are taxable income but that will be at the realm of Best Judgment Assessment.

Under the current Nigeria tax law, taxation is enforced by the three (3) tiers of government.[153] This is as contained in the Taxes and Levies (Approved List of Collection) Act.[154] However, despite these laws, we largely depend on the physical approach to transacting business. There is therefore a challenge in ascertaining where and how the profit derived from e-commerce can be taxed.

[150] Section 3(1) @ Personal Income Tax Act, Cap P. 8, Law of the Federation of Nigeria, 2004
[151] Section 108 PITA
[152] Item 1, 1st Schedule, PITA
[153] Opara L. Op Cit p. 13
[154] CAP

3.7. Cyber Income under the Companies Income Tax (Amendment) Act, 2007

The Companies and Allied Matters Act[155] is the principal Act regulating the formation, operation and winding up of companies in Nigeria. Companies are legal persons created by law.[156] The coming into existence and demise of a company is strictly regulated by law.

However, upon incorporation of a company the company assumes independent personality distinct and different from its shareholders.[157] It then means that a company possesses rights on its own so also is opened to liability or responsibility.

The mode of doing business may be by, partnership, business name or by registering a company. It there means that as companies enjoy the right to do business in its own name distinct from the subscribers, so also the companies are liable to pay tax from the profit they make. Since the main objective of incorporation of companies is to do business in order to make profits.[158] This informed the promulgation of Companies Income Tax Act[159] which provides for how tax could be imposed and the percentage of taxable income of a company.

Section 9 of the Companies Income Tax provide for taxable income of a company.[160] It provides that subject to the provision of this Act, the tax shall, for each year of assessment, be payable at the rate specified in subsection (1) of section 40 of this Act upon the profits of any accompany accruing, derived from, brought into, or received in Nigeria in respect of:

a. Any trade or business for whatever period of time such trade or business may have been carried out;

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[155] CAP C20, LFN, 2004
[156] Section 37, CAMA
[157] Section 37 CAMA
[158] For example, Section 27 of the Companies and Allied Matters Act provides that the object of a company shall be stated in its Memorandum of Association.
[159] CAP C21, LFN, 2004
[160] Section 9(i)

Electronic commerce falls within "any trade" or "business" in the foregoing paragraph and therefore any profit made by a company doing online business for the purpose of this Act, is taxable.

Under the Act, a company is identified by its incorporation number,[161] which shall be displayed by the company on all business transaction with other companies and individuals and on every document, Statement, returns, audited account and correspondence with authorities. However, based on the nature of electronic commerce, the need of paper for documentation is displaced and this creates a lot of challenges to the tax authorities.

In as much as a company derives its income for buying and selling through the application of Information Communication Technology (ICT), such a company is into electronic commerce and as such its profits, gain from such trade or business is a taxable income under the Companies Income Tax Act.[162] The major challenge to the tax administrator will lie on assessment and a service of notice of assessment as the law envisages the physical place to serve notice of assessment.[163]

However, unlike the Personal Income Tax (Amendment) Act, 2011, which provides for service of Notice of Assessment either by email or post, courier service as a good service,[164] there is nothing in the company income tax Act that suggests that service of notice of assessment can be done by electronic mail or through courier service.

Since trade or business means a trade or business or any part of trade or business the profit of which are assessable under the Act,[165] and as rightly pointed out earlier that electronic commerce falls within the categories of business or trade referred in the law, every income

[161] Section 10
[162] Section 9 (1) (a) of the companies Income Tax Act, CAP C21, LFN 2004
[163] Section 68
[164] Section 13, PITA
[165] Para 1 to the 1st schedule, companies income tax (amendment) Act, 2007; Section ((1) (a) of CITA

derived from the gain or profits made from such trade or business is a taxable income within the context of Company Income Tax (Amendment) Act, 2011 although there is no express provision on what cyber income entails but inference from the provision of this Act shows that cyber income are income derived from business on trade which are as a result of application of Information Communication and Technology (ICT).

3.8 Guidelines within the framework of Organisation for Economic Co-operation and Development

At the November 1997 conference entitled "Dismantling the Barriers to Global Electronic Commerce" held in Turku, Finland, government and business representatives met for informal discussions on the challenges posed by global electronic commerce to tax systems[166]. Since that initial meeting, much work has been done by the OECD and revenue authorities to provide greater certainty on how electronic commerce will be treated for tax purposes and clarifying the risks as well as identifying opportunities[167]. Since the main objective of the OECD itself is to achieve the highest sustainable economic growth and employment and arising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy.[168] The OECD has taken a significant step forward in reaching an international consensus on the tax treatment of electronic commerce.

Electronic commerce has enormous potential to change the way we work, play and organise our lives. It is already changing the ways in which multinational enterprises

[166]Makhlouf G (2001), *Taxation and Electronic Commerce: Implementing the OTTAWA Taxation Framework Conditions*, OCDS Publication Services, France p 49Available at www.oecd/tax/treaties/1923232.pdf (Accessed on 14/11/2016)
[167] Ibid
[168] Article 1, Organisation of Economic Co-operation and Development , 1960.

(MNEs) operate – making globalisation a reality – and it has enabled consumers and small enterprises to operate and shop beyond their national boundaries.[169]

If this potential is to be fully realised we must provide a Taxation Framework which provides certainty, fairness, neutrality and avoids putting in place new tax obstacles to the development of this new form of doing business. At the same time this Framework must ensure that taxpayers pay the right amount of tax, in the right jurisdictions and at the right time.

This work goes a long way towards x-raying the Taxation Framework Conditions agreed in Ottawa in 1998. The Ottawa Taxation Framework Conditions provide the principles which should guide Nigeria in her approach to e-commerce. It also states that e-commerce should be treated in a similar way to traditional commerce and emphasises the need to avoid any discriminatory treatment. This Framework was welcomed by Member countries and non-member economies, as well as by the business community.

The OECD, in co-operation with other international organisations, was acknowledged as the organisation best placed to co-ordinate and carry this work forward. At Ottawa it was also recognised that greater business and non-member economy input would be needed to implement globally the broad taxation principles and the other elements of a Taxation Framework that had been identified.

Being mindful of the fact that tax system is one of the most powerful levers available to any government to stimulate and guide its economy and social development,[170]an ambitious work programme was developed to maintain the momentum achieved at Ottawa. Each of the Committee on Fiscal Affairs (CFA)'s subsidiary bodies was tasked with aspects of the Taxation Framework Conditions to study and develop. Five Technical Advisory Groups (Business Profits, Income Characterisation, Consumption Tax,

[169]Makhlouf Op cit p3

[170]Adeoye*I* (2008), *Significance of Taxation in a Nation,* Journal of Private and Commercial Law, Department of Private and Commercial Law, Faculty of Law, University of Ado-Ekiti Nigeria; Vol. 1 p1

Technology, and Professional Data Assessment) consisting of government (from both Member and non-member countries) and business participants were established to provide input into the deliberations.

At Ottawa it was agreed that the broad traditional taxation principles should apply to electronic commerce which are as follows:

a) Neutrality
b) Efficiency
c) Certainty
d) Simplicity
e) Effectiveness
f) Fairness
g) Flexibility.

These principles do provide an important reference point against which to measure and develop taxation proposals, particularly those relating to tax administration.

The CFA used the taxation principles to draw the following conclusions, reflected in the Taxation Framework Conditions:

1. The taxation principles that guide governments in relation to conventional commerce should also guide them in relation to electronic commerce.
2. The CFA believes that existing taxation rules can implement these principles.
3. This approach does not preclude new administrative or legislative measures, or changes to existing measures, relating to electronic commerce, provided that those measures are intended to assist in the application of the existing taxation principles, and are not intended to impose a discriminatory tax treatment of electronic commerce transactions.

4. The application of these principles to electronic commerce should be structured to maintain the fiscal sovereignty of countries, to achieve a fair sharing of the tax base from electronic commerce between countries and to avoid double and unintentional non-taxation.
5. The process of implementing these principles should involve an intensified dialogue with business and with non-member economies.
6. In the field of tax administration, these principles and conclusions were developed into the following Taxation Framework element:

1. Revenue authorities should make use of the available technology and harness commercial developments in administering their tax system to continuously improve taxpayer service.
2. Revenue authorities should maintain their ability to secure access to reliable and verifiable information in order to identify taxpayers and obtain the information necessary to administer their tax system. Countries should ensure that appropriate systems are in place to control and collect taxes.
3. International mechanisms for assistance in the collection of tax should be developed, including proposals for an insert of language in the OECD Model Tax Convention.
4. Recognising that much remained to be done, the Taxation Framework Conditions mapped out an agenda for future work that included the following in relation to the field of tax administration:

1. Taxpayer service
2. Developing an international consensus on ways to simplify taxation systems to minimise the cost of tax compliance, particularly for small to medium sized enterprises (SMEs)

3. Tax administration, identification and information needs

a. Adopting conventional identification practices for business engaged in electronic commerce.

b. Developing internationally acceptable guidelines on the levels of identification sufficient to allow digital signatures to be considered acceptable evidence of identity in tax matters.

c. Developing internationally compatible information requirements, such as acceptance of electronic records, format of records, access to third-party information and other access arrangements and periods of retention and tax collection arrangements.

1. Tax collection and control

Designing appropriate strategies and measures to improve tax compliance with regard to electronic commerce transactions, including measures to improve voluntary compliance.

3.9 The Possibility of Cyber Taxation in Nigeria

The statutory requirement that taxes be fairly apportioned is a long standing and well accepted elements of tax jurisprudence.[171] As far back as the late 1800's the court indicated that state taxes on interstate commerce must be apportioned to reflect the taxpayer's activities in the taxing jurisdiction.[172] The tax payer's activities is therefore not limited to those activities capable of being carried out in a place or in places with physical addresses and electronic commerce falls into such kind of activities. Electronic commerce involves the use of computer networks to facilitate the production, distributions, sales and delivery of goods and services.

[171] Bradley W (2002), T*he Meaning of Fair Apportionment and the Prohibition on Extraterritorial State Taxation*, Fordham Law Review Vol. 71, p. 149 also available at http:/.ir.lawnet.fordham.edu/flr/vol71/Issi/3 (accessed on 30/02/2016)
[172]Maine-v-Grand Trunk Ry.co 142 US. 217; 217-19 (1891)

E-commerce is, by its very nature, a truly global process and no tax jurisdiction acting in isolation can resolve the issues it raises.[173] Under various Nigerian Tax statutes ranging from Personal Income Tax Act,[174] Company Income Tax Act[175] to Value Added Tax Act, it could be said that there is no provision for how e-commerce can be taxed. This has been a serious debate both at national and international environment. Dearth of direct legislations on e-commerce and its virtual nature have made it difficult for the government to establish the real and acceptable mechanism of taxing e-commerce.[176]

As the time tax laws were being made in Nigeria electronic commerce was never contemplated and therefore taxation of e-commerce is not within the framework of Nigeria tax statutes.

3.10 Conclusion

In this chapter, attempt has been made on the regulatory regime of electronic-commerce in Nigeria. Various laws relating to taxation has been examined and it was found out that there is no extant legislation on e-commerce taxation in Nigeria.

The Bills, Electronic Transaction Bill and Electronic Commerce (Provision of Legal Recognition) Bill which should have served as legal framework for regulation of e-commerce were hastily passed by the 7th National Assembly but were not assented to before that regime handed over to the present regime. Consequently, the two Bills lapsed with the 7th National Assembly and they have not been re-introduced before the 8th National Assembly.[177]

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[173] Bradley Op Cit. P. 200
[174] CAP P4
[175] CAP C 21
[176] Ariyoosu *Op Cit*. p. 37
[177] Mahammed N *et al* (2016), *Legal Framework for E-commerce Transaction and Consumer Protection: A Comparative Study*. https://www.researchgate.net/publication/315730418 (Accessed 03/06/2018)

CHAPTER FOUR

CHALLENGES TO TAXATION OF ELECTRONIC COMMERCE IN NIGERIA

4.1. Introduction

The International tax rules, which date back to the 1920's, have not kept pace with the changing business environment, including the growing importance of intangibles and the digital economy. Existing tax rules are rooted in clear-cut jurisdictional boundaries designed for businesses selling goods and services in physical locations. Today, virtually all e-commerce is digital. Data, digitized goods and services can be generated and monetized without physical or territorial limitations.

The digital economy is characterized by an unparalleled reliance on intangible assets, massive use of data (notably personal data), widespread adoption of multi-sided business and the difficulty of determining the jurisdiction in which value creation occurs.[1]

The tax challenges raised by the digital economy include, but are not limited to base erosion and profit shifting (BEPS). BEPS is the result of tax planning designed to take advantage of gaps in the interaction of different tax systems to artificially reduce taxable income or shift profits to low-tax jurisdictions in which little or no economic activity is performed.[2]

Therefore, this chapter shall examine the various challenges confronting e-commerce taxation in Nigeria. These challenges are numerous ranging from the choice of law and jurisdictional challenges, e-commerce being an avenue for tax evasion and avoidance, enforcement of taxs by the tax authorities, residence issue in e-commerce taxation, lack of technical skills required on the part of the tax officials etcetera. The reasons why those

[1]Jinyan L (2014), *Protecting the Tax Base in Digital Economy*http://www.oecd.org/ctp/BEPSActionPlan.pdf (Accessed 27/02/2017)
[2] Ibid

challenges abide will also be examined in this chapter. Electronic commerce opens up new avenues for the marketing of traditional goods and services directly to consumers. It creates similar opportunities for business-to-business (B2B) transactions involving both digital and non-digital products and services.[3]

The categories of challenges facing taxation of electronic commerce are never close.

Therefore, the challenges facing taxation of electronic commerce shall be addressed in turns.

4.2. Choice of Law and Jurisdictional Challenge to Electronic Commerce Taxation.

The international tax regime developed in the 1920s.[4] In general, the regime recognizes two bases for tax jurisdiction.[5] The first is source-based taxation, or territorial jurisdiction. In source-based taxation, the country has jurisdiction to tax income sourced to its territory. Source rules determine the source of the income for this purpose by distinguishing between different categories of income. Hence, income classification is the first step needed to apply source-based taxation. The justification for source taxation is that the source country has contributed infrastructure and other facilities in the income production process. From an economic point of view, source taxation may advance capital import neutrality (CIN).

The second basis for tax jurisdiction is residence, or personal jurisdiction. In residence-based taxation, the country has jurisdiction to tax its residents on their worldwide income. In this system, the determination of residency for tax purposes is critical. The justification for residence-based tax jurisdiction stems from the contribution of the country of residence to the abilities of the income producer. It is alternatively justified by the social contract

[3] Ibid
[4] Azam R (2007), *E-Commerce Taxation and Cyberspace.* Virginal Journal of Law and Technology, Vol 12 No.2, Virgina p2 Also Available at http://www.vjoit.net (Accessed 20/4/16)
[5] Ibid

made between the members of the country and the governing body. From an economic point of view, residence-based taxation may advance capital export neutrality (CEN). These two bases of taxation sometimes lead to double taxation. The classic example of double taxation occurs when a resident of one country produces income in a different source country. A network of bilateral treaties based on model tax treaties has developed over time to prevent double taxation by allocating tax jurisdiction between the countries to the treaty based on different categories of income.[6]

According to the leading model treaty of the OECD, the jurisdiction to tax business income is given to the country that hosts the permanent establishment of the business. Permanent establishment is defined in Article 5 of the OECD Model Tax Treaty to include a fixed place of business through which the business of an enterprise is wholly or partly carried on.[7]

According to Arthur Cordell, of the Canadian Department of Industry, the new wealth of nations is to be found in the digital bits of information pulsing through global networks. The income flows occurring over the Internet are a new and potent source of potential government tax revenue. However, if the potential tax revenue from this new form of income is not captured, the overall tax base will be eroded, the total loss of tax revenue not collected, plus the loss of tax revenue from the income of workers displaced by new information technologies.[8]

To date, the response of the Nigeria and world's taxing authorities to the rise of electronic commerce can best be characterized as "hurry up and wait." Conferences have been

[6] For example, there is Double Taxation Treaty between Nigeria and Canada

[7] OECD (2003) ARTICLES OF THE MODEL CONVENTION WITH RESPECT TO TAXES ON INCOME AND CAPITAL *available at* http://www.oecd.org/dataoecd/52/34/1914467.pdf.

[8] Arthur C, (1998), *New Tax for a New Economy.* http://www.usak.ca/library/giv/v2n4/cordell.html (Accessed 26/05/2016)

convened; white papers have been issued; commissions have been appointed, but there is still precious little concrete advice that tax advisors can give to their clients.[9]

Although there has not been hard and fast rules on e-commerce taxation, statements of principle have abounded. Certain of these stated principles are more or less self-evident, such as the idea that electronic commerce taxing regimes need to be fair, consistent, administrable, and the like.[10] However, other principles are neither self-evident nor harmonious; suggesting that the real work of developing an electronic commerce taxing regime will be neither easy nor quick.

The principal difficulty in developing an electronic commerce taxing regime is that the Internet is still a new medium whose full ramifications are not close to being understood. Accordingly, at least for now, governments at all levels are not eager to commit to rules that could potentially erode their tax bases. Business is not pushing for new rules either, since existing rules can be interpreted favourably. Thus, it seems that electronic commerce tax law will not be a radical departure from existing rules, but instead will develop piecemeal and reactively to cure perceived taxpayer abuses or revenue misallocations.[11]

The coming of the Internet age has profound implications for tax administration as it does for just about everything else. The exponential growth of electronic commerce poses a daunting challenge to taxing authorities' traditional approaches to both direct and indirect taxation. The spectre of massive amounts of economic activity conducted through electronic commerce by remote service providers engaged in non-traceable transactions

[9] David F, *Old and New Issues in the Taxation of Electronic Commerce*, Berkeley Technology Law Journal, Vol.14 Issue2. Also Available on http://scholarship.law.berkeley.edu./btlj (Accessed 22/4/2016)

[10] Makhlouf G (2001), *Taxation and Electronic Commerce: Implementing the OTTAWA Taxation Framework Conditions*, OCDS Publication Services, France p 49 Available at www.oecd/tax/treaties/1923232.pdf (Accessed on 14/11/2016)

[11] Ariyoosu D (2012), *An Examination of the Legal Regulations and Taxation of Telecommunications and Electronic Commerce in Nigeria*; https//www.unilorin-edu.ng.draduate these/law/law-ch-2012-ariyoosu.pdf. (Accessed 7/09/2015) p 330

from unidentifiable locations has created concern among fiscal authorities around the globe. Electronic commerce opens up new avenues for the marketing of traditional goods and services directly to consumers. It creates similar opportunities for business-to-business (B2B) transactions involving both digital and non-digital products and services.[12]

What, then, are the attributes of electronic commerce that have significant implications for taxation? Jeffrey Owens, Head of Fiscal Affairs for the OECD, has identified six characteristics of the Internet that will influence the operation of tax systems.[13]

1. The ability to establish public and private global communications systems which are secure and inexpensive to operate. The opportunities that this opens up for new forms of commercial activities will not be limited to large companies. Small and medium size enterprises will find it easier to engage in international commerce. Start-up capital requirements on the Internet are typically very low. This, in turn, will lead to a rapid expansion in cross border activities.
2. The process of "disintermediation" whereby the Internet will eliminate or substantially reduce the need for intermediaries in the sale and delivery of goods and services, and in the provision of information. Commerce which uses the Internet requires a small number of distribution, sales representative, broker and other professional intermediaries. Already it is possible for a producer of software to sell and to deliver its products directly to the final consumer. Similarly, an airline company can deliver tickets directly to passengers. Financial and other information may become available without the intermediation of banks and other financial institutions.
3. The development of encrypted information which protects the confidentiality of the information transmitted on the Internet. Whilst it is possible to detect a

[12] Ibid
[13] Ibid

message sent by one person to another over the Internet, encryption generally precludes understanding the content of the message.

4. An increased scope for the integration of business functions, e.g., design and production. Private Intranet networks are now widespread in Multinational Corporations (MNE's). OECD estimates that at least two-thirds of Internet transactions take this form. This development produces a closer integration of transactions within an MNE and makes it increasingly difficult to separate out the functions carried out by related enterprises. This integration may also produce a dramatic synergistic effect--- the sum of the parts being much less than the integrated whole.
5. The Internet provides greater flexibility in the choice of the organization form by which an enterprise carries out its international activities.
6. The Internet has led to a fragmentation of economic activity. The physical location of an activity, whether in terms of the supplier, service provider or buyer of goods or user of the service, becomes less important and it becomes more difficult to determine where an activity is carried out.

The question of jurisdiction is very crucial in litigation and particularly in dispute relating to electronic transaction that transcends territorial boundaries. Issues of jurisdiction are decided based on the laws of jurisdiction and multinational conventions concluded between various regional blocks and associations.[14]The issue of jurisdiction however becomes more complex with the advent of modern technology in which border is no longer a barrier to commercial transaction and businesses are now being concluded via the application of modern technology. The issue of jurisdiction and choice of law is a very important one in e-commerce. The problem is which court assumes jurisdiction in a

[14] Ibid

dispute between parties arising from an e-commerce transaction. Further, which law is to be applied by that court? This is due to the fact that the parties may reside at different locations with different legal systems.[15] The most significant issues raised by the advent of e-commerce for income tax regimes [16]are those relating to jurisdiction to tax and the characterization of income.

With respect to e-commerce transactions, determining a taxable presence within a country may be a perilous proposition.[17] .According to the OECD, since Internet servers can be located in multiple global locations, defining them as a fixed place of business could lead to inadvertent double taxation.[18]

The Personal Income Tax Act[19] and the Company Income Tax Act[20] impose tax on person resident in Nigeria and resident and non-resident companies respectively. The contemplation of these two Acts is that there must be a physical presence of a person or of a company before the jurisdiction to impose tax can be exercised. For a person to be chargeable to tax, such a person must have contact with the territorial jurisdiction of the Nigeria.[21] And tax charges can only be effective when the person sought to be taxed has contact with territorial and geographical jurisdiction of a taxing country.[22]This Statutory requirement under the Personal Income Tax Act[23] and the Company Income Tax Act[24] for taxing persons and Companies' income respectively does not apply to electronic

[15]Indigbe A (2010), *Legal and Institutional Framework for E-Commerce in Nigeria* – www.punuka.com/uploads/cbn-paper-on-legal-institution-framework-for-e-commerce-in-Nigeria (Accessed 7/09/2015)
[16] Walter H (2001), Electronic Commerce and The Challenges to Tax Administration,www.acicuda.org/slideshows/etax.ppt >accessed on 20 July 2016
[17] Clayton C (2008),*Taxation of Global E-Commerce in the Internet:* The Underlying Issues and Proposed plan
[18] Ibid
[19] Section 2(1) (a- b) (IV) CAP P8, LFN, 2004
[20] Section 13 (1) and (2), CAP C21,LFN, 2004
[21]Adedokun A (2011), The Exercise Of Jurisdiction Taxation Of Powers And the Dynamics of Electronic Commerce In Nigeria: Legal Perspectives, (2010-2011) *Journal Of Private And Comparative Law*, JPCL Vols 4 & 5, Zaria, Ahmadu Bello University, Zaria, p 49
[22] Ibid
[23] CAP P8, LFN, 2004
[24] CAP C21,LFN, 2004

commerce as cyber jurisdiction wherein electronic commerce takes place is borderless, ubiquitous and global reached.[25] The law as it is recognises the presence of a person in a state before such a person can be subject to tax.

The most significant issues raised by the advent of e-commerce for income tax regimes are those relating to jurisdiction to tax and the characterization of income.[26] Countries or state in Nigeria as the case may be generally exercise jurisdiction to tax income on the basis of residence or source. Both of these concepts are likely to become more elusive in the context of electronic commerce. The issue of permanent establishment is also relevant as a fundamental principle of income taxation.

A source-based approach entitles the source country or a state as the case may be to tax the income of non-residents that is earned within its borders. Entitlement to tax at source is the bedrock of most international tax treaties, which recognize the right of a jurisdiction to tax all income arising within its borders as a right.[27] This permits a country to share in the gains that are generated in cooperation with its own inputs. The jurisdiction-to-tax difficulties confronting taxing authorities relying on residence-based taxation in the electronic commerce context are equalled if not exceeded by the jurisdictional issues confronting taxing authorities relying on source-based principles in asserting jurisdiction to tax income from electronic commerce earned by non-residents.[28]

On residence, taxation based on residence is partly grounded on the benefit principle, which means that the taxation should occur in the jurisdiction where the tax payer benefits from the social welfare, infrastructure and other governmental activities paid from the revenue. Under a residence based system, a country asserts jurisdiction to tax the

[25]Ariyoosu*Op Cit* p125
[26]Ariyoosu*Op Cit* p250
[27]Water H (2011), *Electronic Commerce and the Challenges of Tax Administration*www.acicuda.org/slideshows/etax.ppt >accessed on 20 July 2016
[28] Ibid

worldwide income of its residents regardless of source. An individual or corporate taxpayer's residence - whether defined in terms of domicile, place of incorporation, or seat of effective management---bears no necessary relationship to the electronic commerce in which the taxpayer engages. Accordingly, in so far as the jurisdiction is relying on the residence principle as the basis for taxation, taxpayers will enjoy enhanced opportunities in the context of electronic commerce to move income out of high tax jurisdictions into low-tax or no-tax jurisdictions assuming the taxpayer is properly treated as then resident of such a jurisdiction. Although these opportunities have long existed with respect to conventional commerce, they are magnified in an environment in which the human or legal actors involved can be largely insulated from the electronic aspects of the relevant transactions.

Permanent establishment (PE) is a fixed place of business which generally gives rise to income or value added tax liability in a particular jurisdiction. The term is defined in many income tax treaties and most European Union Value Added Tax systems. The tax systems in some civil law countries impose income and value added taxes only where an enterprise maintains a PE in the country.[29]

A permanent establishment exists where an enterprise has a fixed place of business located in a foreign jurisdiction. The enterprise must carry on business in the Contracting State through a fixed place. The term fixed implies a certain degree of permanence as opposed to temporary. Construction projects, for example, which last for more than twelve months, are considered permanent. This does not imply that businesses need to have duration of longer than twelve months to be deemed permanent. However, if the place where business

[29] Ibid

is conducted is often changed, even a long period of activity does not lead to a permanent establishment.[30]

The concept of a permanent establishment is not limited to a fixed place of business; it may extend to include an agent who is legally separate from an enterprise but sufficiently connected and dependent upon the enterprise so that a permanent establishment is implied to exist, through the actions of that agent. The concept of a permanent establishment is intended to be a condition necessary for the taxation of business profits under the residence and source principles. A permanent establishment is liable to tax on its income and assets by the State in which it is located. This liability to tax is based on the resident principle unless the enterprise has a permanent establishment in another State to which income is attributable. States look for the existence of a permanent establishment as a prerequisite to attach fiscal liability. Treaties look to permanent establishments to allocate the States right to tax. The permanent establishment concept is important because it distinguishes between enterprises that are trading with a country and those trading within a country. This is an important distinction since enterprises trading within a country are subject to taxation on the income and assets derived from its physical presence through a permanent establishment. This insures that business activities will not be taxed by a State unless there is a significant economic relationship between the permanent establishment and the State.

Payment system in electronic commerce also creates serious jurisdictional issues one of which is e-banking. E-banking transaction transcends the national borders. The issue of the applicable law becomes rife in electronic banking transaction involving money transfers from jurisdictions outside Nigeria. The question is, in the event of any dispute, which law will apply? Over the years, the courts have adopted certain guiding principles

[30] Ariyoosu *Op Cit* p255

where the issue of jurisdiction arises in a dispute.[31] In such a situation, the courts have had recourse to the following:

1. Statutory provision (if any);
2. Contractual provision (if any);
3. The law of the jurisdiction closely connected with the contract either in terms of where the contract was made or where it is expected to be executed or where the parties are domiciled.

4.3. Tax avoidance and tax in E-Commerce

An important issue for any government and tax collecting authority is to obtain knowledge and understanding of the reason(s) for tax payers' non-compliance[32]. However, measurement of the magnitude of intentional and non-intentional non-compliance can be difficult as it involves estimating levels of uncontrolled tax, which by its very nature is not detected by revenue authority. Nevertheless, the amount of tax lost through tax evasion and avoidance is enormous[33].

Tax evasion therefore is a contravention of the tax laws, whereby a taxable individual or company neglects to pay the tax due, or reduces the tax liability by making fraudulent or untrue claims on the income tax form[34]. It is the general term for efforts not to pay taxes by illegal means[35]. It entails tax payers deliberately misrepresenting or concealing the true state of their affairs to the tax authorities to reduce their tax liabilities.[36] It is referred to as an intentional effort made by people, corporate bodies, trust and other institutions to

[31]Article 5.1.3, Report of the Technical Committee on Electronic Banking of the Central Bank of Nigeria, 2003.
[32]Ariyoosn Op Cit p 325
[33] Ibid
[34]Ariyoosu Op Cit p 326
[35] Ibid
[36] Ibid

illicitly refuse to pay their tax and reporting true and fair value of their earnings by a means of evading.[37]

On the other hand, tax avoidance is regarded as the reduction or minimization of a person's tax liability by carefully arranging one's affairs in such a way as to take advantage of loopholes in the tax law provisions.[38] It is the intentional act of a tax payer to pay less than what he ought to pay to the tax authority.[39]

The growing internationalization of economic activities has given rise to taxation problems in the sphere of international investment[40]. This is even more so when it comes to those economic activities that depends on the employment of Information Communication Technology (ICT) and the most presumed cost of not enforcing taxes on the e-commerce is the potentially loss of revenue to the government[41]. Tax evasion and avoidance is one of those challenges pose by the information communication, technology (ICT). These two (2) terms will now be discussed in *seriatim*.

It is evident that the Nigerian tax codes have neither defined nor drawn any distinction between tax evasion and tax avoidance.[42] This is more so as the recent amendments to tax law have not addressed the issues of tax evasion and tax avoidance.

One thing that is clear is that tax avoidance is considered to be legal while tax evasion is illegal. To Lord Tomblin,

> Everyman is entitled, if he can to order his affairs so that the tax attaching under the appropriate Acts less than it otherwise would be. If he succeeds in ordering them so as to result, then however in appropriate, the commissioner of Inland Revenue or his fellow tax payers may be of his

[37]Zakarya G et al (2015), *Tax Evasion and Nigeria Tax System*: An Overview – http://repo.Uum.edu.my/16182/1/88/. pdf. (Accessed on 29/10/2016)
[38] Ibid
[39] Ibid
[40] John D.C. *Op Cit*p 299
[41]Goolsbee A et al (1999) ,*Evaluating the costs of and benefits of Taxing Internet commerce* (http://cyber.law.harward.edu/publication. (Accessed) 24/4/2016
[42] Ibid

> ingenuity, he cannot be compelled to pay on increased tax.[43]

Tax evasion has become so widespread in Nigeria, and the situation is much deteriorated by the fact that the government has not shown any effort and serious concern to determine and measure the causes and factors that encourage tax payers in evading and behaving toward evasion.[44]

It is also to be noted that the distinction between tax evasion and tax avoidance hinges on the legality or otherwise of the taxpayer's action.[45] Tax evasion is a violation of the law, and in evasion, the taxpayers worry about the possibility of being detected. However, tax avoidance is within the legal framework[46]. In 7up Bottling Company Plc v-l-s-IRS[47], it was held that tax avoidance is permissible while tax evasion is illegal and can give rise for penalties or imprisonment.

Different factors have been identified as the causes of tax evasion and tax avoidance. As the problem of tax evasion and avoidance cut across many countries, developed and developing, states within sovereign state, the cause seems to be unanimously universal.[48] This is because tax is levied on the citizen and corporate entities as a contribution toward the redistribution of limited resources and taking care of public expenditure. Therefore taxpayer share unique attitude in minimizing their tax liability through all the avoidable means.[49]

The causes of tax evasion and avoidance includes unfair distribution of facilities, poor management and misuse of tax collected, lack of essence of civil responsibility and taxpayer inaccessibility to government services. Other causes of tax evasion and

[43] Ire-v-Dwce of Westmister (1930) TC.490
[44]Zakariya Op Cit p 203
[45]Ariyoosu Op Cit p 327
[46] Ibid
[47] (2003) 3 NWLR (Pt 650) 565 at 591
[48] Ibid
[49] Ibid

avoidance includes corruption in public office, inadequate tax education and awareness, misappropriation of taxes collected, ignorance of the tax authority, lack of enforcement for default, proliferation of taxes, loopholes in the taxpayers.[50] It is the view of this writer that evasion and avoidances are bound to linger in Nigeria as there are no structures in place to curb these menace most especially as it relates to e-commerce as the bodies saddled with responsibilities to collect tax lack the necessary wherewithal to even trace the income got from engaging in e-commerce.

The law[51] providing for the functions of the Federal Inland Revenue Services saddles the Service with the function to make, from time to time, a determination of the extent of financial loss and such other losses by government arising from tax fraud or tax evasion and such other losses (or revenue foregone) arising from tax waivers and other related matters. But how can the Service determine the extent of losses occasioned by e-commerce when the Service may not be in the know of those transactions?

The Service which is saddled with the power to administer all the enactments contained in the 1st schedule of the Federal Inland Revenue Services (Establishment) Act and any other tax legislation[52] relating to tax made by the National Assembly can only administer laws that are in force. Any laws not yet enacted cannot be enforced by the Services. The two Bills relating to e-commerce[53] are still pending before the National Assembly which would have given legal force to electronic commerce in Nigeria in which by ingenuity; the extant tax legislation can be applied to profits derived from e-commerce.

Unless we have a legal and regulatory framework in place, to tax electronic commerce may for a long time be a paradoxical reality as there is no measure in place for now to

[50]Faitai F. et al, Why Should Tax be on digital Flight from Nigeria? www.deloitte.com/ng/en/pages/tax/articles/inside-tax-articles/why-should-tax-be-on-digital (Accessed on 7/09/2015) p 23

[51] Section 8 of the Federal Inland Revenue Service (Establishment) Act, 2007

[52] Section 25

[53] The two Bills are Electronic Transaction Bill and Electronic Commerce (Provision of Legal Recognition) Bill

show how the tax authorities can monitor billion of transaction that crisscross the Nigerian cyberspace.

Our law as it stands, only recognizes Information and Communication Technology (ICT) as a medium of communication especially when it comes to admissibility of document and its character as exampled by the Court of Appeal in the recent case of continental Sales Ltd v. R. Slipping Inc.[54] Per Ogunwuniji define E-mail to be a form of communication that is set down in writing. It is not oral. The fact that it is electronic is immaterial. It can be downloaded and as real as a hard copy of a letter or oral.

This recent decision shows that the court recognizes e-mail as a mode of communication. However, e-mail is a private mode of communication which does not give the tax authorities any opportunity to know the type of communication to know whether same can be subject to tax or not.

The implication of this is that people will continue to violate tax laws by refusing to pay tax knowing fully well that there is no law in place through which they can be sanctioned. Thus they will continue to take advantage of the loopholes in the law and thereby dodge their civic responsibility as provided for in the constitution.[55]

Any attempt to dodge taxation under any guise whether by evasion or avoidance will lead to loss of revenue to the government although some have justified tax avoidance as being legal.[56] According to Max C;

> No one wants to pay more tax than is absolutely necessary, and with governments worldwide becoming more and more greedy and bureaucratic, it's no wonder that too many people are looking for a way out not just the rich now a days. Some people call it selfish or immoral but we and the overwhelming majority call tax avoidance (not tax evasion) good planning[57].

[54] 2013) 4 NWLR (pt 1343) CA 67 at 85 Para G-H
[55] Section 24(f), Constitution Federal Republic of Nigeria 1999 (As Amended)
[56] Max C et al (1999), *Electronic Commerce and Tax Base Erosion*http://www.finon.com/ind.inchtml (Accessed on 31/10/2016)
[57] Ibid

It is the government's duty to ensure that it collects the maximum tax its legally can by blocking both the tax avoidance and tax evasion most especially in the world of technology where traditional mode of business transaction is now being relegated to the background.

4.4. Residence Issues and Taxation of Electronic Commerce

It is apposite to state at the outset that the word "Residence" or "Resident" is not defined anywhere in the Personal Income Tax Act. The court of Appeal in Eco drill Nigeria Ltd v. Akwa Ibom Board of Internal Revenue acknowledged the problem with this omission when per Nweze[58] held thus:

> Now, the term "residence" or resident" is not defined anywhere in the PITA. However, this omission is not peculiar to this Nigerian tax enactment. Like (Nigeria) PITA, the Canadian Income Tax Act did not define "residence" or "resident". It was the Supreme Court of CANADA that filled this legislative hiatus in Thomson-v-Minister of National Revenue (1946) SCR 209, 225 when it defined 'residence" to be … a matter of the degree to which a person in mind and fact, settles into or maintains or centralizes his ordinary mode of living with its accessories in social relations, interests, and conveniences of or in the place in question. It may be limited in time from the outset or it may be indefinite or so far as it is thought of, unlimited. On the lower level the expression involving residence should be distinguished as I think they are in ordinary speech from the field of stay or visit.

The issue of residence is a dicey one in respect of income taxation. This is more so with the electronic commerce. Ola on Income Tax law and practice in Nigeria[59] rather than defining residence enumerated factors that determine residence to include:

1) Domicility: This refers to the place of abode of the taxpayer which may coincide with the jurisdiction of the tax authority where the taxpayer pays his tax.

[5858] (2014) LPELR-23 502 (CA)

[59] Ola C (1974), *Income tax Law and Practice in Nigeria*Heineman Studies in Nigeria Law, Ibadan, p 174

2) Pay Point: Regardless of where the taxpayer is based, tax is deducted at pay-point and remitted to the nearest tax authority.
3) Headquarters or Head Office; Relevant Tax Authority (RTA) can be determined for tax payment purposes based on the headquarters or Head Office of the employer.

The issue of residence is very important to any discourse on electronic commerce with respect to personal income tax. The law has spelt out how this would be paid.[60] Countries impose taxes on companies based on the source and residence principles.[61] But the focus of this work is the Federal and the constituent units within Nigeria.

With respect to companies the issue of residence may not surface since the constitution of the Federal Republic of Nigeria 1999 (as amended) vests the power to tax companies' income on the Federal Government[62].

The concept of residency is grounded in the permanent establishment principle, and residency requirements are usually tied to some geographical or physical presence in the country. Article 5 of this OECD of the Model Income Tax Convention defines a permanent establishment as a fixed place of business through which the business of an enterprise is wholly or partly carried on.[63]

The companies and Allied Matters Act makes it compulsory for companies intending to do business in Nigeria to get incorporated in Nigeria,[64] and by a virtue of this, it must have its registered office in Nigeria.[65] And as such the company while it continues to be a going

[60] Item 8(a) of Part 1, Item 1(a) to Part II of the Schedule to the Taxes and levies (Approved List for Collection) Act, CAP T2, LFN, 2004
[61] Clayton C P OP Cit p12
[62] Item 32 of part 1 to the second schedule and item 59 of the schedule to the Tax and levies (Approved List of Collection) Act CAP T2, LFN 2004
[63] Clayton *Op Cit* p 12
[64] OECD; Developing the Taxation "Rules of the Road" for the information highway http://www.oecd.org/daf/fa/ecom/e/comm.HTM (Accesses on 03/11/2016
[65] Section 56

concern will have permanent or physical presence within the context of article 5 of the OECD.

However, the issue of physical or permanent presence with respect to companies income will arise when such companies engages in electronic commerce as the company may need not be incorporated as required by law before it can do business with customers within the territory of Nigeria. But based on the source principle, if it is determined that the source of the company's income is derived from Nigerian border, Nigeria may still impose taxes the fact that the company does not or fails to establish any residency in Nigeria notwithstanding. Tax then has to be redefined. It is in the light of this that this works x-rays the position of our law with respect to effect of residence on taxation of electronic commerce.

The Personal Income Tax Act (Amended) 2011[66] now defines the period of residency in Nigeria to include the period of annual leave or temporary period of absence. This clause captures internet tax avoiders and brings them into tax nets.[67]

Similarly, there is an amendment of the definition of "principal place of residence in the Personal Income Tax Act, 2011. Itinerant workers is redefined to include any individual irrespective of status who works in more than one state for at least 20 days in at least 3 months of every assessment year.

The growth of new communication technologies and electronic commerce will likely require that principles of residence-based taxation assume even greater importance.[68] In the world of cyberspace, it is often difficult, if not impossible to apply traditional residence concept to link a taxpayer to a particular geographical location. Therefore, where a person resides which will determine which state will impose tax in the electronics

[66] Section 4

[67] Akhidime Augustine (2013), Nigeria Personal Income Tax (Amendment) Act 2011: Implication for Tax Administration and Enforcement. *www.afrrevjo.net/ijah* (Accessed 26/04/17)p 7

[68] Cockfreld A(1999) Balancing National Interests in the Taxation of Electronic Commerce Business Profits http://post.queensu.cal.ac24/TukRevArticle.pdf (Accessed 29/10/16)

environment is glaring. At the extremes, if both the seller and consumer can be anonymous on line, giving no indication of their physical location and can transact in untraceable "e-location" enforcing the sales tax law of every state could be difficult[69].

At present, it may be argued that this difficulty is not as relevant as has been portrayed in some developed countries like the United State of America and the United Kingdom.[70] This is because in those countries, online commerce is dominated by credit card payments and credit verification often hinges on whether one can confirm the billing address of the account. Given this zip code and address information, simple software could immediately, calculate the tax and send payment for most transaction involving physical goods sold online. Merchant with nexus already make such calculations regularly.[71]

Notwithstanding the above position of Goolshee, there remains the potential problem of verifying location of the buyer for transactions involving electronic goods. Such transactions are not typically subject to sales tax as they often do not have physical counterparts. This is, then largely a question of whether sales taxes should apply to this new category of goods.

In respect of individual resident in a particular state in Nigeria, tax of a specified amount is payable for each year of assessment on the total income of every individual or corporate sole or body of individuals deemed to be resident for that year in the relevant state or Federal Capital Territory, Abuja once the person derives his income from within or outside Nigeria.[72] Non Nigerian is also taxable where he derives his income from Nigeria for each year of assessment of that income.

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[69] Section 10

[70] OyedeleTaiwo, (2012), *The Personal Income Tax (Amendment) Act, 2011: Implementation and matter Arising*- http:www.purc.com/ng/en/pdf/pita; amendment –mark- 2012 pdf.p2(Accessed 03/04/2018)

[71] Goolsbee A *Op Cit*p 16

[72] Bradley Joodeph argued flat residence of a taxpayer or engaging in on line business cannot be determined. Bradley *Op Cit*p 171

Taxation based on residence is partly grounded on the benefit principle, which means that the taxation should occur in the jurisdiction where the taxpayer benefit from the social welfare, infrastructure and other governmental activities paid from the revenue. Under a residence-based system, a country asserts jurisdiction to tax the worldwide income of its residents regardless of source.[73]An individual or corporate taxpayers residence – whether defined in terms of domicile, place of incorporation, or seat of effective management bears no necessary relationship to the electronic commerce in which the taxpayers engage.

The main challenge of determining the residency of e-commerce corporations is enormous. These corporations usually lack fixed physical facilities. Their Web sites are usually their main storefronts, and their employees are highly mobile. The physical presence of the corporation in a "central place of management and control" is limited, and the mobility of the corporation is very high.[74]

Therefore, it is not easy to determine the "central place of management and control" of such a corporation in order to determine its residency under traditional definition. In addition, it is easy to abuse the traditional definitions and locate an e-commerce corporation in a low tax jurisdiction to reduce or even to escape taxation all together.[75]

4.5. Challenges of Enforcement of Cyber tax Legislation

The enforcement of the current tax regime on e-commerce faces many difficulties. The global character of e-commerce makes it difficult for any country or state to monitor and tax e-commerce income. International cooperation is needed to handle e-commerce taxation, but such cooperation is not easy, given the conflicting interests of different countries.[76]

[73]Ariyoosu*Op Cit* p 287
[74]Azam R. *OpCit* p 11
[75] Ibid
[76] Ibid p 9

In addition, the virtual nature of e-commerce makes it difficult to monitor and control e-commerce transactions even if countries are cooperating. The limited physical presence of the transaction and the limited physical assets of an e-commerce corporation outside the Internet make it difficult to reveal the business's transactions and income, which in turn makes it difficult to enforce the business's tax duties even if such duties were clearly determined. Furthermore, the anonymity of e-commerce makes it hard for tax authorities to discover the existence of e-commerce transactions, the parties to the transactions, and the details of the transactions.[77]

Since tax authorities often lack such basic information, they often cannot levy taxes on ecommerce transactions. The outcome of all these enforcement difficulties is under enforcement of the current international tax regime on e-commerce. This is true of all three types of e-commerce but particularly of e-commerce in intangibles and services.[78]

It has been observed that the challenges of tax authorities in tax revenue collection are induced by human factors influencing the thinking and decision of tax revenue stakeholders, particularly tax officials and taxpayers.[79] The challenges range from tax compliance issues, corruption of tax revenue to low tax revenue yield as integrity, objectively and confidentiality.

In Nigeria certain institutions are responsible for initiating the driving tax policies and administration in the country.[80] They are taking the task under the context of and aims of construction tax culture and educating the respective taxpayers. They also serve as overseers in administering and enforcing the tax policies as well as related tax laws.[81] The Federal Inland Revenue Services is saddled with the power to collect taxes on behalf of

[77] Ibid
[78] Ibid
[79] Isallah H (2014), *The challenges of Nigeria Federal Inland Revenue Service in Tax Revenue Collection*. Nigeria Journal of Tax Studies, FIRS, Abuja, Vol. 2 No.p 81
[80] Zakariya Op Cit p 209
[81] Ibid

the Federal Government, the State Board of Internal Revenue established by Personal Income Tax Act[82] for collection of taxes for State Governments and the Local Government Revenue Committee established by Personal Income Tax Act[83] for collection of rates and taxes by Local Governments all are established by law for smooth administration and enforcement of tax legislations in Nigeria.

The above are the leading institutions and figures that have the obligation for initiating, enacting, adjusting and enforcing tax policies and administration in Nigeria.

The Nigerian tax system is fundamentally characterized with some distinctive feature in administering taxes in the country[84] and according to Zakariya, these features are expected to exist in any good tax system imposed by effective tax authority and they includes[85]

a) Clarify
b) Fairness
c) Low Compliance Cost
d) Low Cost of Administration
e) Transparency and Accountability
f) Flexibility
g) Economic Efficiency .

However, electronic commerce taxation presents the various tax authorities with how not to run fowl of the above features.

4.6. Cybercrime as a Challenge to E-Commerce Taxation

Conceptually, internet crime means the commission of unlawful acts using the computer either as a tool or a target, or as both. Cybercrime or internet crime is not defined in the Cybercrime (Prohibition, Prevention ETC) Act, 2015.

[82] Section 87
[83] Section 90
[84] Zakariya Op Cit p208
[85] Ibid

The most common internet crimes include hacking and cracking, identity theft, the sale of illegal or stolen articles on the internet, packet sniffing, and the creation of malicious codes such as viruses[86]. These offences are crimes in most advanced countries because of statutory regulations. Cybercrimes pose many challenges to electronic commerce and have indeed made internet transactions insecure and vulnerable to manipulation by persons who are not parties to such transactions.

The Cybercrime (Prohibition, Prevention, ETC) Act, 2015 provides for various offences all aimed at prohibition, prevention and prosecution of cybercrime in Nigeria.[87] The categories of cybercrimes as provided under the Act are never closed.

The Act provides to the effect that from the commencement of the Act, all operators of a cybercafé shall register as a business concern with Computer Professionals' Registration Council in addition to a business name registration with the Corporate Affairs Commission. Cybercafés shall maintain a register of users through a sign-in register which shall be available to law enforcement personnel whenever needed.[88]

The Act also provides for penalty for any person who perpetrates electronic fraud or online fraud using a cybercafé and upon conviction shall be liable to imprisonment for three years or to a fine of One Million Naira or both.[89]

The Act lays emphasis on the usage of cybercafé whereas majority of people these days do not need to go to any cybercafé before they do their online transactions.

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[86]Akomolede T, (2008), *Contemporary Legal Issues in Electronic Commerce in Nigeria* https://journals.assaf.org.za/per/article/download/2765/2572 (Accessed 15/06/2018)

[87] Preamble to Cybercrime (Prohibition, Prevention ETC) Act, 2015
[88] Section 7(1)
[89] Section 7(20

Although the Act makes elaborate provision for prohibition, prevention, control and prosecution of cybercrime in Nigeria, the rate of commission of these heinous is still alarming. The recent disclaimer by the Federal Inland Revenue Services attests to this.[90]

In the said disclaimer, the general public was warned to beware of an email: e-services@<firs.gov.nge-services@firs.gov.ng> being circulated by some criminal elements to dupe people, claiming that the said e-mail belongs to the FIRS which turned out as fake.

It is apposite to state that even where the tax authorities creates an avenue for e-commerce to be taxed, the system is bound to be bedevilled by hackers and other cyber criminals who can go any length to divert payment made by tax payers into different account and before the FIRS will discovered, they would have illegally enriched themselves.

4.7. The Challenges of Infrastructure

The effect of internet on enforcement of tax laws has raised fears of governments being unable to meet legitimate demands of their citizens for public services.[91]There is the challenge of FIRS identifying and tracing people and businesses to pay tax owing to the poor or inadequate records of birth, death and business registration as envisaged in Nigeria over the years.[92]Besides, it has been observed that improper or wrong addresses also increase the difficulty faced by tax officials in the course of discharging their duties.[93]The implication is that tax authorities like Federal Inland Revenue Service (FIRS), State Board of Internal Revenue (SBIR) and Local Government Revenue Committee (LGRC) may not be able to know a customer's tax history, nature of business, and office address for tax

[90]Wahab G, (2018) Public Notice: Valid E-Services Email of Federal Inland Revenue Services (FIRS). Daily Trust, Monday, May, 21, p 14
[91]Ariyoosu*Op Cit* p 338
[92]Aishallah*Op Cit*p82
[93] Ibid

purposes. As information on a taxpayer is inadequate, it becomes very difficult to establish a reliable or accurate database of taxpayers.[94]

The advent of e-commerce will demand a high level of preparedness from the tax administrators, to address the many enforcement challenges posed by the emerging way of doing business.[95]

It is important to understand that collecting a sale tax, or more properly, a use tax, on out-of-state purchases, is one of enforcement. State are able to collect taxes on businesses located within the state since businesses are regularly audited and are required to prove that they have paid taxes levied on them[96].

Vastly, imposed and rapidly emerging technologies, combined with globalization of the economy has led to business and consumer dealings becoming increasingly international in nature, with a consequent increase in cross-border flows that have become easier, faster and more accessible than ever before.[97]

One of the problems with this is the fear that it may open up greater opportunity for tax avoidance and evasion. In particular, it is in international dimension that potentially makes it extremely difficult for tax authorities to collect the necessary information to properly enforce domestic taxation laws.[98]

The availability of timely, detailed, accurate and useful information about a taxpayer's affair is crucial to the Federal Inland Revenue Services (FIRS) State Board of Internal Revenue (SBIR) and the Local Government Revenue Committee's effort to effectively and fairly discharge the functions.

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[94] Ibid
[95] Ariyoosu Op Cit p 338
[96] Varian H(2006), *Taxation of Electronic – Commerce*
http://www.(ensws.gov.801/gov/www/gtax.html
[97] Pinto D (2002), *Taxation Issue in a world of Electronic Commerce* – htpp://ougtax.com Article 5 – free/JaJ 520 Volume 2% 2002 20183 5 204
[98] Ibid

Apart from sheer logistic problems associated with trying to obtaining information about people engaging in commerce, their financial institutions through which payments are being made are not always bound to disclose information about their client except for certain circumstances.[99]

4.8. The Challenge of Assessment and Computation

The e-commerce is a significant way of revenue leakages. These leakages are from e-commerce at the assessment stage where taxpayers are either not assessed at all or they are improperly assessed[100]**.** The challenges are not peculiar to Nigeria alone but other developing countries face issues like:

a) How effective and efficient is the tax law for digital economy and the volume of transactions that are consummated within that e-commerce or platform?

b) Do the tax authorities or agencies have the capacity to address this challenge?

Under the current Nigeria laws[101]on taxation, there are three tiers of government which are the Federal, the State and Local Government with each having its sphere clearly spelt out in the law.[102] These laws have gone through series of amendments such amendments includes Personal Income Tax (Amendment Act 2011 and Company Income Tax (Amendment) Act, 2007, despite this amendment, we still depend largely on the physical approach to transacting business.

Therefore, unless the origin and or destination of a transaction is Nigeria, there is usually a challenge in ascertaining when to tax and how much to tax the individual or the companies in relation to the transaction made under the e-trade or e-commerce.[103] For instance, employees of labour can now work, participate in global meetings and

[99] One of such circumstances are as contained in Section 28 of the Federal Inland Revenue Service (Establishment) Act 2007
[100] Opera L *Op Cit* p3
[101] For example, PITA, CITA, FIRS (Establishment) Act,
[102] Taxes and Levies (Approval List of Collection) Act,
[103]Opera *Op Cit* p 3.

sometimes discharge their duties and obligations from anywhere in the globe. This would mean that a PAYE tax system that is based on physical approach or residency rule can potentially be short-changed by a claim that the employee never stepped into Nigeria.[104] Furthermore, the fact that e-commerce businesses do not necessary require a fixed place of business or address to carryout transactions in any country enables foreign companies to do business and then earn income in Nigeria without declaring or paying any part for tax in Nigeria.[105]

Also goods and services are consumed with e-commerce in Nigeria with little or no Value Added Tax (VAT) in place collected on such transactions. This is not unconnected with the difficulty of tracking the volume of transactions that happen over the internet.[106]

Furthermore, how do we tax a transaction that is taking place between the Nigerian youth and a non-resident retainer of application software? Thus, some of these transactions occur and income earned by the parties involved but tax authorities and its agencies are oblivious that the transactions are taking place.[107]

Tax authorities are facing many difficulties in taxing profits attributable to the software functions of servers. Calculating the income attributable to the server or website would require tax authorities to go through case by case and thousands of lines of computer code. This is not administratively feasible, as tax authorities would somehow have to determine the amount of added value provided through server functions.[108]

To tax an economic activity, the tax authority must be able to identify a taxable event. The factual nature of tax determinations and the difficulties that may arise in electronic commerce environments have been a challenge to tax administrators. For example,

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[104] Ibid
[105] Ibid
[106] Ibid
[107] Ibid
[108] Ariyoosu *Op Cit* p338

whether a business has a permanent establishment depends upon the volume of activity in the country; the arm length principle cannot be applied without a factual analysis of the enterprise's activities and the location of the activities.[109] In the conventional commercial environment, tax administrations rely on being able to identify the taxpayer, obtain access to verifiable information about the taxation affairs of the taxpayer and have efficient mechanisms to collect the tax due. A business engaged in electronic commerce on the Internet may be identifiable only by its domain name. Yet the correspondence between a domain name and the location of where the activity is being undertaken is tenuous. Furthermore, there are cases where the Internet domain name can imply a relationship to a well-known business without any such relationship existing, giving rise to trademark-type disputes. Without accurate identification of taxpayers, it is difficult for the tax administrators to levy taxes. Even if they can identify the taxpayer, but not its physical location in the world, this will give rise to jurisdictional disputes between tax authorities, with all the attendant risks of double taxation.

Responsible businesses engaged in electronic commerce recognise that there are sound commercial reasons for them to work with government to ensure adequate identification. Measures such as the registration of business names, mailing addresses and telephone and facsimile numbers on their Internet sites have been promoted by business as one way to foster consumer confidence in electronic commerce. Such measures will also address some of the challenges faced by tax authorities in identifying taxpayers[110].

Tax authorities may also face difficulties in physically collecting tax in the virtual world. A very large part of tax revenue is collected by intermediaries. Employers are responsible for the collection of wage tax; businesses for consumption taxes; financial institutions for taxes on interest and royalties. In some cases, electronic commerce may remove these

[109] Ibid
[110] Ibid

intermediaries so that tax authorities will be required to collect small amounts from a large number of taxpayers. This may place an unacceptably high compliance cost on taxpayers and high administrative costs on tax authorities. The tax administrators should encourage business practices that identify businesses engaged in e-commerce and examine mechanisms to facilitate tracing of inadequately identified web sites and other electronic places of business.[111]

There are also challenges of inadequate and incomplete records of business transactions for tax purposes in Nigeria. In some cases, these records are never kept at all.[112]Accurate records of business transactions and income are not kept for tax purposes in West Africa including Nigeria[113]and this ugly situation presents the tax authorities with the problem of how to ascertain and assess the taxable income most especially cyber income.

4.9. Skill and Knowledge of Electronic Commerce by Tax Authorities and Officers

According to a recent survey, 46 per cent of online buyers said they have never paid sales tax on an Internet purchase and 75 per cent said they would buy less on the Internet if a sales tax were imposed.[114]

Concerns over the loss of tax revenue have resulted in academic papers describing a world where the leading designers, engineers, architects and other professionals with highly developed skills and possessing intellectual property reside in tax havens. Under this hypothesis the developed world's residents will mainly be consumers whose financial resources would be located in other places' bank accounts.[115]

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[111] Ibid
[112]Isallah *Op Cit* p 83
[113] Ibid
[114] Varian H (2000), *Taxation of Electronic Commerce*, School of Information Systems and Management, University of California, Berkeley
http://www.census.gov:80/population/projections/nation/hh-fam/table1n.txt (Accessed on 20/11/2016)
[115] Mattson R, Electronic Commerce: The Challenges to Tax Authority and Taxpayer
www.oecd.Org/tax/treaties/1923232.pdf (Accessed on 24/10/2016)

Manufacturing plants in this scenario would be relocated to places like Niger, Cameroon and some other less developed areas and possibly some of the more struggling Eastern European countries. All business decisions would then start with the tax consequences as the key determinant. Personal residence and life style decisions of the highly talented professional class would be focused on tax considerations.

Also, in majority of the e-commerce transactions, the mode of delivery and payment remain traditional. The real challenge for enforcement arises only where delivery and payment are through Internet or any other network. The delivery in digitized form creates complications for tax administrations in enforcement of law. But total anonymity exists only where both payment and delivery are in digitized form involving e-cash. Once the technical problems of delivery and payment are sorted out, online commerce will grow exponentially. It is therefore necessary that tax administrators have adequate responses in place to meet the real challenges before they come. It is also necessary that tax administrators seize the opportunity offered by the Internet to improve taxpayer services.[116]

The issue of security as the electronic banking and online trading continues to gain popularity on the back of the cashless policy, electronic fraud has also increased. The personnel of the FIRS are not adequately trained and knowledgeable to track down the fraudsters into banking platform and e-commerce.[117] This also applies to the POs terminals as many times the customer is forced to pay cash when network is down and the account is debited

Tax administration will also become more challenging, as taxable "online" transactions will become more difficult to trace, especially if payment records are encrypted. Some taxable online transactions are encrypted and as such the tax administrators will not be

[116]Ariyoosu*Op Cit* p342
[117]Opara*Op Cit*p5

able to have access to information that will enable them to do their proper assessment. Leaving the tax administrator to depend on information supplied by the taxpayers may not augur well for the purpose of proper taxation if the tax administrators do not have the wherewithal to verify the information supplied.

We are unprepared for the uncertainty of this new technology and this raises the nightmare scenario. We need time to reflect, to understand. We need to go slow and avoid adopting new rules on false premises. We need less heady times and more experience before we make any decisions. Current tax policies, rules and administrative practices are more than inadequate to deal with e-Business at this time in its infancy.[118]

Probably, the most significant error of current thinking about the internet by the tax administrator especially in developing countries like Nigeria is that it allows consumers and merchants to avoid intermediaries, e.g., credit card verification. It is assumed that the internet is borderless and ungoverned, and consumers and businesses may use Cyberspace as a vehicle for tax avoidance. It's been suggested that audit trails will disappear in Cyberspace or that it will become impossible to verify the parties to a particular transaction. [119]In order for electronic commerce to flourish -- both on a business-to-business and business-to-consumer basis -- it is essential to establish "trust" between the participants in a transaction. Industry is seeking to ensure consumer confidence in network-based transactions and protect legal rights. Considerable effort has already been devoted to developing technologies such as digital signatures that can be used to document the particulars of a transaction, as well as verify the identity of the participants. It is upon the identification of the participants in e-commerce that e-commerce can be appropriately taxed and this is what is lacking in Nigeria.

[118] Ibid
[119] Ibid

4.10. Conclusion

In the preceding chapter, regulatory regime for e-commerce taxation was examined.

In this chapter, challenges to electronic commerce taxation were dealt with. These challenges are many. They range from choice of law and jurisdictional challenges, residence issue, enforcement challenges, cybercrime, lack of technical skill on the part of tax personnel and more daunting one, assessment and computation of cyber income. The result of these challenges is loss of revenue to the government.

The e-commerce businessmen do not need to be in a particular jurisdiction before the carry on their transactions thereby not under the regulation of a particular place. Even when they make their income, there is a problem of assessment and computation of their taxable income as their identities are mostly shielded and despite the fact government has made provision for people to voluntarily declare their income and pay their taxes appropriately, some criminal elements have created similar but fake e-mail in order to divert revenue that ordinarily should have come to government.

It has been shown that the mode of business transaction is changing yet tax systems have been slow to change in the same direction. This can hinder economic progress, lead to a loss in tax revenue, and frustrate taxpayers. The government has to brace up in order to arrest the ugly trend.

CHAPTER FIVE

SUMMARY AND CONCLUSION

5.1. Summary

Electronic commerce has the potential to be one of the great economic developments of the 21st Century. The information and communication technologies which underlie this new way of doing business open up opportunities to improve global quality of life and economic wellbeing.[1]

Therefore this work examined the key terms that require conceptual clarification in order to bring home the importance of the topic of this work. Various authors and scholars that have attempted to define concept like e-commerce, taxation or tax as the case may be, cyberspace or internet, cyber jurisdiction have one thing in common. They were all influenced by the peculiarity of their various background and exposure.

The nature of e-commerce has so far in Nigeria defiled all legal process of bringing cyber income within the tax box. This is evident firstly from the fact that e-commerce itself as a mean of modern days' business transaction has not been given legal recognition notwithstanding the Bill which is still pending in the National Assembly.[2]

The various laws that regulate business transactions and taxation in Nigeria ranging from the contract law, the companies and Allied Matters Act,[3]Personal Income Tax Act,[4]Companies Income Tax Act,[5] and the State laws that provide for taxation merely contemplate the traditional way of doing business in which the geographical location of a tax payer determines who subject such taxpayer to tax. The Electronic Commerce

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[1]Makhlouf G (2001), *Taxation and Electronic Commerce: Implementing the OTTAWA Taxation Framework Conditions*, OCDS Publication Services, France p 49 Available at www.oecd/tax/treaties/1923232.pdf (Accessed on 14/11/2016)

[2] Electronic Commerce (Provision of Legal Recognition) Bill

[3] CAP C20, LFN 2004

[4]CAP P. 8, Law of the Federation of Nigeria, 2004 and the Personal Income Tax (amendment) 2011.

[5] CAP C21, LFN, 2004

(Provision of Legal Recognition) Bill and Electronic Transaction Bill are still pending in the National Assembly although when the two Bills are passed into law, they will serve as legal framework for online transactions both commercial and otherwise.

The Companies and Allied Matters Act[6]provides for registration of Companies in Nigeria. Under the law, a non-Nigeria can join in the formation of a company as long as he or she meets the requirements of the law.[7]A foreign company intending to do business in Nigeria is also required to register as a company in Nigeria apart from the type of companies exempted from registration.[8] However, it is unfortunate that the provision of Companies and Allied Matters Act on the need for registration of foreign companies may not be applicable to companies engaging in e-commerce as companies may not need physical presence before they transact business electronically and payment made accordingly into their account.

Though the electronic Transaction Bill which is modelled after the UNICITRAL Model on e-commerce has been pending before the National Assembly and has never been passed into law.[9]The Bill when passed into law will be more encompassing than its sister Bill, Electronic Commerce (Provision of Legal Recognition) Bill as it deals with electronic transaction generally.

Despite these laudable objectives, the Bill is not yet a law in Nigeria and therefore since the UNICITRAL Model on electronic commerce has not been domesticated in Nigeria and therefore it is not yet law.

[6] Section 18, Companies and Allied Matters Act, Cap C20 LFN, 2004
[7] Section 20, Companies and Allied Matters Act, Cap C20 LFN, 2004
[8] Section 56 Companies and Allied Matters Act, Cap C20 LFN, 2004
[9]Oyewumi A (2012), *The FCT Revolution and Commercial Sectors in Nigeria: Impacts and Legal Intervention*, University of Ibadan Law Journal Vol. 2 No. 1, p. 201

The Electronic Commerce (Provision of Legal Recognition) Bill 2011 when passed into law will deal with varieties of commercial transaction but majorly on electronic commerce. The Bill emphasises the common law position that before there can be a valid transaction, the mind of the parties must be *ad idem*. It provides that nothing in the Act shall make it mandatory for a person to use, provide or accept any electronic message in any commercial transactions unless the person consents to the using, providing or accepting of the electronic messages.[10] The Bill does not adopt the categorization of electronic commerce adopted by the UNICITRAL MODEL. The major different kinds of e-commerce adopted by UNICITRAL[11] are: Business to Business (B2B), Business to Consumer (B2C), Business to Government (B2G) and Consumer to Consumer (C2C). However, the categorisation the Bill recognises are never close for the Act is applicable to all commercial transactions including the transaction conducted by the Federal and State government in Nigeria.[12]

Electronic commerce being a process starting from negotiation to payment, the Central Bank of Nigeria[13] has made many guidelines relating to payment system which deviate totally from the cash or payment by cheque which used to be order of the day. Such guidelines include Guidelines on Automated Teller Machine (ATM) 2010 and Guidelines for Card Issuance and Usage in Nigeria.

The Guidelines on Automated Teller Machine (ATM) 2010 provides for payment system by using Automated Teller Machine (ATM) and the conditions for issuing of ATM to cardholders and the also provides for liabilities where fraud occurs in the course of using ATM. However, its scope is limited to payment as payment is just an aspect of business

[10] Section 2 (1)
[11] Shahrzad S. (2015), E-Commerce and impacts of Global Trend and market, International Journal of Research, Granthoaloyah, India p. 49. Also available in Http://www.granthoatoya.com (Accessed on 4/4/2016)
[12] Section 1 (1)
[13] Section 57 of the Bank and other Financial Institutions Act, Cap B3, Law of the Federation of Nigeria, 2004.

transaction and many things must have been done before it will get to the point of payment.

The Federal Inland Revenue Services (Establishment) Act[14]on it part is saddled with the power to collect taxes chargeable by the Federal Government.[15]The Service is saddled with the responsibility to liaise with banks to know the volume of money that pass through both individual and corporate accounts.[16]This does not in the view of this researcher *ipso facto* help to know whether those moneys are derived from taxable profits or incomes as the case may be. Although it may help the Service to monitor income, it is only when the Executive Chairman specifically gives a notice to the bank that they can disclose further information about their customers be it individual or corporate body.[17]

Personal Income Tax (amendment) Act, 2011 only provides for tax authorities to deliver assessment notices via electronic mails and courier services but it is not clear as to whether the tax payer have the corresponding leverage to respond via same means most especially where the tax payer has any objection to the assessment.[18]

What is most disturbing is the fact that before a company can be recognised as a company, such a company must have a physical presence in Nigeria as required by law.[19]The nature of electronic commerce does not require a physical presence before the business of a company can be carried on and as such constitutes tax challenges to the tax administrators and the government.

The OECD has taken a significant step forward in reaching an international consensus on the tax treatment of electronic commerce. The OECD members met in Ottawa and agreed

[14] 2007
[15] Section 2
[16] Section 28(1)(a)
[17] Section 28 (2)
[18]Oyedele Taiwo, (2012), *The Personal Income Tax (Amendment) Act, 2011: Implementation and matter Arising*- http:www.purc.com/ng/en/pdf/pita; amendment –mark- 2012 pdf

[19] Section 27 (1)(b), CAMA

on what is now known as the Ottawa Taxation Framework Conditions. The Conditions provide for the principles which should guide countries in their approach to taxation of electronic commerce. The Framework provides that e-commerce should be treated in a similar way to traditional commerce and emphasises the need to avoid any discriminatory treatment. The traditional principles agreed to at Ottawa include neutrality, efficiency, certainty, simplicity, effectiveness, fairness and flexibility.

Dearth of direct legislations on e-commerce and its virtual nature have made it difficult for the government to establish the real and acceptable mechanism of taxing e-commerce.[20]

The issue of jurisdiction is complex with the advent of modern technology in which border is no longer a barrier to commercial transaction and businesses are now being concluded via the application of modern technology. This is due to the fact that the parties may reside at different locations with different legal systems.[21]

Different factors have been identified as the causes of tax evasion and tax avoidance. As the problem of tax evasion and avoidance cut across many countries, developed and developing, states within sovereign state, the cause seems to be unanimously universal[22]. The causes of tax evasion and avoidance includes unfair distribution of facilities, poor management and misuse of tax collected, lack of essence of civil responsibility and taxpayer inaccessibility to government services. However, e-commerce is now a perfect avenue for tax evasion and avoidance as people will do all they can to avoid paper documentation and they would have encrypted some of their information in such a way that it will be difficult for tax officials to get.

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[20]Ariyoosu Dauda. An Examination of the Legal Regulation and Taxation of Telecommunication and Electronic Commerce in Nigeria. https//www.unilorin-edu.ng.draduate these/law/law-ch-2012-ariyoosu.pdf. (Accessed 7/09/2015). p. 37
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[22] Ibid

5.2. Findings

This work examined electronic commerce as a modern way of business transaction and the possibility of bringing same within tax box within the confines of the relevant laws in Nigeria relating to taxation. The following findings were thus made in the course of this work.

1. The legal requirement for registration of companies, business names is relaxed by the nature of electronic commerce thereby leading to huge loss of revenue to the government as most trading entities engaging in electronic commerce operate as virtual organisations and as such not subject to strict legal regulation as goods and services are traded online without physical presence. The recent gambling company called MMM is a perfect example of how electronic commerce cannot easily be regulated and the resultant effect is loss of revenue to the government. As most companies or individuals engaging in electronic commerce have no physical presence in Nigeria, the Nigerian Government if faced with the jurisdictional challenges of taxing them.
2. As at today, there is no law in force in Nigeria regulating electronic commerce taxation. The Electronic Commerce (Provision of Legal Recognition) Bill and the Electronic Transaction Bill hurriedly passed by the 7th National Assembly was not assented to by the former President Goodluck Jonathan and has not been represented before the 8th National Assembly as such the two Bills lapsed with the last National Assembly. Until a law is passed by the National Assembly and assented to by the president; such a law remains unenforceable for all purposes in Nigeria.[23] An examination of the tax legislations considered in this work shows that those laws are inapplicable to e-commerce taxation. Since commercial

[23] Section 4(2) of the Constitution Federal Republic of Nigeria 1999 (as amended)

transaction is a process which starts from contract formation to payment for the goods and services purchased, electronic commerce also commence from when and how parties come to the terms of contract and to how payment would be made. As to the formation and execution of contract, there is no extant law regulating the activities of businessmen and businesswomen. However, the Central Bank of Nigeria has tried to live up to standard as it has come up with certain regulations which are subsidiary legislations in nature in regulating electronic payment system in Nigeria. These regulations include Guidelines on Automated Teller Machine, (ATM) 2010 and Guidelines for Card Issuance and Usage in Nigeria, 2014.

3. Under the Nigerian law, even the tax collected by the Federal Government is still mainly resident based not to talk of states. Cyberspace in which electronic commerce takes place is a virtual one and therefore a haven for tax evasion and avoidance as their anonymity is guaranteed and the identity of the parties involved is shielded. There is no structure in place as to monitor electronic commerce thus it now lies at the discretion of the participants in the electronic commerce to choose whether to pay tax or not. This ugly situation has led to serious tax evasion and avoidance. Tax payers since most of their website are strongly encrypted; there is nothing to aid the tax authorities in ascertaining cyber income and assessing same for tax purposes.
4. The structures and technical skills required to track e-commerce is not in place in Nigeria. In the European plan, software manufactures are required to devise a method to keep track of e-commerce sales. Banks would then process the transactions, withhold taxes from the sales, and pass the proceeds onto the appropriate government. Banks could offer such a service for fee to clients, and national governments would help banks defray part of the collection costs. There is

no such plan in place in Nigeria as of now whereby the Tax Authorities can compel software manufactures to keep track electronic commerce and some tax officers are not ICT expert like the software manufacturers.

5. There is no system in place in Nigeria as of today that will make digital goods and services be taxable and if taxable, there is problem of characterisation of goods as to determine whether it is the Federal, State or the local government that will impose tax on such goods.

The law on the power of each tier of government clearly spells out items on which each tier can impose tax. This is as contained in the Taxes and Levies Approved List of Collection) Act.[24]The provision of this Act relates to tangible products and not applicable to electronic commerce.

5.3 Recommendations

1. For there to be effective and efficient taxation of electronic commerce, there should be a mechanism in place whereby e-commerce will be highly regulated since it has been shown in this work that e-commerce is a window for loss of revenue to the government. This can only be achieved if there is a synergy between the tax authorities and various stakeholders in the ICT industries which will ensure tax authorities having access the various commercial transactions being carried out by electronic means.
2. The Electronic Commerce (Provision of Legal Recognition) Bill and Electronic Commerce Bill which are modelled after the UNICITAL Model on E-Commerce should be represented and passed into law so as to eliminate legal barrier to the effective use of electronic communications in transaction and also that tax laws should be amended to provide for e-commerce taxation.

[24] CAP T2,LFN 2004

3. There should be a law in place empowering the tax authorities to be able to demand for the record of transactions carried out by electronic means from the Internet or network service providers in order to stem the tide of tax evasion and avoidance as result of electronic commerce. This will enable the tax authorities to be able to tax income that are subject of taxation. A situation whereby customer confidentiality will be used as a ground to deny government vital information should be addressed.
4. There should be proper training and retraining of tax officials as electronic commerce itself requires high knowledge of ICT. For there to be taxation of electronic commerce, tax officers must have firm knowledge and skill in tracing online transaction as people will hardly voluntarily pay tax.
5. The law should also address the issue of characterisation of goods for the purpose of electronic commerce. Characterisation of goods into digital goods and services on the one hand and tangible goods *stricto senso* on the other hands and the power to tax same clearly spelt out in the law.

5.4 Concluding Remarks

The more daunting aspect of this work is the categorization of goods for the purpose of electronic commerce. This is so as in the world of ICT world, goods are not limited to physical or tangible goods. What presents more challenge is a situation where it involves digital goods. It is therefore the humble submission of this writer that the various tax authorities at various levels have to brace up to this challenge. This, they can do by partnering with major stakeholders in ICT sector for appropriate monitoring of electronic commerce for proper taxation in order for electronic commerce not to be a safe haven for tax evasion and avoidance.

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