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Capital Gains Tan in Nigeria

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Abstract
Tax is a compulsory levy imposed by the government on the incomes of taxpayers in order to pay the expenses of governance. Capital Gains Tax is a form of tax chargeable on capital gains arising from the disposal of chargeable assets. This paper examines the nature and the justification for Capital Gain Tax as a lucrative ground for raising revenue for development especially in the developing countries. In Nigeria, Capital Gain Tax is yet to yield the desired result in terms of raising revenue for the government. Our theoretical work on this subject explain reasons which includes lack of awareness, inadequate data and the high rate of inflation which has led to high incidence of avoidance of Capital Gain Tax. Arguments against capital gain tax in Nigeria are examined as well as issues, suggestions and recommendations for the effectiveness of this form of taxation. This paper recommends more aggressive awareness campaign, reduction of tax rate and even a merger of capital gain with income tax to reduce cost of collection.

Key words: Capital Gains Tax; Government; Nigeria

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INTRODUCTION

Taxation has been with man. Apart from revenue to the government, taxation is important to all, taxes collected come back to the taxpayers in the form of social amenities (Ola, 2001).

In recent times, taxation is an economic tool that can be used to steer the economy in order to achieve a particular micro or macro economic growth. In developing countries for example, this economic tool for development may be through tax concessions to newly established firms starting new activities (Shah & Toye, 2004). The rationale for such fiscal concessions should be aimed at encouraging private investment in selected economic activities, promoting regional development or creating employment opportunities. The tax policies can be used to attract foreign investments as foreign investors weigh the effects on their total after tax profits of allocating the capital available to them among different countries. Accordingly, they would prefer to invest in countries with low tax rates (Ali, 1999).

There are many types of taxes that are often levied on individual and corporate entities. Capital gain tax is on income derived from the sale of a capital asset. This paper will examine the concept of tax, reasons for taxation, features of a good tax system, nature, arguments against Capital Gain Tax and recommendations for effectiveness of this form of taxation.

METHODOLOGY

In carrying out this research we adopted a theoretical framework by looking at other literatures on the subject as basis for our findings and recommendations.

Meaning of Tax

Failure of the Nigerian tax laws to define the term tax has left much to be desired. Recourse shall be to judicial pronouncements and opinion of scholars as to its meaning. Tax is a monetary charge imposed by the government on persons, entities, transactions, or property to yield public revenue…, the term embraces all governmental imposition on the person, property to yield public revenue… The term embraces all government occupations, and enjoyment duties, import and excises (Blacks, 2004).

Cooley (1924) defined tax as the enforced proportional contributions from persons and property, levied by the sovereignty for the support of government and for all public needs.

Cooley's definition has been endorsed expressly or otherwise by many different courts. Cooley's definitions characterize taxes as contributions but many other definitions refer to them as impost, charges, burdens, or exactions.

Although Cooley's idea of enforcement and levy as attribute of tax agrees with judicial and academic definition of tax, his notion of contribution seems controversial. A close look at other definitions buttresses this point. In U.S. V Butler Roberts[1], tax is defined as an exaction for the purpose of Government. Similarly, Latham C. J. in MATTHEW V CHUCORY MARKETING BOARD[2] was more emphatic, as he defined tax as a compulsory exaction of money by a public authority for public purposes. The compulsory nature of tax was amplified by Chambers Encyclopedia. It defined tax as a 'compulsory levy to finance goods and services provided by a governing body for the collective satisfaction of wants.

Even though tax may be seen as contribution, it is never a discretionary one. Thus in *Michigan Employment Sec. Commissioner V Patt*, tax is seen as an enforced contribution exerted pursuant to legislative authority. Other views expressed on the meaning of the subject of tax emphasizes its compulsive attribute, Igweike (2003) defined tax as a pecuniary burden placed on taxpayers for the good of the society. In the same vein, Ola (1985) sees tax as "the demand made by the Government of a country for the compulsory payment of money by the citizens of the country".

It is our view from the foregoing that tax is a levy imposed by the Government on her citizens for the sole purpose of raising money for goods and service in the interest of the taxpayers.

The primary as well as the traditional objective of taxation is to raise money to meet government's expenditure on social welfare. Apart from this, taxation also serves other purposes such as redistribution of income among the populace. Here the rich are made to pay or bear higher taxes in favour of the poor.

Taxation may be used to increase productivity. This is achieved when the taxpayer is compelled to work harder in order to restore his lost income paid through a higher tax. The above is always not the case as higher taxation may have disincentive effect than the intended incentive. Higher taxation can lead to migration to countries of low income tax rates and involvement in black market activities (Ayua, 1999).

High marginal tax rates can lead to distortion in the form of substitution of one form of business organization for another as differences in tax treatment of the various kinds of businesses may lead to the choice of those most favourably treated by the tax system and a high incidence of tax evasion and tax avoidance. Taxation can be an instrument for regulating consumption pattern. High taxation can be used to discourage undesirable activities on citizens such as drinking of alcohol, smoking and betting.

Features of a Good Tax System

Whatever the objectives of tax in a country, it is desirable that it is characterized by equity, neutrality, certainty, and efficiency. The feature of equity means that those with the same income should not pay differently. Apart from areas of fixed wages, there is the practical problem of arriving at persons with same income in Nigeria where other incomes outside salary earning have little or no statistical record at all.

Neutrality of tax entails non-discrimination between different activities in the economy. Here it will depend on the objectives of the taxation. Some discriminations are necessary and inevitable where the government wishes to achieve certain economic goals. Thus, where the Government decides that industries operating in rural areas should pay less tax over their corporate earning to boost investment in rural areas, such discrimination will be justified against their counterpart in urban areas in view of the economic goal.

Certainty of tax is not only fair to the taxpayers but will make the government to plan for the expected revenue. A good tax system must be efficient so as not to make the administrative cost of collecting the tax higher than the tax expected to be raised. To achieve this, there must be an efficient administration of tax system through the use of trained personnel (Olong, 2006).

Classification of Taxes

Taxes are classified into: proportional, progressive and regressive taxes. There is also the classification into direct and indirect taxes. A proportional tax is a neutral tax as it takes a constant proportion of income, while the progressive tax is not constant but graduate to apply to higher rates as incomes increases. Progressive tax though based on the idea of vertical equity as it distribute income between the rich and the poor, has been criticized as a result of its disincentive effect on enterprise and handwork (Ayua, 1999).

Regressive tax structure is one under which the revenue yield becomes smaller as the value of the property taxed increases. Developing countries hardly opt for regressive tax as it cannot generate the required revenue for the needed expenditure outlay. A direct tax is imposed on property or person and the burden borne by the person upon whom it is assessed and not pass on from the nominal taxpayer to another person. A good example of indirect taxes is prices on commodities which ultimately fall on consumers.

[1] (1936) 279 U. S. at p. 6
[2] (1938) 60 CLR 203 at p. 226

NATURE AND JUSTIFICATION FOR CAPITAL GAIN TAX

Capital gains tax is income derived from the sale of a capital asset. Gain here, means increases resulting in the market value of assets to a person who does not regularly offer them for sale and in whose hands they do not constitute stock in trade. Capital gains may arise in two instances, in the first place, where the asset appreciate in value while still in the hands of the owner or may be he realized gains when the assets are sold or disposed off. Capital gains tax are payable on stocks, shares, securities, land and buildings, plant and machinery every business assets such as good will and secret processes.

Capital gains tax has been justified on the ground that capital gain on assets increases a person or person's taxable capacity by increasing his power to spend or save. Capital gains are not distributed among the different members of the tax paying community in fair proportion to their taxable incomes, but are concentrated in the hands of property owners and it has been argued that their exclusion from the scope of taxation constitutes a serious discrimination in tax treatment in favour of a particular class of taxpayers.

Non payment of capital gains tax will create discrimination in favour of property owners that will lead to further reinvestment of those gains in assets thereby perpetuating further severe inequalities in income and wealth as capital gains only accrue to those who own property. Non payment of capital gains tax accruing especially to those in the upper income bracket puts a greater relative burden on the income tax of those who do not enjoy such gains (Ayua, 1999).

In developing countries capital gains tax is a lucrative ground for raising money for purposes of development. This gain, Tripathy (1978) has argued:

> In these (developing) countries there exist large opportunities for the realization of capital gains because of the tendency of rising prices inevitably accompanying a process of accelerated economic development, besides, the process of economic development itself tends to generate capital gains because of the rise in real income, company profits and the value of shares. But as the proportion of wealth held in the form of equity shares of the capital gain arises to the owners of property such as land and real estate. Thus, the taxation of capital gains tax constitute an important fiscal mechanism to plough back a proportion of the increase benefits accruing to the holders of property as a result of a process of development into the developmental funds of public sectors.

Whatever arguments are in favour of capital gains tax, capital gain tax like other type of taxation have been criticized as having a kind of a lock-in-effect on business in the sense that it inhibits the sale of capital assets which have appreciated in value (Brown, 1955). It is also argued that it reduces the flow of investment especially in developing countries where there is high need for greater investment mobility (Amatong, 1975). The negative effect on sale of asset will be minimal where capital gains are payable on the value of appreciation, where the tax is not only through sale of asset.

Chargeable Assets

Chargeable assets are all forms of property, including options, debts and any form of property created by the person disposing of it, or otherwise coming to be owned without being acquired. Landed property in the form of land and building are the main incomes yielding assets in Nigeria. Capital Gains are not chargeable on appreciation of value until the property is disposed of.

> There is disposal where any capital sum is derived from a sale, lease transfer, an assignment, a compulsory acquisition or any other disposition of assets. Where any capital sum is received under a policy of insurance and the risk of any kind or damage or injury or, or the loss or depreciation of assets Where any capital sum is received in return for forfeiture or surrender of rights or for retraining from exercising rights. Where any capital sum is received as considerations for use or exploitation of any asset and Where any capital sum is received in connection with any trade, business, profession or vocation Disposal occurs when ownership changes or when the owner diverts himself of his rights over or interest in the property. The receipt of a capital sum from the assets is deemed to be a disposal. Thus, receipt of compensation from an insurance company for loss or damage in cases of fire accidents is a disposal[3].

Disposal to a Connected Person

Where a taxpayer sells his property at an under value to say, his wife, this will be a transaction between connected persons, in this case, the chargeable gains will be calculated on the market value of the property at the date of the transfer. For this purpose, the Act defines who a "connected persons" are: A person is connected with an individual if that person is the individual's spouse. A trustee of a settlement is connected with any individual who in relation of the settlement is a settler and with any person who is connected with such an individual. A person is connected with any person with whom he is in partnership and with the spouse or relative of any individual with whom he is partnership.

A company is connected with another company if:

(a) The same person has control of both or he and persons connected with him has control of the other;

(b) Where a group of two or more person has control of each company, and the group either consist of the same persons or could be regarded as consisting of the same persons by treating a member of either group as replaced by a person with whom he is connected;

(c) A company is connected with another person if that person has control of it or if it and that person connected with it together have control of it;

(d) Any two or more persons acting together to secure

[3] See Section 6 of the Capital Gains Tax Act

or exercise control of a company shall be treated in relation to that company as connected with another and so will any person on the directions of any of them to secure or exercise control of the company.[4]

RATE OF TAX AND EXEMPTIONS FROM CAPITAL GAINS TAX

The rate of capital gains tax is ten percent of capital gains accruing to any person or company.

The Capital Gain Tax Act exempts from gains accruing to:

(a) Ecclesiastical, charitable or educational institutions of a public character;

(b) Any statutory or registered friendly society;

(c) Any co-operative society registered under the co-operative societies Law of any state; or

(d) Any trade union registered under the Trade Union Act, in so far as the gain is not derived from any disposal of any assets acquired in connection with any trade or business carried on by the institution or society and the gain is applied purely for the purpose of the institution or society as the case may be.

Gains accruing from any local Government Council are not subject to Capital Gains Tax. Companies being a purchasing authority established under any law in Nigeria empowered to acquire any commodity in Nigeria for export are exempted from Capital Gains Tax.

Exemption for Superannuation Fund

Superannuation fund under the Act means a pension provident or other retirement benefits fund, society or scheme approved by the Joint Tax Board under Section 20 (1) (f) of the Personal Income Tax. Any gain accruing to a person from any disposal of investment held by him as part of any superannuation fund but so that where part only of that fund is approved under section 20 of the Personal Income Tax Act the gain shall be exempt from being a chargeable gain to the same extent only as income derived from the assets would be exempt under that section.

Decorations, Stocks and Shares

Disposal by any person of a decoration awarded for valour or gallant conduct which he acquires otherwise than for consideration in money or money's worth are not chargeable gains. Disposal of Nigerian government securities, stocks and shares shall not be chargeable gains under the Act.

COMPUTATION OF CAPITAL GAINS TAX

Capital gain is the net consideration accruing to a person on the disposal of assets and the sum of the total consideration and expenses for acquiring the asset. It is arrived at by deducting from the proceeds accruing to any person on a disposal of assets the followings:

(a) The amount or value of the consideration (in money or money's worth) given wholly, exclusively and necessarily incurred in providing the asset.

(b) Expenses wholly, exclusively and necessarily incurred on the asset for the purposes of enhancing its value being expenditure reflected in the state or nature of the asset at the time of the disposal.

(c) Expenses wholly, exclusively and necessarily incurred on the asset in establishing, preserving or defending the title or right over the asset.

(d) The incidental cost of making the disposal incidental costs of the acquisition of the asset or of its disposal includes fees, commission or remuneration paid for professional services of any surveyor or valuer, or auctioneer or accountant or agent or legal adviser and cost of transfer or conveyancing including stamp duties, cost of advertising.[5]

Expenses allowable as a deduction in computing the profits or gains or losses of a trade, business, profession or vocation for income tax purposes are not to be deducted for the purposes of capital gains tax. So also are premiums or other payments made under a policy of insurance against the risk of any kind of damage or injury to, lose or depreciation of any asset. If however assets, have qualified for capital allowances, this does not prevent the deduction of expenses allowable in the computation of capital gains under the capital gains tax.

The above position on deductions is to the effect that capital gains are liberally calculated for the purpose of capital gains tax law (Ayua, 1999). In practice, a capital gain is calculated as sale proceeds less cost and certain other allowable expenditure. For example, where Jibrin, resident in Abuja on 19th November 2005 sold his house at Kalwa, not being his principal residence for ₦150, 000. He in addition incurred the following expenses:

Advertisement in SUN Newspaper	₦7, 000.00
Clearing	₦1000.00
Allowable legal expenses	₦15, 000.00

He bought the house on 16th July 1981 at ₦60,000.00 and on that day incurred the following expenses:

Solicitors fees- Re-conveyance	₦2, 000.00
Re-roofing	₦11,000.00
Tiles for flooring	₦2000.00

To compute the amount of capital gains tax for the above hypothetical case due for Jibril.

Proceeds of sale	₦150,000.00
Less expense:	
Advertisement	₦7, 000.00
Clearing	₦1000.00
Legal expenses	₦15, 000.00

[4] See Section 24 of the Capital Gains Tax Act
[5] See Section 14 of the Capital Gains Tax Act

Re-roofing	₦11, 000.00
Solicitors' fees for re-conveyance	₦2, 000.00
Tile for flooring	₦2, 000.00
Cost of acquisition	₦60, 000.00
Total	₦98, 000.00

₦150, 000.00 – ₦98, 000.00 = ₦ 52,000.00

10% of ₦52, 000= 5,200.00

Capital gains tax = ₦5,200.00

Market Value

To prevent artificial variation in the market price of asset and to ascertain a market value of property which sale is made to a connected person, Section 21 of the Act defines market value as: The prices which those assets might reasonably be expected to fetch on a sale in the open market. In estimating the market value of any asset, no reduction shall be made in the estimate being made on the assumption that the whole of the assets is to be placed on the market at one and the same time. In re-estimating the market value of any assets acquired, if the market value exceeds the consideration actually paid by the acquirer, the assets shall be deemed to have been acquired for the amount paid by the acquirer.

Reliefs

To prevent double tax relief when new assets are finally disposed of, relief are given under the capital gains tax Act in respect of replacement of business assets, compensation for assets lost and destroyed and in respect of delayed remittances from abroad. The relief will be in the form of tax deferred.

CAPITAL GAINS TAX ADMINISTRATION AND APPLICATION

The administration of capital gains tax is under the Federal Board of Inland Revenue. The Board is charged with care and management of tax by doing all things necessary and expedient for the assessment and collection of the tax and shall account for all amounts so collected in a manner to be prescribed by the minister. The Board is a Juristic person that can sue and be sued in its own name. The Board is empowered to acquire, hold and dispose of any property taken as security for or in satisfaction of any such tax or penalty or of any judgement debt due in respect of any tax.

The Board has wide powers by the provisions of the Act but the decision of the Board is subject to appeal to Appeal commissioners and even to the Federal High Court. The appeal commissioners to be appointed by the Minister can be up to twelve in number and are to be persons of experience and capacity in the management of a substantial trade or business or the exercise of the profession of Law and Accountancy in Nigeria. Apart from the secretary to the commissioners, memberships are drawn from the private sector. They preside over compliant by aggrieved persons and companies on the assessment of Capital Gains Tax. The onus of approving that an assessment is excessive is on the appellant.

The appeal commissioners may confirm, reduce, increase or make any such order thereon as they deem fit. In other to give legal effect to the decisions of the appeal commissioners, the decisions of the appeal commissioners can be enforced as if were a judgment of the Federal High Court. Appeal lies from the appeal commissioners to the Federal High Court. It is however curious that section 74 (4) of the Companies income Act applicable to capital gains tax provides that during the pendency of the appeal, tax shall be paid in accordance with the decision of the Appeal commissioners, within one month of the notification of the amount of the tax payable. The provision of the section implies that an appeal does not operate as a stay but it is argued here that excess tax complained which is the subject of appeal need not be paid until the final determination of the appeal as process of refund from the Federal Government treasury might not be easy when the appeal succeeds in the court.

Offences and Penalties

The Act creates offences and penalties for contravention and non-compliance with the provisions of the Act. The offences created by the Act includes making incorrect return by omitting or undertaking any profit liable to tax or giving of incorrect information in relation to any matter or thing affecting the liability of any company to tax. Aiding, abetting of false statements and returns.

It is commendable that the act penalizes authorized persons for excessive assessment, embezzlement and other criminal conducts but the penalties for the offences will need to be reviewed upward if there will serve as deterrence to other persons. This is necessary as some of the penalties are such that a culprit can bear without or with little pain. Under the act, a serious offence likes making incorrect return only attract a fine of ₦200.00, while excessive embezzlement attract only a token of ₦600.00. In view of the value of the Nigerian currency, an upward review of the penalties will make penalties more meaningful.

REASONS FOR POOR PERFORMANCE OF CAPITAL GAIN TAX IN NIGERIA

There are many problems with the management and administration of capital gain tax as presently implemented in Nigeria. Oserogho (2004) posited that the principal problem is that of lack of data or record keeping in order for the tax authorities to be aware of when the capital gain has been made and liable to payment of this tax. This is especially as Nigeria continues to maintain a cash base economy as opposed to an electronic one.

Another issue is that the law allows the government to charge and collect tax on gain but there is no provision in event of loss and thus, the tax payer bears his loss alone. This raises the contention by tax payers that the government is only interested in collecting tax on profit earned but have no consolation in the event of loss.

The problem of high rate of inflation over the years has been argued to have wiped out the real value of assets, such that the owner is at the losing end in real terms when disposing off the assets.

It is sometimes claimed that Capital Gain Tax in conjunction with Income Tax is a case of double taxation. According to this theory, value of capital relates to the future income that the capital is expected to produce. Adeyemi & Babington-Ashaye (n.d) observed that any increase in the value of capital hence relates to an expected increase in future income. However this additional future income is already subject to income tax so the capital gain is already fully taxed. Put differently, when a person earns income, they pay tax on wages and salaries. If they consume the remainder of income right away, they will not pay further tax, at least not under the income tax. However, if they put their money into a capital investment and they earn income as capital gains. They will pay tax on that income. They are paying additional tax on their investment. Therefore, the argument concludes, investors are discriminated against under a Capital Gain Tax compared to consumers.

Greenspan (1997) commented that Capital Gain Tax if eliminated would presumably, over time, increase economic growth which will raise revenue for the personal and corporate taxes as well as the other taxes. He maintained that the crucial issue about Capital Gain Tax is not its revenue raising capacity but it is a very poor tax for that purpose since its impact is to impede entrepreneurship activities and capital formation. He conceded that all taxes impede economic growth to some extent or the other but that Capital Gain Tax is at the far end of the scale.

NEED FOR EFFECTIVE CAPITAL GAIN TAX REVENUE IN NIGERIA

Adeyemi & Babington-Ashaye (n.d) observed that government obligations to the citizens of Nigeria have become enormous over time. The people are well informed about governance; they demand the highest standard of living, especially, in a democratic setting where the only guarantee to sustaining political offices is through transparency and accountability of political office holders. These obligations cannot be achievable if the Government still creates loopholes in the tax system, particularly, through inability to expand the tax base and one sure way is through the effective management of the Capital Gain Tax.

CONCLUSION AND RECOMMENDATIONS

Generally, a tax is a very strong economic tool in any developing country like Nigeria in terms of the accrued revenue for economic development. Capital gains Tax has enjoyed legal recognition early in Nigeria and the government commitment to strengthen her revenue derivable from this source can be seen in the periodic reviews of the laws up to the most recent the 2004 Capital gains Tax Act.

The Act is comprehensive but the penalties for contravention of its provisions can hardly take exhaustive care of incidence of tax evasion and avoidance. As commented earlier, the effect of the various penalties, especially in relation to fines, has been overtaken by inflation. There is the urgent need for an upward review of the fines to keep pace with the recent malpractices in tax administration.

The Nigerian Law as it stands makes no provision for Capital Gains on appreciation. In an inflation prone economy, Capital Gains Tax on appreciation will be equitable. Holders of assets like corporate shares and urban real estates make real gain under inflationary condition by way of capital appreciation if they sell or transfer these assets which will certainly enhance the accumulation of purchasing power of the owners (Amatong, 1975). This is possible where there is periodic revaluation of capital assets and the Gains taxed especially where the assets have been held for a certain number of years.

There is also the urgent need for comprehensive data base to ease assessment of Capital Gain Tax as well as a consideration of a downward review of the percentage of tax rate on accruable gain in subsequent review on the Act.

An aggressive awareness campaign is necessary as most Nigerian are yet to be adequately informed about this form of taxation, while a merger of capital gain with income tax is capable of reducing cost of collection without reducing revenue to the government.

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