DEATH AND TAXES: AN OVERVIEW OF THE TAX CONSIDERATIONS OF A NATURAL PERSON IN DEATH

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Scope and lifespan of tax liability

Tax liability attaches to the assets and incomes belonging to or accruing to persons which may, within the context, include natural and corporate persons under the laws in force in Nigeria[1]. What this means is that for every person or group of persons who have assets or earn one form of income or the other, tax liability may attach to them. The streams of income which would be relevant here are quite broad and include incomes from salaries, wages, loans, gifts, inheritance, dividends, net profit/gain, bonuses, allowances, gratuities, reimbursements, investment returns, insurance, and the likes. The exact scope of a person's income which is subject to taxation would be determined by the particular tax laws to which the person is subject.

Tax liability attaches to a natural person from the day he is born, provided he has assets and an income. Thus if for example a one month old child (John Doe) is given a duplex in Ikoyi as a gift, the land use charge payable on that property from the date the gift is transferred becomes payable by that child.[2] Also, if John Doe at 3 months old acquires some shares in a company which pays dividends, the tax or taxes payable on the dividends attach to John and he becomes liable to pay same. To put it simply, a person is never too young or too old to be taxable.

For a body with artificial personality, tax liability may attach to it from the day it begins to hold assets or conduct business. However, our focus in this article is on natural persons.

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[1] For example, a company registered in Nigeria obtains corporate personality upon registration under section 37 of the Companies and Allied Matters Act, Cap. C20 LFN 2004.

[2] Albeit through a guardian/trustee.

Death taxes

As mentioned in the foregoing paragraphs, tax liability continues to attach to a person during his natural life, and thereafter, to his estate. This is because tax base is rooted in the assets and incomes of a person which do not necessarily terminate with the demise of the person. Thus, when the assets pass to the estate of the deceased, the estate becomes liable to pay taxes arising and due therefrom as well as the outstanding tax obligations of the deceased.

Generally, 'death tax' can be regarded as a pejorative term used by taxpayers to describe any form of tax assessed and payable on all or a portion of a deceased's estate, whether before or after such estate is inherited. Death taxes vary in nomenclature, form and scope across different jurisdictions. For example, the United States' estate tax finds its tax base in the estate of the deceased, while the United Kingdom's inheritance tax finds its tax base in the transfer of legacies to beneficiaries either by a Will or by the applicable rules of intestacy. While there may appear to be a thin line between the two, it may help to note that estate tax is assessed on the deceased's estate as a whole in the hands of the personal representatives to the estate, while inheritance tax is assessed and charged on the fragmented estate according to what each beneficiary of the estate has received as legacy from the deceased's estate. Thus, if John Doe dies today and a tax is imposed on the total value of assets belonging or accruing to him as at the time of his death, this is referred to as the estate tax. In that case, the personal representatives pay the required percentage of the value of all the assets. It could also be that the assets are not taxed as a whole but in the hands of the beneficiaries under his Will or in intestacy, in which case it is called an inheritance tax. This means that Mr. X who takes a bungalow under John's Will or in intestacy would pay a percentage of the value of the bungalow as inheritance tax.

Are there death taxes in Nigeria?

It is perhaps a common perception that Nigeria has no death tax. While this may be regarded as a presumptuous perception, it is not necessarily a wrong one. This is because in the operational sense of death taxes, the Nigerian tax regime has no recognised estate or inheritance tax imposed by any law in force in Nigeria.

In this context, it is imperative to mention the now repealed Capital Transfer Tax Act of 1979 (CTTA) which was a federal legislation that imposed a tax on the devolution or transfer of assets upon the death of the owner of the property. Section 4 of the CTTA provides as follows:

In respect of every person dying on or after 1st April 1979 there is here imposed on the value of all property passing on the death of such person capital transfer tax at the graduated rates specified in section 18 of this Act.

The CTTA then specified the categories of property that are deemed to pass upon death for the purpose of the capital transfer tax.[3] By section 18 of the Act, the scale of rates of the capital transfer tax was given as follows:

First 100,000 .. .. Nil
Next 150,000 .. .. 10%
Next 150,000 .. .. 20%
Next 250,000 .. .. 30%
Next 500,000 .. .. 40%
Next 1,000,000 .. .. 50%
Thereafter.. .. .. 60%

It therefore appeared that the provisions of the CTTA considered above, evinced a clear intention to create and impose a tax quite similar to the estate tax earlier discussed, on the value of all property passing on the death of the deceased person.

The CTTA has however since been repealed.[4] The only other federal legislation on taxation of capital transfers is the Capital Gains Tax Act Cap. C1, LFN 2004 (CGTA). While the CGTA makes more elaborate provisions on the imposition and administration of tax on capital transfers effected by owners of properties *inter vivos*,[5] it omits any express or implied imposition of a capital transfer tax in respect of transfers that occur upon or after the death of a tax payer.

For the purpose of capital gains tax under the CGTA, a deceased's assets which he was competent to dispose of at the time of his death are deemed disposed by him on the date of his death and acquired by the personal representatives for a consideration equal to the last transfer value[6] or the market value at the time of his death.[7] The gains which accrue as a result of this deemed transfer are exempted from capital gains tax.[8] Thus, the personal

[3] Capital Transfer Tax Act 1979, s 5.
[4] Personal Income Tax Act 1993, s 107.
[5] Latin phrase for "between the living" or "while alive"
[6] The last transfer value here refers to the amount of the consideration for which the asset was last disposed of by way of a bargain made at arm's length
[7] Capital Gains Tax Act 1967, s 8(1).
[8] Ibid. s. 8(2).

representatives or other persons on whom the deceased's assets devolve take the assets tax-free for the purpose of capital gains tax.

Section 8(4) of the CGTA further provides that when a legatee or a beneficiary acquires the deceased's assets from the personal representatives, there will be no chargeable gain accruing to the personal representatives, and the legatee's acquisition of the assets is treated as if it had been the initial acquisition of the assets from the deceased by the personal representatives. The necessary implication of this is that the transfers of assets/wealth from the deceased to beneficiaries under a Will or by intestacy are not subject to capital gains tax.

Thus, it may be correct to state that since the repeal of the CTTA in 1993, death taxes in Nigeria have been abolished and there appears to be no statutory authority to collect a wealth tax of this nature.

Is the 'estate duty' legal?

For legal practitioners in probate practice and other persons who have had to apply to a High Court for probate or letters of administration, the term 'estate duty' should not be strange. High Court registries in the country have adopted the practice of charging an 'estate duty' on the estate of the deceased in respect of which the probate or letters of administration are sought. This is often charged by levying 10% of the value of the aggregate of the deceased's estate as the estate duty. The legality of this is however a question which needs to be answered.

It is trite that there is no taxation without representation. What this means is that a tax, regardless of the appellation it is accorded, cannot be imposed or charged except it is backed by a legislation which clearly provides for the imposition of such tax. The estate duty as charged by the probate registries has no place in our tax legislation. There are also no provisions in the laws of any state, High Court rules or probate rules of the states empowering the probate registries to charge the estate duty or any other percentile fee on a deceased's estate.

The administration of taxes in Nigeria is statutory since taxes can only be administered/collected by persons or agencies of the government who are designated for that purpose by the statute imposing a tax or any other law made pursuant to statute. For example, the Federal Inland Revenue Service (Establishment) Act 2007 (the "FIRS Act) empowers the Federal Inland Revenue Service (the "FIRS") to administer all the enactments listed in the First Schedule to the FIRS Act.[9] The FIRS Act also empowers the

[9] Federal Inland Revenue Service (Establishment) Act 2007, s 25(1).

FIRS to delegate this power and stipulates how such delegation is to be done.[10] It is pertinent to note that the probate registries in Nigeria are not tax collection agencies by any law in force in Nigeria, and the practice can be said to offend the democratic doctrine of separation of powers where the legislature makes the laws, the executive administers it, and the judiciary interprets and enforces the laws.

Despite the legal irregularity shadowing the estate duty, there appears to have been no opportunity for the judiciary to pronounce on the legality of the duty and so it is still being charged by the probate registries.

Tax obligations in respect of the deceased's estate

Although there is no specific legislation imposing tax on the assets of the deceased or taxing the legacies received in the hands of legatees, this is not to suggest that there are no provisions in other existing laws that provide for the treatment of tax obligations incurred by the deceased during his natural life or tax obligations attaching to his estate. Some of these provisions are considered below:

The Personal Income Tax Act[11] (PITA) provides for the treatment of the income accruing to a deceased person through his trade or business, providing that if such incomes accrue after his death, they are to be treated, for the purpose of personal income tax, as though he had earned the income on the last day he conducted business. By this provision, the law brings the income earned by a deceased person into the tax net.[12]

In the same vein, the PITA provides that in the operation of the pay as you earn scheme, if emoluments are paid by an employer to a deceased's next of kin, the employer is to deduct the applicable tax.[13]

Income arising or due to a trustee of any settlements or trusts, or estates or to an executor of any estate of a deceased person are also liable to personal income tax,[14] and may only be collected by the territory of which the tax authority is the relevant tax authority in relation to such settlement, trust or estate.[15]

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[10] Ibid. s 25(2).
[11] Cap. P8 Laws of the Federation of Nigeria 2004.
[12] Personal Income Tax Act 1993, s 31.
[13] Ibid. Operation of PAYE Regulation No. 6
[14] Ibid. s. 1(b)
[15] Ibid. s. 2(6)

The PITA also expressly exempts from personal income tax, sums received by way of death gratuities or as consolidated compensation for death or injuries.[16] What this means for the family of a deceased person is that any payment received from the employer of the deceased as death gratuity will be taken tax-free for the purpose of personal income tax. It stands to reason also, that payments received through a court award for wrongful death or injuries[17] would be taken by the estate of the deceased or the injured, as the case may be, tax-free for the purpose of personal income tax.

Conclusion

One may contend that the rationale for death taxes lies in the attempt by states to curb unfettered inter-generational wealth transfer and ensure the redistribution of wealth while generating substantial revenue. While Nigerian income tax laws provide for the taxation of the incomes accruing to a deceased person, there is no framework for taxing the assets of the deceased which transfer to the personal representatives or beneficiaries, wherein lies the greater value and wealth. This latitude allows for inventive tax planning to limit tax liabilities in transfer of property/assets *inter vivos* or by testamentary means. The taxman mourns the huge figures he could be amassing from taxing the assets of the dead while the taxpayer revels in the breathing space afforded by the dearth of death taxes. Ultimately, the current regime for taxing the incomes and assets of deceased persons in Nigeria appears to provide reasonable room for tax avoidance.

If you would like to get more information on this and other areas tax related matters, you may contact the Taxation Practice Group of the firm through its email address: taxgroup@aelex.com.

[16] Ibid. item 23, 3rd schedule

[17] Since the court award here is a compensation for wrongful death or injury

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