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TAX APPEAL TRIBUNAL RULES IN FAVOUR OF TAXPAYERS IN TWO SUCCESSIVE LANDMARK JUDGMENTS

Introductory summary

The Tax Appeal Tribunal, South East Zone, sitting in Enugu ("**TAT**" or the "**Tribunal**"), recently held that tax audits conducted by relevant tax authorities in violation of statutorily laid down procedures are not binding on taxpayers. The decision was reached in the case of ***Polaris Bank Plc v Abia State Board of Internal Revenue*** (unreported judgment of the TAT delivered on August 20, 2019 in Appeal No: TAT/SEZ/001/17) ("***Polaris***").

The Tribunal also held that interests and penalties are not payable on tax assessments raised outside the statutory 6-year limitation period prescribed for tax audits. Furthermore, where evidence shows that the substance and effect of an exercise conducted by a tax authority after the limitation period is indeed a tax audit, it will make no difference even if such exercise is styled "*tax investigation*". Hence, any interest or penalty arising therefrom will be invalid and unenforceable against the targeted taxpayer.

Besides, the Tribunal also held that a State tax authority in Nigeria does not possess the statutory power to assess or collect any of the taxes listed in the *Taxes and Levies (Approved List for Collection) Act* ("**Approved Taxes Act**"); where there is no primary legislation in the State specifically imposing the tax. Examples of such taxes are Business Premises Levy and Economic Development Levy.

This comes on the heels of the decision of the TAT in ***Nigerian Breweries Plc v Abia State Board of Internal Revenue*** (unreported judgment of the TAT delivered on June 20, 2019 in Appeal No. TAT/SEZ/002/17) (***"Nigerian Breweries"***), where the Tribunal held that:

(i) Where an appeal is filed against an assessed tax liability, payment of penalty and interest on the assessed tax will abate until such appeal is determined, in accordance with

section 68(2) of the Personal Income Tax Act ("PITA"), and

(ii) Gratuities paid by an employer to an employee are wholly exempt from tax, within the meaning of section 3(1)(b) of the *Personal Income Tax (Amendment) Act, 2011*.

The *Polaris* case

In *Polaris*, a demand notice was issued by the Abia State Board of Internal Revenue (ASBIR) to Polaris Bank Plc (the "**Bank**") for alleged unpaid tax liabilities, covering the period of 2006 – 2011 accounting years. The Bank challenged the demand notice on several grounds but admitted a portion of the demand which it subsequently paid. Attempts to reach an amicable resolution of the dispute between the parties failed following which another demand notice was issued by ASBIR, demanding for payment of the unpaid portion of the original assessment. Aggrieved, the Bank lodged an appeal at the TAT challenging the validity of the subsequent assessment for unpaid portions of the original assessment. The key points distilled from the decision of the Tribunal in this case include the following:

(a) When tax audits do not comply with statutorily laid down procedures, any tax assessment, interest or penalty based thereupon is invalid and unenforceable. A tax audit is statute-barred after six (6) years from the year of assessment and same will not automatically be deemed as a "tax investigation" even if it is so tagged by a tax authority;

(b) Where agreements are reached, during tax reconciliation exercises, between taxpayers and tax authorities with respect to undisputed tax payments; such agreements must be in writing, be acknowledged by both parties and must be presented in evidence by the party seeking to rely on same;

(c) Where a taxpayer objects to a tax assessment or appeals against it within the time allowed by law; such a tax assessment will not become final and conclusive until the issues are fairly and judiciously determined; and

(d) The *Approved Taxes Act* does not have a charging provision. Consequently, reliance cannot be placed upon the Approved Taxes Act by a State of the Federation as the basis for assessing and collecting taxes.

In the overall, where any tax assessment, audit or related documentary evidence sought to be tendered by a tax authority against a taxpayer is proven to have been issued in violation of any of the above principles as decided in ***Polaris***;

the assessment, audit or related documentary evidence will be held to be incompetent and void, and liable to be set aside by the Tribunal.

Besides the above key points, another issue raised for determination in *Polaris* was whether Abia State Board of Internal Revenue (*"ASBIR"*) or the Abia State Internal Revenue Service (*"ASIRS"*) is the juristic person, with the powers to sue and be sued in its own name. This issue had been raised in *Nigerian Breweries*, an earlier case decided by the TAT. On this point, the Tribunal followed its earlier decision as analysed below.

The *Nigerian Breweries* case

In *Nigerian Breweries*, a tax audit exercise was initiated and conducted for the years 2014 – 2015 on the business operations of Nigerian Breweries Plc (the "Company"). After the conclusion of the exercise, ASBIR issued an assessment for alleged outstanding tax liabilities; which included accrued penalties and interests for the stated period to the Company. The Company challenged the assessment on the following grounds:

(i) That the assessment did not consider statutory reliefs available to the Company, such as interest on mortgage loans, pensions, and life insurance; and

(ii) That consolidated tax reliefs were not properly computed in the assessment.

In its response, ASBIR called for further information and documents which the Company provided. After this, a revised assessment on the business operations of the Company for the period was issued. In arriving at the figure in the revised assessment, ASBIR subjected the gratuities that were paid by the Company to its retired employees to tax. The revised assessment was further challenged by the Company on the basis that gratuities are not taxable under the PITA. In spite of this objection, ASBIR refused to amend the revised assessment and issued a notice of the refusal to the Company. Aggrieved by this action, the Company lodged an appeal at the TAT seeking orders to discharge the revised assessment and declare that gratuities are exempt from tax under the PITA. ASBIR replied by challenging the competence of the appeal and asked for a strike-out order on the basis that Abia State Internal Revenue Service (*"ASIRS"*) is the juristic person with the capacity to sue and be sued under the laws of Abia State, and not ASBIR.

In determining the appeal, the Tribunal arrived at the following conclusions:

(a) The ASBIR is a juristic person, being a State Board of Internal Revenue created pursuant to section 87(1) of the PITA. Explaining further, the TAT held

that the same section 87(1) of the PITA established the State Internal Revenue Service as the operational arm of a State Board. Hence, by the doctrine of covering the field in concurrent legislative matters; section 87(1) of the PITA has already prescribed the name of a tax authority in any State of the Federation and, consequently, section 3(1) of the Abia State Board of Internal Revenue Law No. 7 of 2008 (as amended) (the "**Abia Law**") that established ASIRS is only a "surplussage";

(b) In dealing with members of the public, States in Nigeria are at liberty to choose the style to adopt in naming their tax authorities. As such, a State may either adopt the "State Board of Internal Revenue" prescribed in section 87(1) of the PITA or the "State Internal Revenue Service" which the same section of PITA established as the operational arm of the State Board. In essence, both ASBIR and ASIRS can be used interchangeably;

(c) Payment of penalty and interest accruing on an assessed tax liability should be in abeyance until the determination of the appeal within the meaning of section 68(2) of the PITA;

(d) Gratuities do not constitute part of the chargeable earnings listed in the charging section of the PITA and are therefore wholly exempt from taxes under the PITA. In arriving at this point, the provisions of section 3 of the PITA were considered vis-à-vis section 3(1)(b) of the Personal Income Tax [Amendment] Act, 2011); and

(e) Where an income is not a taxable income pursuant to the charging provision of the applicable tax statute but taxed in a schedule to the statute, the charging provisions of the tax statute will prevail. Hence, the Tribunal will hold the relevant item taxed in the schedule as statutorily exempt from tax under the applicable tax statute. Consequently, *section 18(b) of the Third Schedule to the PITA* (which subjects gratuities paid to employees in excess of ₦100,000 to tax) was held to be inferior to section 3(1)(b) of the *Personal Income Tax (Amendment) Act, 2011* which makes no mention of gratuities in the list of chargeable earnings.

Remarks

The decisions in the two cases of ***Polaris*** and ***Nigerian Breweries*** have both further developed our jurisprudence on the limits of the powers of tax authorities. The cases have also elevated the debates around the validity of the often self-

initiated tax audits and investigations conducted by the tax authorities.

Notably, the distinction made between *tax audit* and *tax investigation*, even where the tax audit is tagged as a tax investigation by tax authorities in order to circumvent the law (in cases where an alleged tax offence has become statute-barred) has now become judicially noticed. This point clearly makes a separation between the legal consequences of tax avoidance and tax evasion. In essence, unless a *prima facie* case of a tax offence which necessarily triggers a tax investigation has been established, a tax authority that has failed to conduct a tax audit within the statutorily prescribed audit period, is statute-barred from raising additional tax assessments by labelling a tax audit as a "tax investigation".

We also note that in reaching its decision in ***Nigerian Breweries***, the Tribunal applied the purposive and mischief rules of construction and interpretation of statutes and therefore considered the history of the PITA to note that gratuities, which were part of the charging provision in the original enactment (PITA, 1993) was at some point deleted by legislative amendment. On this premise, the Tribunal reached the conclusion that the deletion was done to cure the mischief of taxing compensation for loss of employment, which is ordinarily exempt from tax and therefore held that gratuities are not taxable under the PITA.

These two landmark judgements of the TAT have paved the way for purposeful interpretation of tax statutes and implementation of tax policies and administration in Nigeria. We note that except tax authorities strictly adhere to the principles enunciated in ***Polaris*** and ***Nigerian Breweries***, more taxpayers are likely to seek judicial redress against tax assessments which are computed in violation of applicable legislation, going forward. It will be interesting to see how tax authorities will react to the two decisions in the future.

The Grey Matter Concept is an initiative of the law firm, Banwo & Ighodalo.

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