HOLDING THE TAXMAN TO HIS WORD: THE DOCTRINE OF LEGITIMATE EXPECTATION AND TAX ADMINISTRATION IN NIGERIA

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Abstract

This paper examines the extent of applicability of legitimate expectation to taxation in Nigeria against the backdrop of judicial attitude which has excessively subjected the doctrine to statutory limitations. With analysis of relevant tax laws in relation to the concept and features of legitimate expectation, the paper identifies some factors enabling legitimate expectation in taxation, e.g. permissive provisions creating discretionary powers in the tax laws, the doctrine of waiver, and judicial precedents adopted by tax agencies. It proffers ideal approaches for the taxman and the taxpayer in order to ensure that legitimate expectation makes as much impact in taxation as the law envisages.

Key words: Legitimate Expectation, Taxation, Judicial Attitude, Tax Laws, Discretionary Powers.

1.0 INTRODUCTION

Nigerian tax laws are fraught with intricate provisions and ambiguities that impede tax compliance to a great extent. It is therefore the common experience of taxpayers often willing to discharge their responsibilities that they are stuck with uncertainties on what the law requires of them. Faced with this albatross, individuals and corporate entities usually step beyond professional consultation with tax practitioners to channel their enquiries on extant and prospective tax liabilities to the tax authorities. Apart from clarification letters known as Advance Tax Rulings (ATRs)[1] with which the authorities respond to such queries, information circulars, guidelines and regulations are also released occasionally, outlining compliance rules and procedures. It is also usual in tax administration that an undocumented mode of tax treatment assumes the

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[1] The Organization for Economic Co-operation and Development (OECD) defined Advance Tax Ruling as "A letter ruling, which is a written statement, issued to a taxpayer by tax authorities, that interprets and applies the tax law to a specific set of facts. See Glossary of Tax Terms. http://www.oecd.org/ctp/glossaryoftaxterms.htm (accessed 21st December 2018). The International Monetary Fund (IMF) states that, "An advance tax ruling regime seeks to promote clarity and consistency regarding the application of the tax law for both taxpayers and the tax authority." See Waerzeggers, C. and Hillier, C. Introducing an Advance Tax Ruling (ATR) Regime; IMF Tax Law Technical Note, Volume 1, Issue 2, May, 2016.

status of a rule by virtue of consistent application, and taxpayers who arrange their affairs in accordance with such a practice expect the relevant tax body to play along. These are the common sources of legitimate expectation in taxation. In the tax context, legitimate expectation, creates a basis upon which taxpayers can adopt and rely on official representations and patterned tax practices with the assurance (which is indeed the legitimate expectation) that the relevant tax body would maintain its expressed position or promise; or at least that the courts would intervene if the taxman reneges.

However, judicial attitude to legitimate expectation in tax matters in Nigeria is not very liberal. Statutory limitation to this doctrine, which is not meant to take absolute effect, has unduly influenced the courts, leading to denial of the doctrine in many instances. This has added a new and raging controversy to the deluge of unresolved dissensions between tax authorities and taxable entities in Nigeria namely: whether legitimate expectation applies to taxation in Nigeria; and if it does, in what instances? This paper identifies the ideal instances mainly enabled by the law itself, where the doctrine of legitimate expectation can be entertained in taxation.

2.0 UNDERSTANDING THE DOCTRINE OF LEGITIMATE EXPECTATION

2.1 THE MEANING

The doctrine of legitimate expectation demands that a public authority shall respect and apply its stated position or sustained practice in exercising its powers on members of the public. It is not a statutorily created right but a principle of fairness in the exercise of public powers, which is recognised and applied by the courts on the rationale that public authorities are bound by an impression they created which induced the public to act in a certain way.

The expectation arises when a representation is made by a public body that it would follow a certain procedure before taking a decision on the substantive merits of a particular case. Courts usually consider the reasonableness of the expectation and the nature of the representation made.

In ***Council of Civil Service Union v. Minister for the Civil Service***[2] Lord Diplock observed that for legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision maker to

[2] (1985) AC 374 (408-409)

enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it and which he has been given an opportunity to comment or (ii) he has received assurance from the decision maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

The Court of Final Appeal, Hong Kong in ***Ng Siu Tung & Ors. v Director of Immigration***[3] noted that, legitimate expectation might arise as a result of a promise, representation, practice or policy made, adopted or announced by or on behalf of government or a public authority. Thus, it is the words or attitude of the public authority that gives rise to the expectation of the public or individual concerned.

2.2 THE ORIGIN

The doctrine of legitimate expectation originated as a judicial creation and assumed wide acceptance as a legal principle without codification, although implicit in written laws sometimes. According to Wade and Forsyth, legitimate expectation is a "welcome addition to the armoury of the courts in ensuring that discretions are exercised fairly."[4]

The first use of the term was by Lord Denning in ***Schmidt v. Secretary of State for Home Affairs***[5] even though the circumstances of the case defeated the application of the doctrine. In this case, a policy of the Department of Home Affairs permitted aliens studying at the recognised institution to stay in Britain. The plaintiff who was studying at Hubbard College of Scientology was permitted to stay in the country for a certain period. Hubbard College later lost the recognised status. The plaintiff then sought renewal of the stay which was refused. Legitimate expectation was held not to have arisen in this case because the permits were for a limited time, which had expired. However, Lord Denning stated that the plaintiff would have been entitled to a hearing if the permits had been revoked before the expiration, in which case, there would have been a legitimate expectation of being allowed to remain in the country for the time specified.

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[3] [2002] 1 HKLRD 561

[4] *(PDF) The Protection of Legitimate Expectations in UK Administrative Law*. Available at: https://www.researchgate.net/publication/277010634_The_Protection_of_Legitimate_Expectations_in_UK_Administrative_Law (accessed 29th October 2018).

[5] [1969]1 All E.R. 904

Legitimate expectation made a debut in Nigerian law through the case of ***Stitch v A.G. Federation.***[6] In that case, Stitch bought and shipped a Mercedes Benz 280 Saloon car to Nigeria on 22nd February 1982. She sought to obtain an import licence for the car, having fulfilled the laid down conditions before that date. Based on a directive suspending the issuance of import licences for that period, her license was delayed till 29th April 1982. In the meantime, on 20th April 1982 the then *Economic Stabilization (Temporary Provisions) (Customs Duties) Order 1982* was released, which increased the rate of duty payable on that type of car from $33^{1/3}$% to 500%. Import duty on the car had been assessed at ₦ 1, 449. 22K based on the pre-existing 33 1/3% rate. After the import licence was issued to her on 29th April 1982, the Board of Customs re-assessed her import duty at ₦ 14,500.00K based on the 500% rate introduced by the new Economic Stabilization Order of 20th April 1982 under which era her import licence was issued. The Supreme Court acknowledged the power of the Minister of Commerce had discretionary powers under Section 3(2)(a) of the Finance Act, 1981 to refuse to grant a license without stating a reason for such refusal. However, the court noted that the Minister in exercise of his discretionary powers must act fairly and not to the prejudice of the citizens. The Court held further that:

> *"an aggrieved person is entitled to invoke judicial review, if he shows that a decision of a public authority affected him by depriving him of some benefits or advantage which in the past he had been permitted to enjoy and which he legitimately expected to be permitted to continue to enjoy, either until he was given reason for its withdrawal and the opportunity to comment on those reasons, or he has been given assurance that it would not be withdrawn before he had been given the opportunity of making representations against the withdrawal."*

2.3 THE ATTRIBUTES

Legitimate expectation has been categorised into procedural and substantive. The former presumes the procedure that a public authority would follow in exercising its powers in certain circumstances based on its representations. For instance, an expectation that the public authority will make consultation before taking

[6] [1986] 5 NWLR (Pt. 47), 1007 SC.

a decision.[7] Substantive legitimate expectation on the other hand, envisages the decision that the public authority would take under a circumstance.[8]

In the South African case of ***Duncan v Minister of Environmental Affairs***,[9] the Court also set out what needs to be proven for legitimate expectation to be enforced, namely:

- The representation inducing the expectation must be clear, unambiguous and devoid of any relevant qualifications;
- The expectation must have been induced by the decision maker;
- The expectation must be reasonable; and
- The representation must be one which is competent and lawful for the decision maker to make.

Judge Allie in the above case concluded that "What must be shown is the legitimacy of that expectation which led the person whose expectation was so raised to believe that it would receive a procedural benefit."[10]

3.0 DOES LEGITIMATE EXPECTATION APPLY TO TAXATION IN NIGERIA?

3.1 WHAT THE COURTS SAY

Statutory law is the most common limitation to the operation of legitimate expectation. Thus, in several instances, the doctrine has been subdued by the provisions of a statute. The British case of *Dickinson & Ors. v HMRC*[11]vividly illustrates this rule. In that case, HMRC the tax authority, acting pursuant to section 55 of the Taxes Management Act 1970, expressly agreed to postpone any requirement for payment of tax claimed, until after the resolution of appeals on the tax to the First-tier Tribunal. However, the Finance Act 2014 in its section 219 provides for the issuance of Accelerated Payment Notices (APNs) by HMRC which mandated up-front payment of tax alleged to be due before the determination of any outstanding appeal as to the underlying liability to pay. Section 224 of the FA 2014 amended section 55 of the Taxes Management Act 1970 and introduced a "Restriction on powers to postpone tax payments pending initial appeal" in cases where APNs have been given. Following this amendment, HMRC gave to the Appellants

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[7] *Attorney-General for Hong Kong v. Ng Yuen Shiu* [1983] UKPC 2, [1983] 2 A.C. 629, Privy Council (on appeal from Hong Kong).
[8] *Christopher [F.] Forsyth (December 2011), "Legitimate Expectations Revisited", Judicial Review,* ***16*** *(4): 429–439 at 436–437, para. 26.*
[9] [2010] (6) SA 374 (SCA) at paragraph 15.
[10] See paragraph 84 of ***Duncan v Minister of Environmental Affairs*** at Fn. 9. See also *Woolf, L.*; Jowell, J.; Le Sueur A.; and Donnelly, C. 2007. *De Smith's Judicial Review* (6th ed.), London: Sweet & Maxwell, para. 4-051.
[11][2018] EWCA Civ 2798.

accelerated payment notices (APNs) under section 219 of the Finance Act 2014 (FA 2014) and its associated provisions. Such notices require taxpayers (here the claimants) to pay "up front" sums alleged to be due as tax before the determination of any outstanding appeal as to the underlying liability to pay. The Appellants argued that it offended legitimate expectation and amounted to abuse of power for HMRC to resile from the express promises made not to enforce payments pending resolution of the disputes as to the tax in question. The Court of Appeal endorsed the High Court's decision that although HMRC acted in a manner that was conspicuously unfair, there had been no abuse of power by HMRC because of Parliament's legislated policy of requiring the tax in dispute to sit in HMRC's hands and not that of the taxpayers, until the dispute was resolved. This change in the rules, in the court's opinion, overweighed the conspicuous unfairness of HMRC's behaviour.

However, the statutory limitation rule is not meant to be absolute and should instead be applied based on the circumstances of each case and with painstaking reading of the relevant law to determine if the law gives legitimate expectation any chance of survival. The sad reality though, is that Nigerian courts have scarcely identified lifelines of legitimate expectation in taxation. Judicial inclination in Nigeria is rather to exclude any consideration of fairness or equity when a tax liability arises from a statutory provision, no matter the circumstances. Through this attitude, the courts have evolved principles that are recited in tax disputes to easily impede legitimate expectation further. In ***Authority v. Regional Tax Board***,[12] the Supreme Court per Lewis JSC held as follows:

> "No tax can be imposed on the subject without words in an Act of Parliament clearly showing an intention to lay a burden on him. ***But when that intention is sufficiently shown it is, I think, vain to speculate on what would be the fairest and most equitable way of levying that tax***" (emphasis added)

A major flaw in the above principle is that it interchanged the existence of a tax liability with the mode of assessing the tax. But the two are indisputably different. Statutory law may create a tax liability with a strict provision, leaving no escape route for the taxable person, but the law can also make a permissive provision on how to assess the tax.

In ***Shell Petroleum International Mattschappij B. V. v. FBIR***,[13] the following principle, which has become a common reference point was created:

> "Payment of tax or who is entitled to pay tax is an issue of law, not of agreement, contract or compromise."

[12] (1970) NCLR 276 at 286.
[13] (2011) 4 TLRN 97.

The later decision of the Court of Appeal in ***Federal Board of Inland Revenue v. Halliburton (WA) Limited***[14] further highlighted the statutory limitation to legitimate expectation in tax matters. With reliance on Administrative Law by Wade and Forsyth,[15] the Court of Appeal said about legitimate expectation that:

> "What the doctrine postulates is that where a public body or person acting in public authority has issued a promise or has been acting in a given way, the members of the public who are to be affected by the scheme of conducting public affairs in the charted manner would by law require the promise or practice to be honoured or kept by the public body or person acting in public authority, ***save where there exists sound basis not to so insist on the settled scheme of conducting public affairs."*** (Emphasis added).

In determining the sound basis that would justify a deviation from the settled scheme of conducting public affairs as highlighted above, the Court of Appeal referred to the British case of ***Ex P. Begbie***[16] which held that the application of the doctrine is aborted or frustrated by the operation of statute. The relevant statute in this case was Section 26 of CITA, 1990.[17] The court, in its overstretch of the statutory limitation rule, seemed to overlook the discretionary nature of the power exercisable by the Federal Board of Inland Revenue under that Section, and that exercising that discretion would warrant fairness and hence create a ground for legitimate expectation.

Legitimate expectation was further frustrated in the ***Halliburton case*** by the court's attempt at distinguishing the doctrine from estoppel[18] The Court of Appeal faulted the position of the Federal High Court in the same case which viewed legitimate expectation as a specie of estoppel. Without pointing out the distinct characteristics of estoppel in comparison to legitimate expectation, the Court of Appeal held out legitimate expectation as a principle that enjoins public bodies to be fair, straight-forward and consistent in their dealings with the public and concluded that legitimate expectation differs from estoppel. It is opined here, that although legitimate expectation applies only to exercise of power by public authorities while

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[14] (2016) 4 N.W.L.R (Pt. 1501) 53.

[15] Wade, W. and Forsyth, C. 2004, Administrative Law (9th ed.), Oxford: Oxford University Press, pp. 857-858.

[16] (2000) 1 WLR 1115.

[17] *In pari materia* with Section 30 of CITA 2007.

[18] The words of Denning J (as he then was; who later became Lord Denning) in ***Central London Property Trust Ltd v High Trees House Ltd*** [1947] KB 130 (or the *High Trees case*) spelt the doctrine of promissory estoppel in English law. Denning said: "*... a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made and which was in fact so acted on.*" But he qualified it that: "*... in any event the estoppel would cease when the conditions to which the representation applied came to an end...*" From these words, estoppel shares ample similarities with legitimate expectation as explained in the foregoing pages.

estoppel applies to contractual arrangements, the two are products of equity and aim at fairness. Moreover, contractual considerations are unavoidable in certain tax determinations, and estoppel is thus applicable to such determinations. Thus, estoppel in taxation, when effective between the tax authority and the taxpayer, can easily pass for legitimate expectation.

It was in the later judgment in ***Saipem Contracting Nigeria Limited & 2 Ors. v. Federal Inland Revenue Service & 2 ors.***[19] that the Court of Appeal created a ray of hope for legitimate expectation in the Nigerian tax system. In this case, the court expressed principles that would have led to the application of estoppel but for the facts of the transaction in that case and the wording of the ATR obtained from FIRS.[20] Saipem entered into a contract with Shell Nigeria Exploration and Production Company Limited ("Shell") and approached the Federal Inland Revenue Service ("FIRS") for an Advance Tax Ruling on the tax implications of the contract in respect of Companies Income Tax, Value Added Tax and Withholding Tax. In response, FIRS stated that the activities of Saipem under the contract, to the extent that they were not carried out in Nigeria, were not taxable in Nigeria. FIRS stated further that the expressed opinion was subject to Section 13(2)(a) – (d) of the Companies Income Tax Act (CITA)[21] which outlines four circumstances under which the profit of a company not resident in Nigeria would be deemed to be derived from Nigeria, and hence would be taxable in Nigeria. Those circumstances are: where the company has a fixed base of business in Nigeria through which it has earned profit; where the company habitually operates a trade or business through a dependent agent in Nigeria; the company earns profit through a single contract of surveys, deliveries, installations or construction (i.e. turnkey project); or the company carries out trade or business with a related company wherein the commercial or trade relations are deemed artificial or fictitious (raising issues of transfer pricing).

Saipem, obviously construed the above opinion as a blanket tax exemption on the contract. Thus, when FIRS issued Notices of Assessment on Saipem for Companies Income Tax, Value Added Tax and Withholding Tax based on the contract, Saipem sued to contest the right of FIRS to resile from its representations in the Advance Tax Ruling. Saipem's contention was that the doctrine of estoppel, akin to the doctrine of legitimate expectation, forbade FIRS to renege on its assurances of tax freedom of the contract, more so when Saipem had relied on the said assurances to embark on the contract. In treating the applicability of estoppel, the

[19] CA/L/436/2014 – (Unreported) delivered on 10 July 2018.
[20] It bears repeating that estoppel and legitimate expectation, if applied to advance tax ruling, would have the same effect.
[21] Cap C21, Laws of the Federation of Nigeria, 2004 (as amended in 2007)

Court of Appeal for the concept and ambit of estoppel, relied on the Evidence Act, 2011 and the decision of the Supreme Court in ***Abalogu v. S.P.D.C.* Ltd.**[22] The provision of Section 169 of the Evidence Act restated and applied in ***Abalogu v. S.P.D.C.* Ltd.**[23] is that where a person has, by his words or conduct, made to another a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party had taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him.

The court recognised two conditions that would enable the application of estoppel to the Saipem case namely, that the representation was one which FIRS resiled from, and that Saipem had acted on it to Saipem's detriment. But the court noted that the contract in question had been concluded before the representation was made by FIRS. The contract was entered into on 27th August 2009 while FIRS' letter of clarification was issued on 17th March 2011, about two years later than the contract, a clear indication that Saipem could not have relied on the representation in the letter to embark on the contract. The court also noted the provisos in the FIRS representation – that the activities of Saipem SA "***to the extent that they are not carried out in Nigeria***," are not taxable in Nigeria; and that the representation made was subject to Section 13(2)(a)-(d) of CITA. The court therefore inferred that FIRS did not make a volte face when it subjected the profit from the contract to tax, as FIRS' letter did not grant a blanket tax exemption considering the provisos therein. Hence, FIRS was not estopped from applying the provisions of the law to determine the tax liability of Saipem in respect of the contract.

The hope which the Saipem decision raises for legitimate expectation in taxation is that unlike previous judgments, it did not merely dismiss estoppel with the hasty conclusion that taxation is statute-based *stricto sensu* and admits of no fairness or equitable consideration. The court rather took pains to identify the significant elements of estoppel, applied them to the facts of the case and concluded in clear terms that FIRS indeed acted in line with its ATR when it raised tax assessments against Saipem, and so the tax assessments were not caught by estoppel. This conclusion was based on the court's finding that the tax exemption stated in the ATR was conditional, and the condition was not present, so FIRS was right in raising the assessment. The court held that estoppel did not operate against FIRS to prevent it from raising the contested tax

[22] [2003] 13 NWLR (Pt.837) 309.
[23] Ibid, p. 31, paras. A-C.

assessments. The tax assessment by FIRS having not deviated from the ATR, complied with legitimate expectation. Moreover, the ATR conformed to statutory law. It is implicit in the above standpoints that the court is now inclined to thorough examination of the facts and circumstances of each case *vis-à-vis* the related ATR to determine if legitimate expectation would operate against the tax authority. Furthermore, Saipem had entered into the contract two years before the FIRS representation was issued. The FIRS representation could not therefore be the basis entering into the contract as claimed by Saipem.

The Saipem judgment also offers some significant lessons to both the taxman and taxpayers on safeguards to ATRs. The ATR of FIRS in that case was carefully couched in words that qualified its binding force on FIRS. It offered tax exemption of Saipem's activities "***to the extent that they are not carried out in Nigeria.***" FIRS, when it gave the ATR might not have fully known or understood whether the activities were carried out in Nigeria, and to what extent. Contract variations and the intricacies of contract execution may bring up circumstances which an ATR did not contemplate, especially if the prior disclosure of the taxpayer comprised only the contract document. Where the facts of a transaction are not wholly available or not fully understood by the taxman, conditional expressions as used in the ATR to Saipem may save the taxman from the trap of its written clarification if previously unknown or poorly understood facts later emerge at the time of tax assessment. Further subjecting the ATR to the law (more so a specific provision of the law) also indicated a position that the law overrides whatever might be written in the ATR. A cautious taxpayer faced with such an ATR would deeply enquire into the relevant law and place little or no reliance on the ATR, knowing that the tax authority has expressed unwillingness to be bound by what it said in the ATR.

However, the favours of the Saipem judgment on legitimate expectation are not direct and positive but barely implicit. It is a strained interpretative stretch that would view this judgment to mean that legitimate expectation would have estopped FIRS from deviating from its ATR if FIRS had so deviated. The judgment would have better established the binding force of an ATR and the applicability of legitimate expectation to tax if the court had added a mere *obiter dictum* on what it would have decided if it had found that FIRS contravened the ATR. To consolidate the implied principle in Saipem therefore, there is need for another judgment where the court addresses a finding of fact that a tax assessment violated the related ATR.

Contrary to the impression which most of the above decisions might have created, statutory law is not a rigid barrier to legitimate expectation in taxation. It only limits the doctrine when the language of the law

indicates a mandatory duty. The wording of a statutory provision should be examined in each case to determine if exercise of powers under that provision is subject to any fairness rule or consideration. In this respect, ***Stitch v. A-G. Federation,***[24] remains a good point of reliance on the applicability of legitimate expectation to statutory duties, and this is not meant to exclude the tax sphere, as ***Stitch*** itself also involved government revenue that was rooted in a statute. In ***Stitch***, the Supreme Court did not uphold the action of the Minister on the simple premise that it was statute-based. The court rather read the underlying discretion in the power of the Minister to grant or refuse import license pursuant to the Act, and held that by that discretion, the Minister's decision ought to have been guided by fairness. Hence, legitimate expectation applied in that case. Thus, the statutory law, in each case must be thoroughly examined to determine if it allows considerations of fairness and equity in the tax assessment. If it does, then legitimate expectation is enabled.

4.0 WHERE LEGITIMATE EXPECTATION APPLIES TO TAXATION IN NIGERIA

4.1 DISCRETIONARY POWERS

A statutory provision can create a substantive power, but the mode or procedure of exercising the power would be by discretion bestowed on the tax authority by the same law, another law or an executive policy instrument enabled by law. The court prescribes fairness as the fundamental rule whenever exercise of power is by discretion. Thus, in the ***Stitch Case***, the Supreme Court introduced legitimate expectation because it found that the Minister's power to grant or refuse import license, though stemming from a legislation – i.e. the Finance Act, 1981, was discretionary, hence its exercise must be based on fairness and equitable considerations. Therefore, when a statute expresses or implies administrative discretion, it would be legitimately expected that the words of the statute would be applied by such standards of fairness and reasonableness that the circumstances of the case demand.

Legitimate expectation would also be created when exercise of discretionary power becomes consistent in mode and forms a pattern, such that persons who are subject to such a power would arrange their business affairs with the expectation that the pattern would be maintained. The expectation can also emanate from an ATR by the tax authority on how to apply its discretion in assessing a specific transaction or specific transactions of a company or an individual in a year of assessment. The difference between the ATR aspect

[24] Note 6, supra.

and the consistency rule is that the latter attracts a wider scope of legitimate expectation as it extends legitimate expectation to future similar cases until the pattern is terminated by emergence of a contrary statutory provision or by notification from the tax authority. When similar ATRs on a particular tax issue is provided to many taxpayers over a period in response to separate enquiries, thereby indicating prevalence of that particular issue or when a consistent practice gains some level of popularity, it usually prompts issuance of an information circular or a guideline to the public by the tax authority for ease of reference.

Examples of discretionary powers in tax law that give rooms to legitimate expectation are:

4.1.1 Discretion in Income Tax Assessment of Companies – Section 30 CITA

Under Section 30 of CITA, certain conditions would give basis for FIRS to assess a taxpayer not by its actual assessable profit, but by a fair and reasonable percentage of that profit. Section 30(1) (b)(i) of CITA provides as follows:

> "30.(1) Notwithstanding section 40 of this Act, where in respect of any trade or business carried on in Nigeria by any company (whether or not part of the operations of the business are carried on outside Nigeria) it appears to the Board that for any year of assessment, the trade or business produces either no assessable profits or assessable profits which in the opinion of the Board are less than might be expected to arise from that trade or business or, as the case may be, the true amount of the assessable profits of the company cannot be ascertained, the Board may, in respect of that trade or business, and notwithstanding any other provisions of this Act if the company is a-"

The above opening part of the provision marks the conditions for the exercise of FIRS' discretion in assessing the company namely:

a. where it appears to the Board that for any year of assessment, the trade or business produces: no assessable profits or assessable profits which in the opinion of the Board are less than might be expected to arise from that trade or business.

b. the true amount of the assessable profits of the company cannot be ascertained.

Where any of the above circumstances exists and the company is a Nigerian company, FIRS is empowered to assess and charge that company for that year of assessment on such "***fair and reasonable***" percentage of the turn-over of the trade or business as FIRS may determine. If the company is a non-resident company,[25] CITA under Section 30 (1)(b)(i), (ii), (iii), and (iv) provides for the following modes of assessment based on the means through which the company earned the profit from Nigeria:

(i) where the company has a fixed base of business in Nigeria, it is assessed and charged on such ***fair and reasonable percentage*** of that part of the turnover attributable to the fixed base

(ii) where the company operates a trade or business through a dependent agent in Nigeria, it is assessed and charged to the extent that the profit is attributable to the business or trade;

(iii) where the company executes a turnkey project – i.e. one single contract involving surveys, deliveries, installations or construction, it is assessed and charged on such a ***fair and reasonable percentage*** of the turnover of the contract; and

(iv) where the trade or business is between the company and another entity under such commercial or financial relations which in the opinion of the Board is deemed to be artificial or fictitious, the company is assessed and charged on a ***fair and reasonable percentage*** of that part of the turnover as may be determined by the Board.

By demanding assessment on ***fair and reasonable percentage*** in the above situations, Section 30(1) of CITA calls for the discretion of FIRS in the assessment. Consistency of practice in raising such assessment would create a legitimate expectation in favour of concerned tax payers and bind FIRS to apply the practice to similar situations. Such consistency is manifested in the case of foreign companies operating through fixed bases in Nigeria under Section 30(1)(b)(i) above. In all such cases, FIRS treats 80% of the company's turnover as allowable expenses, while 20% is deemed the profit and taxed at the 30% rate for Companies Income Tax prescribed in Section 40 of CITA. In effect, the total tax assessed on the company is 6%.

[25] Section 30(1) (a), CITA.

Application of the 6% flat rate to all non-resident companies assessed on turnover basis by FIRS has however attracted severe criticisms on the ground that across-the-board treatment does not represent the ***fair and reasonable*** consideration anticipated by Section 30(1)(b)(i). Adebiyi and Isiadinso[26] argued that the peculiarities of the industry in which a non-resident company operates, the business size and its model would affect the level of profits to be generated from its operations, and so these peculiarities should be considered by FIRS in determining a fair and reasonable percentage of the turnover. While this argument holds some plausibility on the ground that factors determining corporate profit are variable and case-specific, it can be countered on the basis that the 6% rate is applied one-off to the particular company that contests it, and not in comparison to any other company or on the basis of any precedent. Besides, a company that files its returns on deemed profit and not on actual profit would be deemed to have brought itself under this mode of assessment and to be therefore bound by the 6% rate. The duty therefore rests on each company to convince FIRS that the 6% rate is not fair and reasonable to its peculiar circumstances, and proffer with substantiation the rate that would be fair and reasonable. Legitimate expectation can avail a particular company in line with the peculiarities of its operations only when the expectation arises from an ATR directed by FIRS to that company stating a particular turnover rate for the company. FIRS would then be bound to apply that specified rate to the company.

In 2014, the Transfer Pricing Division of FIRS[27] issued letters to non-resident companies operating through Permanent Establishments in Nigeria, directing them to file their returns on the actual profit mode of assessment under section 55 of CITA rather than the deemed profit mode obtainable in Section 30[28] of CITA This was in furtherance of the disclosure requirements in the Income Tax (Transfer Pricing) Regulations No 1, 2012 and to bring the regulations to bear on foreign companies doing business in Nigeria through their related entities. This directive created the impression that FIRS had done away with deemed profit assessment and hence FIRS was inundated with a deluge of enquiries from various stakeholders on the true position. To weather the storm from the directive, FIRS released a public notice[29] stating that while all Nigerian companies and all non-resident companies carrying on business in Nigeria were mandated to file

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[26]Adebiyi, O. and Isiadinso, O. Section 30(1)(b)(i) CITA-Turnover Assessment – What Constitutes Fair and Reasonable Percentage of Turnover, *Anderson Tax Digest*, Business Day, Tuesday 13 March 2018. p. 9.

[27] Currently the International Tax Department.

[28] Section 55 requires both resident and non-resident companies to include in their returns: audited accounts, tax and capital allowances computation for the year of assessment and a true and correct statement in writing containing the amount of profit from each and every source computed; a completed self-assessment form, and evidence of payment of the whole or part of the tax due.

[29] Public Notice on Filling of Tax Returns by Non-resident Companies under CITA.

their returns on actual profit basis, FIRS retained its powers to assess a company to tax on deemed profit basis if the conditions in Section 30 of CITA so necessitated. The notice reiterated the directive to all non-resident companies to comply with the filing requirements of Section 55 of CITA from the assessment year commencing 1st January 2015. It is thus clear that deemed profit assessment is still applicable where the circumstances in Section 30 necessitate despite FIRS' insistence on the filing of full returns under Section 55. But it is in deemed profit assessment that FIRS' discretion and the ground for legitimate expectation arise.

4.1.2 Discretion in Achieving Arms' Length Standard in Transfer Pricing

Before the introduction of Transfer Pricing Regulations in Nigeria, substantive tax laws had enabled discretionary power of FIRS to achieve arm's length standards[30] in transactions between related entities.

Section 22(1) of CITA provides:

> "Where the Board is of opinion that any disposition is not in fact given effect to or that any transaction which reduces or would reduce the amount of any tax payable is artificial or fictitious, it may disregard any such disposition or direct that such adjustments shall be made as respects liability to tax as it considers appropriate so as to counteract the reduction of liability to tax affected, or reduction which would otherwise be affected, by the transaction and any company concerned shall be assessable accordingly."[31]

The above law confers discretion on FIRS to make price adjustments to transactions between related parties that would bring such transactions to the arm's length price obtainable in a market overt. But the statutory provisions are grossly inadequate to guard and guide the exercise of the discretion.

FIRS released the Income Tax (Transfer Pricing) Regulations No 1, 2012 which was later replaced with the Income Tax (Transfer Pricing) Regulations No 1, 2018. The later Regulations in its Paragraph 5, mentioned

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[30] Arm's length refers to the terms obtainable where the transaction occurs in a market overt between unrelated parties. Paragraph 27 of the Income Tax (Transfer Pricing) Regulations 2018 defines "Arm's Length Principle" to mean *"the principle that the conditions of a controlled transaction should not differ from the conditions that would have applied between independent persons in comparable transactions carried out under comparable circumstances."*

[31] Materially similar to Section 30(1)(b)(iv) of CITA. Section 17 of the Personal Income Tax Act, Chapter P8, Laws of the Federation of Nigeria, 2004, and Section 15 of the Petroleum Profits Tax Act, Chapter P13, Laws of the Federation of Nigeria, 2004 (as amended by the Petroleum Profits Tax (Amendment) Act, 2007 make equivalent provisions.

five specific transfer pricing methods and added as a sixth item, a leeway for FIRS to apply any other method as may be prescribed through regulations from time to time. Thus, FIRS reserves the discretion to adopt any of the five specific transfer pricing methods[32] listed in Paragraph 5 of the Transfer Pricing Regulations, 2018 or apply any other appropriate method pursuant to the sixth item in that Paragraph 5. The overriding consideration in choosing which method to apply depends on the appropriateness of the method in leading to arm's length standards.

Legitimate expectation applies based on the discretion of FIRS in the substantive laws and in the above-stated regulations. Thus, when FIRS communicates its acceptance of a transfer pricing method in a proposed transaction or business arrangement to the involved parties, with prior disclosures by the parties, and the transaction is carried out or the arrangement is commenced with reliance on the FIRS' assurance, legitimate expectation would bind FIRS to maintain its expressed position.

4.1.3 Discretion to Extend Time for Tax Compliance

The various tax laws stipulate time periods for filing of tax returns, payment of tax and other compliance requirements. They also state the consequence of non-compliance usually in the form of penalties. The deadlines created by such provisions are known as statutory due dates. However, the laws while stipulating compliance times also granted discretionary power to FIRS to extend the times. For example, Sections 52 and 55 of CITA stipulate the times for statutory filing with FIRS by companies while Section 59 provides for extension of the time by FIRS. Section 30 of the Petroleum Profits Tax Act also provides the time for the submission of audited financial statements by upstream petroleum companies while Section 34 of that Act provides for extension of the time.

Such extension of time is upon application by the taxpayer who must show good cause to the satisfaction of FIRS why the stipulated time should be extended. The effect of the extension of time when granted is that the company is no longer bound by the statutory due date and would hence be free from the penalty. Extension of time is a promise by the tax authority not to enforce the penalty provision. Therefore, where the relevant authority has exercised its discretion to grant extension of time, it would be bound by legitimate expectation not to enforce penalty over the extended period. However, as legitimate expectation demands

[32] Comparable Uncontrolled Price ('CUP') method; Resale Price method; Cost Plus method; Transactional Net Margin method; and Transactional Profit Split method.

good faith, the extension can be withdrawn and hence penalty enforced if it is discovered that the taxpayer withheld or misrepresented relevant facts while applying for it.

4.2 CONTRACTUAL AND STATUTORY WAIVERS

The word "waiver" according to Black's Law Dictionary is *"the voluntary relinquishment or abandonment, express or implied, of a legal right or advantage."*[33]

In ***Oniah v. Onyia***[34] the Supreme Court per Karibi-Whyte JSC further explained waiver in the following words:

> "The concept of waiver presupposes that a person who is to enjoy a benefit or who has the choice of two benefits is fully aware of the benefits and has either neglected to exercise his right to the benefit, or where there is choice has preferred one. The exercise must be voluntary"

Onifade v. Oyedemi[35] highlighted the forms and elements of waiver as follows:

> "Whether the waiver be express or implied, the party against whom the doctrine is raised, must be aware of the act or omission, and must do some unequivocal act adopting or recognising the act or omission. Both elements must be present to constitute a waiver…"

It is clear from the above authorities that c

Applicability of waiver in taxation varies in scope under contract and statute. In a contractual setting, the contract document need not expressly nor even impliedly provide for waiver. The doctrine of waiver would be invoked against a party to the contract who with full knowledge of his rights under the contract, has by his words or action, given up the right. Such a relinquished right cannot be reclaimed. In a statute-governed situation on the other hand, waiver arises by express provision of the relevant statute. While the general principle as enunciated in ***Raji v. Unilorin***[36] and ***Menakaya v. Menakaya***[37] among several other authorities is that a statutory duty cannot be waived, waiver arises on a statutory right or power where the statute creates

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[33] Black's Law Dictionary (9th ed.). p. 1717.
[34] [1989] 1 NWLR (Pt. 99) 514 at 534.
[35] (1999) 5 NWLR (Pt.601)54.
[36] [2007] 15 NWLR (Pt.1057) 259.
[37] [2001] 16 NWLR (Pt. 738) 203: (2001) 9 SCNJ 1 at 19.

the waiver. The statutory provision for the waiver often adds a strict guard by stipulating conditions and procedures for its exercise.

Statutory waiver can be derived from most of the discretionary powers granted to tax authorities under the various tax laws. For example, while Section 32(1) of the FIRS Act just like Section 85(1) of the Act provides for interest and penalty for failure to pay tax as and when due, both sections in their subsections (3) empower FIRS to remit the whole or any part of the interest and penalty when good cause is shown for such remission. This clear statutory waiver was exercised in an unusually high scale in 2016 that cast it open for benefit by all taxpayers who fell within its scope. Vide a public notice in 2016, FIRS granted a general waiver on interest and penalties stretching back to three years (2013-2015) to all taxpayers in default on the condition that such defaulting taxpayers would: (a) come forward to declare their indebtedness within a 45-day window, and (b) present a payment plan on the outstanding principal tax liability acceptable to FIRS.

When a taxpayer takes advantage of such statutory waiver and complies with the conditions attached thereto, the doctrine of legitimate expectation would forbid FIRS to take any backward step on the promise. Likewise when tax liability is governed by a statute-enabled contract, the waiver of a right or power arising from that contract by the word or conduct of FIRS would bind FIRS by legitimate expectation and such right or power cannot be restored.

4.3 JUDICIAL DECISIONS ADOPTED BY TAX AUTHORITIES

When the court creates a principle in its judgments, the tax authorities, beyond enforcing the judgment in the particular case involved, are inclined to applying the principle to the tax treatment of future similar cases. Thus, the judicial precedent becomes the practice on that issue and gradually becomes an accepted practice in tax circles. The adopted judgment might comprise the court's interpretation of a particular statutory provision, or a term that frequently triggers dissension between taxpayers and the taxman. An example is the decision of the Supreme Court in ***Arbico Ltd v. FBIR***.[38]

For a long time, the meaning of "*trade*" in the contexts of the various tax laws was a point of frequent controversy. The lack of consensus on what constituted a trade mainly concerned the issue, whether continuity in similar transactions is required for a trade to exist or if a one-off transaction could also

[38] (1996) 2 All NLR 303.

constitute a trade. The transaction in the ***Arbico case*** was one-off, and the court had to resolve whether it was a trade in the context of Section 9(1)(a) of CITA.[39] The Supreme Court finally laid down the rule that an isolated one-off transaction could still constitute a "trade". FIRS not only adopted this decision of the Supreme Court in resolving the "trade" controversy in the context of other statutory provisions, but also drafted it into an Information Circular applicable to all cases under CITA and PITA where the issue of what constitutes trade arises.[40]

Judgments on tax disputes are usually judgments *in personam*[41] and not *in rem*.[42] It is settled in law that the former class of judgments bind only parties to the particular dispute that led to the judgment and their privies, while the latter is tied in effect to the subject-matter of the dispute and binds the whole world in respect of that subject-matter.[43] By this nature of tax judgments therefore, tax authorities are neither entitled nor bound in law to apply the principles of one judgment in the treatment of another case, no matter the similarities of facts and circumstances. Every case is treated on its own merit, and the court can alter or abandon a principle from a judgment as circumstances demand. However, when the taxman notifies a particular taxpayer or the entire public of its adoption of a judicial decision like the ***Arbico Case***, legitimate expectation would be created to bind the taxman until a later decision alters the principle.

5.0 CONCLUSION AND RECOMMENDATIONS

It is conceded that taxation is based on statutory laws which created the taxes in the first place. However, tax liability is not always determined solely by the words of the statutes. Extra-statutory factors at times determine tax liability. This paper identified and discussed three of such factors namely: discretionary powers of the tax authorities, waivers, and adopted judicial precedents. These factors accommodate the doctrines of legitimate expectation and estoppel in taxation and amply vest ATRs with binding force on the taxman. Besides the legal bulwarks around such legitimate expectation, public confidence in the tax authorities would be well preserved if the tax authorities should honour their assurances on tax treatment to the extent that the law permits and desist from any assurance that would fall foul of the law. The court also

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[39]Section 9(1)(a) of CITA provides that tax shall be payable upon the profits of any company accruing in, derived from, brought into, or received in Nigeria in respect of any trade or business for whatever period of time such trade or business may have been carried on.

[40] FIRS Information Circular on What Constitutes 'Trade' for Tax Purposes: Guidelines for the General Public – August 2010.

[41] Also known as a judgement *inter partes* - a judgment that determines the rights and obligations of parties to a dispute or their privies, as opposed to a judgment in rem which determines the status, ownership or title to the subject-matter of a dispute. See Imam, I. 2017, *The Nigerian Law of Evidence*, Lagos: Malthouse Press, p. 71-72. See also Oke v. Atoloye (1986) 1 SC 452.

[42] Ibid.

[43] Awoniyi v. Registered Trustees of AMORC (2000) 6 SCNJ 141.

has a duty to detect the enabling factors to the doctrine of legitimate expectation in cases where they occur and apply the doctrine to such cases.

Tax payers, in seeking ATRs should make full and true disclosures that would match the taxman's clarifications with the correct facts. On deemed profit assessment under Section 30 of CITA, which seems to have generated the highest number of disputes on legitimate expectation, all companies should adhere to the FIRS' directive to file elaborate returns under Section 55 of CITA. With that, a company would have satisfied the disclosure requirement which the Court of Appeal stated as a *sine qua non* of legitimate expectation in the ***Halliburton judgment***. Then if FIRS decides to assess the company under Section 30 for one of the factors in that section, the prerequisite of disclosure would have been satisfied by the company. Where the company is a foreign company operating through a fixed base in Nigeria under Section 30(1)(b)(i) of CITA, FIRS, assessing the company to tax on turnover basis, should give a prior notice of the 6% rate (i.e. 30% of the 20% deemed profit after 80% has been deducted as expenses) and ask the company to justify any less percentage that would be fair and reasonable to the peculiarities of the company's business.[44] Some of the relevant factors to support a lower percentage for a particular non-resident company can also be gleaned from the company's returns if filed under Section 55 of CITA. This underscores the importance of compliance with that section in filing of returns as FIRS has directed. The company can also, as an objection to the notice of deemed profit assessment, suggest a lower rate than the 6%, and present its justification to FIRS. Much as uniform application of the 6% rate to deemed profit assessments does not in all cases produce the ***"fair and reasonable"*** result contemplated in Section 30(1)(a)(i) of CITA, it has gained such fame to the point of judicial notice that a non-resident company wishing for any better treatment by FIRS may consider the extra steps suggested above. FIRS too should create a window for variation of the 6% rule in deserving cases, to lessen government's burden of frequent protracted litigation from this issue.

As tax liability is strictly governed by a statutory law provision, where the taxpayer perceives ambiguity in the law, professional opinions and advice from specialised tax and legal consultants should be sought and relied on, rather than rely solely on statutory interpretation from the tax authority. Taxpayers should also timeously engage such professional services for the negotiation, review and monitoring of their transactions in order to maintain alignment with tax laws.

[44] Adebiyi and Isiadinso proffered some yardsticks on such justification, Note 25, supra.