TAT Upholds Statute of Limitation, Rules That Tax Authority Cannot Carry out Repetitive Tax Audits Without Credible Basis

Background

On 28 May 2021, the Tax Appeal Tribunal (TAT) South-South Zone, sitting in Benin, delivered a judgment in a matter between Ecobank Nig. Ltd ("the Bank") v Delta State Board of Internal Revenue ("the Revenue"). The matter bordered on the legality or otherwise of the Revenue carrying out tax audit or investigation on taxpayers beyond six (6) years, without establishing a case of fraud, willful default or neglect, on the part of the taxpayer.

It is important to recall that section 55 of the Personal Income Tax Act (PITA) 2011 (as amended) provides for a limitation period within which additional assessments must be raised on a taxpayer by tax authorities. The section allows tax authorities to raise additional assessments as often as necessary where they are of the opinion that, in any given year, a taxable person has not paid the correct amount of tax. However, such assessments must be raised within six years of the given year.

Section 55(2), however provides an exception to this general provision. The section allows tax authority to carry out audits and investigations beyond six years where the taxpayer has committed any form of fraud, willful default, or neglect (FWDN). The law however does not specify how the FWDN is to be proved by the tax authority.

In the past, Tax authorities have usually relied on this FWDN exception to conduct audits and investigations beyond the six-year limitation period, resulting in disagreements with taxpayers.

Details of the Case

In 2019, almost 20 years after the Delta State Board of Internal Revenue (DSBIR) wrote to different banks, including Ecobank (Bank) notifying the banks of its intention to carry out a review of the PAYE tax remittances made to the Delta State government for the 2000 – 2010 tax periods, DSBIR served Ecobank in Delta State a letter of notice to carry out a review of PAYE tax remittance.

The Bank objected to the intended investigation, and DSBIR eventually raised a Best of Judgment assessment on the Bank. The Bank appealed the additional assessments on the grounds that they were statute barred and DSBIR had not proved the existence of any of FWDN.

It is interesting to note that DSBIR had earlier, at least twice before, audited those years and raised additional assessments which the Bank settled without admitting liability.

Before and during the trial, DSBIR claimed that its decision to conduct the investigation was because of some intelligence it had, ostensibly that the Bank had committed fraud and willfully defaulted by failing to report certain allowances paid to its employees, thereby paying lower taxes.

Arguments for Consideration

The tax advisor to the Bank, PwC, on behalf of the Bank, argued as follow:

- ✓ the letter written by the DSBIR initiating the investigation was generic and did not give specific details of the FWDN allegedly committed by the Bank. Failing to provide particulars of FWDN was a denial of the Bank's right to fair hearing,
- ✓ there was insufficient evidence before the Tribunal to support the allegations made by DSBIR
- ✓ the evidence given during the trial by the DSBIR was an afterthought and inconsistent, and
- ✓ DSBIR had been caught by the doctrine of laches and acquiescence for failing to review the Bank's books until almost 20 years after

DSBIR on its part opposed that it relied on whistleblowers' information as well as information from other states in proof of its allegation against the Bank. However, it did not rely on or tender evidence of these during trial.

TAT's Decision

The Tribunal, in allowing the appeal, upheld the Bank's arguments and held as follow:

- DSBIR did not provide specific particulars of the alleged FWDN to the Bank, thereby denying the Bank of the opportunity to respond to the allegations. This was a breach of the Bank's right to fair hearing.

- DSBIR did not provide credible evidence before the Tribunal to support its claim that the Bank committed any of FWDN.
- DSBIR was indolent for not conducting its investigation until after 20 years. Equity aids the vigilant and not the indolent.
- DSBIR's testimony under cross-examination was inconsistent and unreliable.
- Per the Companies and Allied Matters Act (CAMA), companies are only obliged to keep documents for six years. Any document kept beyond this period is at the prerogative of the company.

Commentaries

✓ The decision of the Tribunal is commendable as it has provided clarity on some of the controversial points on the limitation period provision. It is now clearer that when relying on the FWDN exception in conducting audits beyond six years, the tax authority has a duty to provide specific particulars of the FWDN, such that the taxpayer can respond appropriately. Tax authorities will not be allowed to ambush taxpayers before the courts.

✓ The affirmation of the provision of CAMA on document retention, which has now been replicated in the Companies Income Tax Act by virtue of the Finance Act 2020 augurs well for taxpayers. The decision also encourages taxpayers to approach the Tribunal and other courts to challenge arbitrary assessments and object to tax audits or investigations beyond the limitation period where the tax authority has not shown that the taxpayer has committed FWDN.

✓ In line with this decision, it is recommended that tax authorities should conduct audits and raise assessments on a timely basis in line with global practices. Tax authorities should also consider adopting a risk-based audit approach due to the limited manpower available to carry out audits within the 6 years' timeline. They should therefore adopt more desk examinations for low-risk taxpayers and deploy tax audit and investigation for higher risk taxpayers.

For more enquiry, contact our tax team:

Aliu Yesufu
Partner, Tax

234 (0) 803 311 4535
aliu@nexianigeria.com

Mathew Agada
Senior Manager, Tax

234 (0) 703 7419 350
mathew@nexianigeria.com