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Pioneer Tax Holiday: Matters arising from recent developments and the doctrine of legitimate expectation

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Introduction

There have been some recent developments with the administration of Pioneer tax holiday by the Nigerian Investment Promotion Council ("NIPC"). It is no longer news that the dwindling oil revenue has forced the government to increase the pressure on the Federal Inland Revenue Service ("FIRS") to generate more revenue for the government. In response to this increased pressure, the FIRS has challenged the administration of the pioneer tax holiday by the NIPC claiming that the grant of the holiday to some taxpayers is inconsistent with the provisions of the Industrial Development (Income Tax Relief) Act ("IDITRA").

Several arguments have been advanced in the past against the grant of the tax holiday to some taxpayers. Some of these arguments include:

- Whether the NIPC (instead of the President) has the power to grant the tax holiday in the light of the provisions of IDITRA that suggest that the grant ought to be made by the President; and

- Whether the NIPC has the power to expand the list of pioneer industries contained in a schedule to IDITRA in the light of the provisions of IDITRA that expressly stipulate that only the Federal Executive Council can expand the list.

In recent times, both the FIRS and the NIPC have come up with further arguments to justify the withdrawal (or cancellation) of the tax holiday that have been granted to some taxpayers. These include:

- Whether the NIPC has the power under IDITRA to grant the tax holiday to companies engaged in petroleum operations under the provisions of the Petroleum Profits Tax Act;

- Whether the NIPC has the power to grant the tax holiday for five years at initial grant or, for an initial period of three years renewable for a period of two years or one year twice; and

- Whether, having granted the tax holiday for an initial period of 3 years, the NIPC has the power to extend the tax holiday by two years or one year twice. This argument presupposes that only the FIRS has the power to grant an extension of the tax holiday after the initial period of 3 years.

Some taxpayers have received letters from the NIPC cancelling in part, the tax holiday earlier granted to them. Assessment notices have also been issued by the FIRS relying on one or a combination of these three arguments. However, a taxpayer affected by this development can rely on the doctrine of legitimate expectation to challenge the FIRS or the NIPC.

What is legitimate expectation?

Under Nigerian law, where a public body or person acting in public authority has issued a promise or 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 scheme or promise to be honoured or kept by the public body or person acting in public authority, save where there is a basis not to insist on the settled scheme of conducting public affairs.

Legitimate expectation is a public law doctrine which establishes that if a public body has led an individual to believe that he will have a particular right or enjoy a benefit, and the individual, relying on the representation has planned his affairs accordingly, then by the principle of fairness and natural justice, the individual is said to have a legitimate expectation that can be protected.

In the context of the recent moves by the NIPC and the FIRS, a potential argument could be framed as: 'Having been promised the grant of tax holiday, I decided to undertake the business venture on the basis of this promise and formally applied for the tax holiday. I was granted the tax holiday and after the grant, the NIPC (or the FIRS) is seeking to reduce, withdraw or cancel the benefits of the tax holiday. I should have a legitimate expectation that can be protected.'

What are the limits?

The doctrine of legitimate expectation is merely an expectation of benefit, relief or remedy that flows from a promise or established practice. It does not confer an enforceable legal right. There must therefore be an existing legal right conferred on the individual by law in respect of which the statutory body has promised some accommodation on how the individual will be allowed to exercise the right. This expectation of benefit will not be available in a number of instances:

- Where the benefit promised or given is contrary to the provisions of the law. If FIRS or the NIPC can successfully argue that the grant of the tax holiday is contrary to the provisions of the law in the circumstances of a particular taxpayer, it will be difficult to sustain a claim of legitimate expectation.

- The court would not exercise its discretion on the basis of legitimate expectation in the absence of a specific rule or requirement entitling the taxpayer to rely on the representation of the NIPC/FIRS.

- Public interest factors. In determining what constitutes public interest, the courts consider: the strength of the legitimate expectation, the subject matter to which it relates and the consequences of giving effect to it. To this end, issues such as national security, for example, will prevent the enforcement of a legitimate expectation. It seems, in this context, that the threat that the actions of FIRS and the NIPC portends for investor confidence which has a significant impact on the country's economic growth is an important public interest factor in support of the claim of legitimate expectation.

- Failure to comply with condition precedents. No legitimate expectation can be founded on a grant which has been cancelled or withdrawn for failure to comply with the conditions imposed for its consideration. For example, if one of the conditions for the grant of an extension of the tax holiday was not fulfilled, a legitimate expectation claim may fail.

What should taxpayers do?

The first thing that a taxpayer who is affected by this move by the NIPC and the FIRS should do is to consider the entire facts leading to the decision of the NIPC or the FIRS and the basis of the decision of either of them.

The reasons given for the decision of the FIRS and NIPC in respect of different taxpayers are not entirely the same. It is therefore important to consider the specific reasons that have been provided in the context of the taxpayer. It is also important for the taxpayer to consider all the facts and circumstances of the grant, refusal, withdrawal or cancellation of the tax holiday.

The next step will be for the taxpayer to apply the provisions of IDITRA to the reasons given by the FIRS or NIPC and the facts. If the taxpayer reaches a conclusion that the powers exercised by the NIPC in granting the tax holiday is consistent with the provisions of the IDITRA then there should be a valid basis for a claim of legitimate expectation.

What is the way forward?

There is a need for the Nigerian government, through the relevant agencies, to ensure that there is clarity in laws that affect Nigerian companies. A situation where investors who have relied on the representations of the NIPC and the habitual acceptance by FIRS of the representations made by the NIPC now have to deal with significant liabilities that can potentially wipe out their business leaves much to be desired.

Taxpayers and investors also need to always scrutinize actions of government agencies to be sure that the actions are in strict compliance with the provisions of the relevant laws especially when they confer a benefit. Like the old saying goes, all that glitters is not gold!

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