

THE LEGALITY OR OTHERWISE OF DISTRAINING EMPLOYERS FOR FAILURE TO PAY TAX UNDER THE PAY-AS-YOU-EARN (PAYE) SCHEME IN NIGERIA*

Abstract

Income tax is paid under the Pay as You Earn (PAYE) Scheme by a person who is engaged by another under a contract of employment. It is the responsibility of every employer to deduct income tax from the pay of the employee for onwards remittance to the relevant tax authority. Anytime a taxable person fails and/or refuses to make the necessary tax payments or returns, sanctions are prescribed in the relevant tax laws, which include but are not limited to the power to distraint the property of the employer. This impunity is continuing notwithstanding that the issue of assessment and payment of personal income tax payable by a taxable person is ordinarily a matter between the Taxable person and the Tax Authority where the person resides. It is a practice that under the Pay-As-You-Earn (PAYE) Scheme, it is the employer that is visited with all sorts of embarrassment and punishment for failure to pay tax to the tax authority as and when due by the employee. The employer is sometimes but most painfully distrained, kicked out business and exposed to all manner of hardship based on the Best of Judgment Assessment by an inefficient staff of the tax authority. This paper examines the propriety or otherwise of the practice in Nigeria of distraining or distressing of an employer over an unpaid PAYE tax. Doctrinal method of data collection was used and analytical approach adopted in examining the research materials like taxing statutes, judicial decisions, textbooks, journal articles and internet sources. The paper discovered that it is a wrong procedure adopted by the tax authorities to distraint an employer while enforcing payment of tax under the PAYE Scheme. The employer is not allowed under the law to object to any step taking by the tax authority whereas every action is targeted at the employer. Moreover, assessment of tax payable is always determined at the beginning hence the duty of the employer is that of an agent. The paper calls for the review of this wholesome practice in the tax jurisprudence.

Keywords: Legality, Distrain, PAYE, Tax, Emoluments, Deductions, Employment

1. Introduction.

Tax is payable on the aggregate amounts of income of every taxable person including gains or profits from any trade, business, profession or vocation, salaries, wages, fees, allowances or other gain or profit from employment including compensations, bonuses, premiums, benefits or other prerequisites except for those specified under the law¹ Pay-As-You-Earn (PAYE) Scheme is a collection system for the recovery of tax payable on personnel emoluments or salaries and wages.² Under PAYE regulations it is the Board that determines the assessment before issuing special tax deduction cards. The law³ provides for the deduction of tax from the emoluments paid. By this the Employer becomes an agent of the collecting authority and is required to deduct and remit the tax paid by the employee and to account for the deduction to the relevant authority.⁴ By the letters of the law, although the taxable person is the employee, the person earning the income, where he is employed by an organization subject to PAYE, the chargeable person is the Employer. Hence, it is the law that the employer is answerable to the relevant tax authority for tax deductions from employee's emoluments. Failure to account for the deductions will attract some form of sanctions.⁵ This means that upon assessment, the relevant tax authority imposes that obligation on the employer to deduct and remit certain ascertained sums from the emoluments of the employee on a monthly basis. It is only where the employer fails to discharge this obligation that such obligation becomes a financial liability in the hands of the employer.⁶ At this stage, the relevant tax authority after due demand, should institute a debt recovery action against the employer for the sum that might have been ascertained by the relevant tax authority. The employer is expected to make good such non-deduction, under-deduction and non-remittance of PAYE deduction to relevant tax authority. Part of the controversy surrounding the enforcement of tax is the assessment on Best of Judgment (BOJ). The employer cannot object to the BOJ as it is not a taxable person. Where the employer did not object in writing to the relevant tax authority to review and reverse the assessment after receiving the notice of assessment, the relevant tax authority will resort to distraining procedure under the law.⁷

* **By Kachidobelu John BIELU, BL, LL.M, PhD,** Lecturer Faculty of Law, Nnamdi Azikiwe University Awka, Anambra State, Nigeria, +2348037443753 e-mail: kachbielu@gmail.com; kjbielu@unizik.edu.ng.

¹ Personal Income Tax Act (PITA) 2011, S.3 (1)(a)-(f), *ID Sam Nig Ltd v LSIRS* (2011) 5 TLRN 41 at 50

² *ID Sam Nig Ltd v LSIRS* supra.

³ PITA, 2011, S. 81

⁴ *Ibid*, S. 82

⁵ *Ibid*

⁶ *Ibid*, SS 56 (4) and (5), 81

⁷ *Ibid*, S 104 (1)

2. Meaning of Tax

Taxation spans over a wide gamut of human activity and is essentially aimed at providing the requisite revenue for the socio-economic development of a nation. Taxation⁸ is the composition or assessment of tax. It is the means by which the State obtains the revenue required for its activities. It is therefore the process of levying and collecting tax from taxable persons. It is the imposition, assessment and enforcement of payment of tax by the appropriate authority. Tax is a pecuniary burden laid upon individuals or persons or property to support the government which is exacted by legislative authority.⁹ In *Matthews v Chicory Marketing Board*,¹⁰ a tax is a compulsory exaction of money by public authority for public purposes.

3. Taxable Person under the Act

Under the Personal Income Tax Act,¹¹ tax is imposed on the income of individuals, communities and families and others arising or due to a trustee or estate. Hence, it is imposed on any individual or body of individuals (including a family, any corporation sole, trustee or executor) having any income which is chargeable with the tax under the provisions of the said Act¹². The total amount determined in accordance with the table in the sixth schedule of Personal Income Tax Act shall be payable for each year of assessment on two categories of persons¹³, viz; every individual other than persons covered under paragraph (b) of this subsection or corporation sole or body of individuals deemed to be resident for that year in the relevant state¹⁴. Again, the following other persons,¹⁵ persons employed in the Nigerian Army, the Nigerian Navy, the Nigerian Air Force, the Nigeria Police Force other than in a civilian capacity,¹⁶ Officers of the Nigerian foreign service¹⁷ and every resident of the Federal Capital Territory Abuja.¹⁸ A person resident outside Nigeria who derives income or profit from Nigeria¹⁹ will also be taxed. The Relevant Tax Authority in the State shall though have powers to collect tax under this Act from itinerant workers.²⁰ For the individual, other than an itinerant worker and persons covered under paragraph (b) of subsection (1) of the section, tax for any year of assessment may be collected only by the state in which the individual is deemed to be resident for that year under the provisions of the first schedule to this Act and in case of persons referred to in subsection (1)(b) of this section, tax shall be collected by the Federal Inland Revenue Service.²¹ In the case of an itinerant worker, tax may be collected for any year by any state in which the itinerant worker is found during the year.²² In the case of a village or other indigenous communities, tax may be collected for the year only by the law of the territory in which that community is be found and the tax may be charged on;

- (a) The estimated total income of all its members
- (b) The estimated total income of those of its members whose income is impracticable in the opinion of the relevant tax authority to assess individually; or
- (c) The amount of any communal income which in the opinion of the relevant tax authority in relation to such community, it is impracticable to apportion with certainty between its members.²³

In the case of the income of a family recognized under any law or custom in Nigeria such as family income, in which the several interests of individual members of the family are indeterminate or uncertain, tax may be collected only by the territory in which the member of that family who customarily receives that income in the first instance in Nigeria usually resides.²⁴ For an income arising to a trustee of any executor of any estate of a deceased person, tax may only be collected by the territory of which the tax authority is the relevant tax authority

⁸ B.A. Garner (ed), *Black's law dictionary*, 10th ed, (USA; Thomson Reuters, St. Paul M.N., 2014) 1688.

⁹ 1A Ayua, *Nigerian Tax Law* (Ibadan; Spectrum's law publishing, 1996) 9.

¹⁰ (1938) 60 CLR 263 at 276

¹¹ PITA 2011, S.2

¹² *Ibid*, S 108

¹³ *Ibid*, S 2(1)

¹⁴ *Ibid*, S.2(1)(a)

¹⁵ *Ibid*, S. 2(1)(b)

¹⁶ *Ibid*, S. 2(1)(b) (i)

¹⁷ *Ibid*, S.2 (i) (b) (ii)

¹⁸ *Ibid*, S. 2(1)(b) (iii)

¹⁹ *Ibid*, S. 2(1)(b) (iv)

²⁰ *Ibid*, S. 1 (A)

²¹ *Ibid*, S.2 (2)

²² *Ibid*, S.2 (3); But the proviso is that: (a) in an assessment for any year upon an itinerant worker credit shall be given against the tax payable, but not exceeding the amount thereof, for any income tax already paid by him to any other tax authority for the same year; and, (b) Collection of so much of any tax imposed in a territory on an itinerant worker for a year of assessment as remains unpaid on the itinerant worker leaving that territory and during that year shall remain in abeyance during his absence, paid tax in some territory for that year, credit shall be given against any unpaid tax in the first mentioned territory, but not exceeding that unpaid amount, for the tax paid in that other territory.

²³ *Ibid*, S. 2 (4)(a)(b) and (c)

²⁴ *Ibid* S.2 (5)

in relation to such settlement, trust or estate and to the extent provided in the second schedule to this Act.²⁵ But the law also provides that nothing in the section shall be construed as imposing liability to tax on the personal emoluments of any person serving as other rank and accordingly any other enactment or law imposing tax on the income of individual shall not apply.²⁶

4. Pay-As-You-Earn (PAYE) Scheme

The Pay-As-You-Earn (PAYE) is an income earned by a person who is employed by another person in a contract of employment. The tax is provided under the Personal Income Tax Act.²⁷ Under the scheme, tax is deducted at source by authorized employers. In *LSBIR v. JENKINS INV.*²⁸, the term PAYE is used to describe the system whereby the employee pays tax on whatever income he earned from his employment in any particular employment at the end of the month. The employer deducts the tax from the employee's earnings. The total amount deducted by the employer from the employee's earnings at the end of every month is then remitted to the relevant tax authority. It is to be noted that the relevant tax authority is empowered by the Act²⁹ to collect PAYE of employees resident in the state except those who are exempt.³⁰ In *7up Bottling Company PLC v LSIRB*,³¹ it was held that the employer is a collecting agent on behalf of the tax authority. Employers are expected to use the PAYE guidelines as the standard for making tax deductions and tax payments to the tax offices in respect of their employees on a monthly basis.³² The guidelines apply to all incomes (that is, emoluments which includes salary and allowances) of an employee derived or deemed to be derived from Nigeria, whether or not such income is received in Nigeria. All Employers of labour, agents and consultants are to ensure that all employees make full disclosure³³ of all their incomes at the beginning of the year (whether or not such income is received in Nigeria or not). Such disclosure should encompass as required by law all incomes earned, accruable, derived or accumulated in Nigeria. This includes disclosure of income paid both in Nigeria and outside, as well as all salaries and allowance paid either in cash or in kind.

The employer is further required to deduct an appropriate amount from the weekly or monthly wages/salary of the employee in anticipation of employee's tax liability for the whole year. The authorized employers who so deducts the PAYE taxes are expected to make regular returns to the relevant tax authorities in such a manner as the Relevant Tax authority directs.³⁴ The returns of income and claims for allowances and reliefs are filed at the commencement of the tax year by each employee with the relevant tax authority. The tax office shall calculate the allowances due to the employee based on the returns and enter these on the tax deduction card. The card together with the notice of total free pay allowance will be sent to the employer to be used to compute the amount of tax to be deducted from the employee's emoluments at the end of each month. In arriving at the tax to be deducted monthly, the cumulative gross earnings is usually considered. The aggregate of the basic salary, overtime, bonuses commission, housing allowances and transportation are some of the earnings considered. The total allowances from tax free pay up to the month under consideration is deducted to arrive at the amount on which tax is payable. The amount of tax on sum would be ascertained from the tax liability for that particular month. Any tax deducted from employee's salary must be remitted to the relevant tax authority within ten (10) days after the end of the month under consideration. In the event of failure by the employer to make deductions or properly account thereof, the amount thereof, together with a penalty of ten percent per annum of the amount, plus interests at the prevailing commercial rate shall be recoverable as a debt by the relevant tax authority from the employer.³⁵ Where an employee leaves an organization such an employee must collect a duplicate copy of form 'E' and the original copy will be sent to the relevant tax office. The tax deduction card will then be marked off with a word indicating

²⁵ Ibid S. 2 (6)

²⁶ Ibid S.2 (7) provides that where any other income accrues to a person serving as other rank (not being income by way of personal emoluments) that income shall be liable to tax under the Act or under any relevant enactment or law.

²⁷ Ibid, SS.81 and 82

²⁸ (2013) 10 TLRN 148

²⁹ PITA, 2011, S.2

³⁰ Note that the relevant tax authority in the state are not permitted under the law to collect taxes of members of the armed forces of the federation, members of the Nigeria Police Force, staff of the ministry of Foreign Affairs and non-resident individuals. See also PITA, 2011, S.2 (1)(6) and the schedule to the Taxes and Levies (Approved List for Collection Act, Cap T2 LFN 2004.

³¹ (2000) 3NWLR (Pt. 650) 505

³² MT Abdulrazaq, *Revenue Law and Practice in Nigeria* (Lagos; Malthouse Press Ltd; 2015) P.71.

³³ Note that Employers of labour, Tax Agents and Consultants and Employees who engage or supplies an incomplete disclosure income are liable to be charged for concealment of information with intent to defraud the Government of Nigeria.

³⁴ PITA, 2012, S.81(1) (2)

³⁵ Ibid, S.82. Note that this could be in addition to the provision under S.81(3) which provides that any employer who contravenes the provisions of this section will be liable on conviction to a penalty of N500,000 for a body Corporate and N50,000 in case of individual

that he had left and the date clearly indicated. This is to avoid presumption by the tax authority that he is still in service or employment.

5. Residency as a Factor in Determining PAYE Tax

The law requires every individual other than persons specified³⁶ under paragraph (6) of the subsection 2 or corporation sole or body of individuals deemed to be resident for that year in the relevant state should pay tax. It is where an individual, corporate body is resident or deemed to be resident or where a non-resident corporate body has its permanent establishment for a particular year of assessment that determines the relevant tax authority that will collect tax.³⁷ Place of residence in relation to an individual is a place available for his domestic use in Nigeria on a relevant day and does not include any hotel, rest house or other place at which he is temporarily lodging unless no permanent place is available for his use on that day.³⁸ However, principal place of residence in relation to an individual with two or more places of residence on a relevant day, not being both within anyone territory means.³⁹

- a. In the case of an individual with no source of income other than a pension in Nigeria, that place of those places in which he usually resides.
- b. In the case of an individual who has a source of earned income other than a pension in Nigeria, that place of those places which on a relevant day is nearest to his usual place of work.
- c. In the case of an individual who has a source or sources of unearned income in Nigeria, that place of those places in which he usually resides.
- d. In the case of an individual who works in the branch office or operational site of a company or other body corporate, the place at which the branch office or operational site situates⁴⁰.

The importance of the concept of residence lies in the fact that it activates the jurisdiction of the taxing authorities and without which it will have no legal basis to charge a taxpayer to tax. This activates the jurisdiction of the relevant tax authority. In *Registered Trustees of Association of Food Confectionaries of Nigeria & 2 ors v AG Lagos State*,⁴¹ it was held that an action by a tax authority without first settling the question of jurisdiction is a nullity.

6. Employer as a Statutory Agent

By the provisions of the Act,⁴² the employer is an agent of collection and is required only to deduct the tax from the emoluments paid to the employees and to account for the deduction to the relevant tax authority. Although taxable person is the employee, the person earning the income, where he is employed by an organization subject to PAYE, the chargeable person is the employer. It means that all that is required is a directive to the employer by the Tax authority as to the amount to be deducted from the salary of the employee. Pursuant to this, the employer will be responsible for remitting the amount so deducted or required to be deducted.

7. Best of Judgment (BOJ) under PAYE Scheme

Where a taxable person intends to avoid or evade payment of tax, he will either not file his returns or to submit the returns which obviously does not represent the income of the tax payer for the year of assessment. When this happen, the Board will invoke the powers conferred on it under the Act⁴³ and assess the taxpayer on its best of judgment. In *FBIR v FM Solanke*,⁴⁴ the court held that when the return of income is not accepted by the commissioner, he is entitled and indeed has a duty to make an estimated assessment. It is not necessary for the commissioner to give his reasons for arriving at his estimates. In all, best of judgment shall not be vindictive, arbitrary or capricious. Where it is construed as a punitive measure, its imposition will be seen to be arbitrary, excessive or capricious. It must be done honestly and be a fair estimate of the proper figure of assessment.⁴⁵ A pertinent question at this juncture is whether the Best of judgment assessment is applicable to PAYE system? Section 54 of the Personal Income Tax Act is very relevant to the issue at hand. It provides a guide thus that the relevant tax authority shall proceed to assess every taxable person chargeable with income tax as soon as may be,

³⁶ Ibid, S 2(1)(a)

³⁷ K.J. Bielu, Legal Regime for Achieving an Effective Tax Revenue Generation in Nigeria; Issues and Prospects, a PhD Dissertation presented to the Faculty of Law, Nnamdi Azikiwe University, Awka, Anambra State Nigeria, August 2017 p.128

³⁸ PITA, 2011, First Schedule, paragraph 1

³⁹ Ibid

⁴⁰ The proviso to this is that the operational site shall include oil terminals, oil platforms, flow stations, factories, Quarries, construction site with a minimum of 50 workers.

⁴¹ No 2 (2010) 2 TLRN 47; Note however that the insistence of the Lagos state that the business was in Lagos was rejected.

⁴² PITA-2011, S 81, see also *ID Sam Ltd v LSIRS* (supra)

⁴³ +Ibid, S 54(i), *FBIR v Azigbo Brothers Ltd* (2012) 6 TLRN 29.

⁴⁴ (2011) 4 TLRN 164

⁴⁵ *ITC v Badridas Ramrai Shop, Akola* (1937) LR 641, *Nigerian Breweries Ltd v LSIRB* (2002) 5 NWLR (Pt. 759)1.

after the time allowed to the person for the delivery of the return provided for in section 41 of this Act, or otherwise as it appears to the relevant tax authority practicable to do so.⁴⁶ Where a taxable person has delivered a return, the relevant tax authority may accept the return and make an assessment accordingly; or refuses to accept the return and to the best of his judgment, determine the amount of assessable, total or chargeable income of that person and make an assessment accordingly.⁴⁷

It is very clear from the provision of section 54 PITA, which it deals with the assessment of the individual tax payers and does not refer to an audit. Besides, the Act⁴⁸ exempts staff or employee subject to PAYE from the arbitrariness of Best of Judgment. It provides that notwithstanding the provisions of the section, no assessment to income tax for a year of assessment shall be made by the relevant tax authority on an employee with respect to his emolument or other income if that tax is recoverable by deduction under the provisions of section 81 of this Act⁴⁹ Under the PAYE scheme, it is the Board that determines the assessment before issuing special tax deduction cards. In *7up Bottling Co. v. LIRB*,⁵⁰ the non-applicability of Best of judgment assessment to PAYE scheme was apt although the court refused to comment on the issue thus:

... the service of assessment notice was not required for the recovery of tax deducted under the PAYE or WHT system. For what provision applied to the two systems, he cited sections 80(1) and 72(1) of Decree 104, 1993, which show that what is required is directives to the employer from the tax authority as to the amount to be deducted from the salary of the employee pursuant to which employer will be responsible for remitting the amount so deducted or required to be deducted.

It is worrisome that this important observation and contribution by the revenue authority to the court was totally ignored by the Court of Appeal in their judgment. This would have been an opportunity for the superior court to pronounce on it. In *Nigeria Breweries v LIRB*,⁵¹ the court held that the best judgment assessment is not applicable to PAYE system. In *Ericson v BSBIR*,⁵² the Court held;

... Flowing from the foregoing, the question to ask as this juncture is whether the BOJ carried meets the required standards and in line with the provisions of the law? The answer is in the negative. In this appeal, it is crystal clear that section 54(1) and (2) provides for the assessment of income tax. It is under the above section that BOJ is raised.

From the above, an assessment and the Best of judgment assessment cannot be raised against the employer because the employer is not a taxable person. It is only when the employer fails to remit or deduct the tax to the relevant tax authority that an employer becomes chargeable. Failure to remit same does not also make the employer to be a taxable person. Under the law⁵³ any assessment raised against the employer lacks merit as same is not a true reflection of the position to the law.⁵⁴

8. Distraining an Employer by the Procedure under Section 104 PITA 2011

Where a tax payer did not fix his assessment on time, the tax authority by virtue of the Act⁵⁵ can assess the tax liability of the tax payer and then issue a demand notice on the tax payer for the assessed sum. The demand notice is served on the taxpayer,⁵⁶ if the taxpayer disagrees with the assessment in the demand note, he may file an

⁴⁶ PITA, 2011, S 54 (1)

⁴⁷ Ibid, S.54(2)

⁴⁸ Ibid, S 54 (5)

⁴⁹ Except, within six years after the end of that year, (a) He applies to the relevant tax authority so to be assessed, whether in connection with any claim to repayment of tax or otherwise or; (b) The relevant tax authority consider the assessment to be necessary or expedient so as to arrive at the correct amount of the income tax to be charged on or to be payable by the employee for that year.

⁵⁰ 4 ALL NTC 279 at 314. This was an observation or reaction of the respondent's counsel expressing the view that the appellant's counsel was confusing the statutes of the Appellant (Employer) with that of an individual tax payer

⁵¹ 4 All NTC 479 at 188

⁵² 9 All NTC 235 at 270. It is pertinent to mention that Best of judgment is a penal provision evoked where any assessee fails to furnish a statutory return or fails to comply with returns on Notice requiring him to produce the books of account and documents or fails to comply with directive of the Tax Authorities to audit his account and establish his tax liability by a nominated auditor.

⁵³ PITA, 2011, S 54 (3) & (4)

⁵⁴ BOJ assessment under the present Nigeria Law can never be deemed to have become final and conclusive in the circumstances that it was not objected to within (30) days of receipt

⁵⁵ PITA, 20122, S 54 (1)

⁵⁶ Ibid, S 57

objection to the tax authority within thirty (30) days of receipt of the demand notice.⁵⁷ By virtue of the Act⁵⁸ where the tax payer does not file objection to the demand notice within 30 days of the receipt of demand notice, the Court upon an Oath by the tax authority will entertain an application *via an ex-parte* motion to recover the debt⁵⁹. Where the judge is satisfied that the application is meritorious, he may order the tax authority to execute a warrant of distress and the tax authority may keep the goods for 14 days to allow the defaulter time to pay. The tax defaulter is also to bear the cost of keeping the goods.⁶⁰ When the goods are sold, the tax authority shall deduct the cost and incidental charges in addition to the tax liability before paying the balance from the sale to the tax defaulter/owner of the properties⁶¹. The categories of goods and properties that can be sold are chattels and all movable items belonging to the debtor wherever the name may be found in the country.⁶² The tax authority cannot, however, make a final sale except by the order of the court.⁶³ On a strict interpretation of the provisions of the Act,⁶⁴ the property of taxable persons, by whom tax is to be paid, is the taxpayer and not the employer. The Act⁶⁵ insists that taxable person having any income which is chargeable with tax under the provisions of the Act, that is, the taxable person is the employee and shall be charged. Under the Act⁶⁶, there are preconditions for a grant of a distraining order. It includes that the assessment must have become final and conclusive, a demand notice having been served on the taxable person or on the person whose name the taxable person is chargeable and the employer is not one of the persons referred to in the section. It means that it is the employee's and not the employer's property that will be distrained to recover the amount of tax due from its employees.

By the virtue of the provision under consideration, the ascertainment of whether the provision of section 104 connotes distraining of the employer is very germane. Recall that assessment and demand notice is not served on the employer, let alone the assessment becoming final and conclusive. In *DSA Agricultural Machinery Manufacturing Company Ltd v LSIRB*⁶⁷, the court held;

The appellant was not assessed for the tax of his employees and could therefore not object to the proceedings taken. The Appellant is liable to assessment under the Income Tax Act and is equally vested with the right to object and appeal against any tax of its employees which can be objected or appealed against by the respective employees.

Reference in that case was made to the decision in *7up Bottling Co. Plc v LSIRB*⁶⁸ wherein the court, however, held inter alia;

Section 56-61 did not convey any right or notice on the appellant who is not the tax payer. The taxpayer in terms of PAYE and withholding Tax Systems cannot be the employer; rather, it is the employee as rightly submitted by the respondent. Therefore the appellant has no basis or locus to complain about any anomaly or non-compliance with the provisions.

It follows that objections to an assessment are applicable only to a situation where it is an individual who is not subject to Pay as You Earn Scheme of tax collection. The service of assessment notice is not a requirement for the recovery of tax deducted under the PAYE system. The requirement is the directives to the employer from the tax authority as to the amount to be deducted from the salary of the employee as sanctioned by the law. Pursuant to this, the employer will be responsible for remitting the amount so deducted or required to be deducted. The Act⁶⁹ provides thus: 'Income tax chargeable on an employee by an assessment whether or not the assessment has been made, shall, if the relevant tax authority so directs, be recoverable from any emolument paid or from any payment made on account of the emolument, by the employer to the employee'. A direction under the above subsection shall be in writing addressed to an employer or be published in the state Gazette and shall specify the emolument of an employee or class of employees to which it refers to and the amount or amounts of income tax to be deducted, whether by reference to tax tables issued by the relevant tax authority or otherwise.⁷⁰ The procedure in the administration of PAYE is that the employee shall file returns at the beginning of the year in the

⁵⁷ Ibid, S 58

⁵⁸ Ibid, S.104 (1)

⁵⁹ Ibid, S 104 (2) & (3)

⁶⁰ Ibid, S 104 (4) & (5)

⁶¹ Ibid, S 104 (6)

⁶² Ibid, S 104 (7)

⁶³ Ibid, S 104 (8)

⁶⁴ Ibid, S 104 (1)

⁶⁵ Ibid, S 104 ()

⁶⁶ Ibid, S. 104(1)

⁶⁷ (2006) 3 CLRN III at 126

⁶⁸ (2000) 3 NWLR (pt 650) 563, *LSBIR v JENKINS INV.* (Supra)

⁶⁹ PITA, 2011, S.81(1)

⁷⁰ Ibid, S. 81 (5)

appropriate form. The appropriate form is FORM A. The appropriate tax authority issues a notice of free pay, allowances and tax deduction cards. The tax to be deducted will be in accordance with the tax deduction cards issued by the relevant revenue authority. Tax deducted is to be remitted with a covering letter and Tax Form G (that is the employee's remittance card). By the end of the year, the employer files returns on tax 'FORM H' indicating the taxes deducted and remitted to the revenue. In addition to this, the tax 'FORM G' and tax deduction card must be returned to the revenue. With the above procedure, tax payers under PAYE Scheme are the most vulnerable to tax as it is usually very difficult for this category of tax payers to conceal information leading to their assessment to tax just as it is difficult for them to be involved in tax evasion and avoidance. Again, since the entire scenario is clear about the tax that should be paid as same had been predetermined BOJ option is not applicable as the amount to be paid is known.

From the foregoing, it is the Board that determines the assessment before issuing special tax cards. This is the reason the court have consistently held that the employer is not competent or have no locus to complain on behalf of its employee.⁷¹ By the law, the tax authority can only maintain an action for the recovery of the unpaid deductions from the employer and not to embarrass him with a distraining procedure under the law for individual tax payers. The provisions of section 104 of the Personal Income Tax cannot therefore be invoked against an employer of labour for failure to comply with the provisions of the law rather the options provided by the law ought to be pursued.

9. Conclusion and Recommendations

Under PAYE System, the authorized employer who so deducts the PAYE tax will make regular returns to the relevant tax authority in such a manner as the relevant tax authority may prefer for the deductions so made on the employees resident within the state except those exempt. The employer is therefore a collecting agent on behalf of the tax authority. The law provides for voluntary compliance on the part of the employer. The employer is acting on the directive of tax authority. The tax authority may prior to appointing him fixed the amount of tax collectible from each employee. It is important to conclude with the view that no assessment notice is required or issued by virtue of the Act to an Employer. Assessment is also not a condition precedent to the action for recovery of tax deducted from the employees, pursuant to the provisions of the Act. A holistic examination of the provisions of the personal income tax Act, in event of default in the remittance of tax, reveals that a distraining order should not be procured against an Employer under a PAYE Scheme. Employer is not a tax payer under PAYE system. The relevant tax authority should choose from the options under the law as a procedure for the recovering of the debt owed. The option favourable for enforcement or recovery of PAYE tax is an action commenced by a writ of summons. This is so since the employer is not the tax payer assessed under PAYE. An action commenced by a writ of summons will offer the tax payer and the employer an opportunity to present evidence before the trial court. This is imperatives as if not, obviously, the whole thing will go one way as no other set of facts or evidence weighing against it as is the practice today will remain. Again, since Best o judgment has no application under PAYE and assessment can no longer become final and conclusive, using alternative procedure other than a distraining order will place the parties on the same balance and also save the entire procedure from so much mockery and criticism that had bedeviled the procedure under section 104 PITA.

⁷¹ *7up Bottling co v LSIRB[supra]*