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DOES THE DOCTRINE OF LEGITIMATE EXPECTATION APPLY TO TAXATION IN NIGERIA?

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1. INTRODUCTION

The doctrine of legitimate expectation demands that a public authority respects and applies its stated position or sustained practice in exercising its powers. It is 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 the impression they created which induced the public to act in a certain way. In enforcing legitimate expectation, courts usually consider the reasonableness of the expectation and the nature of the representation made by the public body that gave rise to the expectation.

Legitimate expectation has been categorised into procedural and substantive. Procedural legitimate expectation presumes the procedure that a public authority would follow in exercising its powers in certain circumstances based on its representations. Substantive legitimate expectation on the other hand, envisages the decision that the public authority would take under a circumstance.

In the South African case of ***Duncan v Minister of Environmental Affairs*** [2010] (6) SA 374 (SCA) at paragraph 15, the Court 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.

2. DOES THE DOCTRINE OF LEGITIMATE EXPECTATION APPLY TO TAXATION IN NIGERIA?

Statutory law is the most common limitation to the application of legitimate expectation in tax cases. Thus, in several instances, the doctrine has been subdued by the provisions of a statute. However, the statutory limitation rule is not meant to be absolute and should instead be applied based on the circumstances of each case. 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, even where the statutory provision is permissive in its wording and admits of discretion on the part of the taxman. Through this attitude, the courts have evolved principles that are recited in tax disputes to easily impede legitimate expectation further. In ***Federal***

Board of Inland Revenue v. Halliburton (WA) Limited, (2014) LPELR-24230(CA). The Court of Appeal placing reliance on Administrative Law by Wade and Forsyth held as follows:

> "*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* (2000) 1 WLR 1115, which held that the application of the doctrine of legitimate expectation is aborted or frustrated by the operation of statute. The relevant statute in this case was Section 26 of CITA, 1990. 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.

Contrary to the impression which most of the judicial 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. For this reason, instances abound where legitimate expectation can apply to taxation without offending the relevant tax laws.

3. WHERE LEGITIMATE EXPECTATION APPLIES TO TAXATION IN NIGERIA

3.1. 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.

Legitimate expectation would therefore 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 are led to arrange their business affairs with the expectation that the pattern would be maintained. The expectation can also emanate from an Advanced Tax Ruling ("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.

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

3.1.1. Discretion in Income Tax Assessment of Companies – Section 30 CITA

Under Section 30 of the Companies Income Tax Act, Chapter C21, Laws of the Federation of Nigeria 2004 ("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. 30(1) (b)(i) of CITA provides as follows:

> "*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..*"

Where any of the circumstances highlighted above exists, 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. By demanding assessment on fair and reasonable percentage Section 30(1) of CITA calls for the discretion of FIRS in the assessment. Consistency of practice by FIRS in raising such assessment is to subject 20% of the turnover tagged "*deemed profit*" to the 30% tax prescribed in Section 40 CITA, which results in 6% tax. This consistent practice creates a legitimate expectation in favour of concerned tax payers and binds FIRS to apply the practice to similar situations. This pattern has however been criticised as unfair in many instances.

3.1.2. Discretion in Achieving Arm's Length Standard in Transfer Pricing

The Income Tax (Transfer Pricing) Regulations No 1, 2018 in Paragraph 5, mentions 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 or apply any other appropriate method pursuant to the sixth item in that Paragraph 5.

Legitimate expectation applies based on the discretion of FIRS 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.

3.1.3. 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 consequences 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.

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 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.

3.2. Contractual and Statutory Waivers

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

Waiver applies both in contract and under statute, but in varied scopes. In a contractual setting, the agreement need not expressly nor even impliedly provide for waiver. The doctrine of waiver would be invoked against a party 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.

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. 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 stipulated conditions. 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.

3.3. 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 forms a rule of practice in tax circles.

Judgements on tax disputes are usually judgments *in personam* and not *in rem*. It is settled in law that the former class of judgments bind only parties to the particular dispute, 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. 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 between the cases. However, when the taxman notifies a particular taxpayer or the entire public of its adoption of a judicial decision, or issues a circular based on the judgment, legitimate expectation is created to bind the taxman until a later decision alters the principle.

4. CONCLUSION

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 article has identified 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 advance tax rulings with binding force on the taxman.

In addition, public confidence in the tax authorities would be well preserved if the tax authorities 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 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.

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