Legal Alert – February 2011 – Tax Clearance Certificates

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The voluntary payment of direct taxes in Nigeria has over the years systematically deteriorated as has the quality of the services delivered by the various tiers of government to the citizenry. To combat the earlier mentioned malice of tax evasion, the Nigerian tax authorities introduced the issuance of Tax Clearance Certificates in the late 1970s to enable governments and other related third parties to, at a glance, and *prima facie*, confirm that the holder of the Tax Clearance Certificate has in the past three preceding years of the date of the issuance of the tax clearance certificate, paid his or her or its taxes.

In logical reverse to the statement in the above paragraph, persons that do not have a tax clearance certificate are presumed not to have paid their taxes.

Unfortunately, the non-automation of the various Inland Revenue Services all over the federation of Nigeria, coupled with bureaucratic delays and archaic tax laws, have resulted in the procedure for applying for and obtaining a Tax Clearance Certificate unnecessarily protracted which in turn has encouraged a culture of corruption which has led to a negation of the statutory objectives for issuing a Tax Clearance Certificate in the first place.

The efforts of the Inland Revenue Service to correct the negative culture of non-payment and in some instances the under-payment of taxes and also, the issuance of bogus Tax Clearance Certificates in other instances, may be negated by the lack of public information on the statutory provisions on this subject matter. This Alert is therefore intended to assist you with the basic information on this subject of Tax Clearance Certificates.

What is Tax Clearance Certificate?

Various legal writers, including Dr. Asada and Mr. Zumka Sekop have described a Tax Clearance Certificate to be a written confirmation from the revenue authorities that a tax payer's tax liabilities for the three years immediately preceding the current year of tax assessment, have been settled as at the date of the issuance of the Tax Clearance Certificate, and that no further tax is due for payment. These authors have also acknowledged that in some instances, a Tax Clearance Certificate may be issued to a tax payer who has some tax arrears due for payment but have entered into an agreement with the revenue authorities on how the tax arrears will be liquidated.

The best description on what a Tax Clearance Certificate is can be found in the statutory provision of Section 101(1) of the Companies Income Tax Act ("CITA") as amended, which provides as follows:- "Whenever the Board is of the opinion that tax assessed on profits or income of a person has been fully paid or that no tax is due on such profits or income, it shall issue a tax clearance certificate to the person within two weeks of the demand for such certificate by that person, or, if not, give reasons for the denial". Reference to the Board in this provision is the Federal Board of Inland Revenue.

A tax clearance certificate must disclose with respect to the last three preceding years of assessment, of the mentioned tax payer, the total profits or chargeable income of the tax payer, the tax payable, the tax actually paid and the tax amount outstanding for payment; and alternatively, a statement that no tax is due for payment.

Mandatory Submission of Tax Clearance Certificates

It is a mandatory statutory requirement that all departments of government and commercial banks must demand for the Tax

Clearance Certificate, for the last three preceding years, of any person with whom they intend to have any dealing in the areas of applications for government loans, contracts and other businesses, registration of motor vehicles, applications for firearms license, foreign exchange transactions or the remittance of funds outside Nigeria, applications for certificate of occupancy of land, building plans, transfer of legal title to land, applications for plot of land, export or import licenses, pools or gaming licenses, distributorship, registration of a limited liability company or a business name, allocation of market stalls, etc. See Section 101(2) & 101(4) of Companies Income Tax Act, as amended, for further elucidation.

Is a tax clearance certificate final and conclusive?

A contentious question with regard to tax assessments and tax clearance certificates is whether they are by themselves final and conclusive tax documents? Section 76 of the Companies Income Tax Act (as amended) provides that where no valid objection or appeal has been lodged within the time provided in the relevant tax law against a tax assessment, or where the total profit and the tax payable on such profit of a company has been determined after an objection or an appeal, the determined assessment shall be final and conclusive for all purposes of compliance with the tax provisions of the Companies Income Tax Act, as amended.

In the Matter of Alhaji Audu Bado v. Commissioner of Revenue (1972) (4) SC (reprint) 57, the Appellant's contention was that the assertion that the Commissioner of Revenue's assessment certificate is sufficient and conclusive evidence of the tax owed was contrary to the constitutional provision on fair hearing, and therefore null and void. The Supreme Court considered this objection and held that a Tax Assessment Certificate is sufficient and conclusive evidence of the tax amount due for payment provided that no contradictory evidence is produced by the tax payer to displace the figures in the Tax Assessment Certificate. The Supreme Court was further was of the view and so held that the tax payer's Constitutional right to challenge the Assessment Certificate by calling contrary evidence is in compliance with the tax payer's constitutional right to fair hearing and this right was not infringed in this instance particularly as the Appellant was served with the notices of assessments, and the Appellant never raised any objection nor provided any contrary evidence challenging the assessments. The Assessment Certificate was therefore upheld to be valid for payment by the tax payer.

In another matter, Federal Board of Internal Revenue v. Owena MOTELS Limited, 2 TLRN March 2010, the Federal High Court sitting in Akure held that on the service of the notices of assessments on the Defendant, for the period of 1993-1998, without any objection by the defendant, it meant that the sums thereon stated became conclusive, final and due for payment thirty (30) days after the service of each notice of assessment on the Defendant. Judgment was accordingly entered in favour of the Federal Inland Revenue Service based on the preponderance of evidence before this Court.

There is however no specific Section or provision in the Companies Income Tax Act, as amended, or in any tax circular which makes the issuance of a Tax Clearance Certificate final and conclusive evidence of the tax paid or payable for the stated period. The professional view in this regard is that many Tax Clearance Certificates are generally issued based on the tax returns which are filed under the self-assessment procedure. However, should the tax authority detect any under-payment of tax or fraud in the payment or non-payment of tax, the various tax legislations allow the Inland Revenue Service to undertake a tax audit and or issue further tax assessments based on the audited accounts filed with the self assessment forms, or apply the best of judgment principle or other methods allowed under the tax laws to raise further tax assessment.

Therefore, the amount of tax paid and indicated as such in a Tax Clearance Certificate will be final and conclusive where it has been adjudicated upon and or finally determined by a judicial authority.

Conclusion

The non-alignment of the existing and sometime archaic tax legislations in Nigeria to address the present day realities of doing business and living in Nigeria in the twenty-first century will continue to promote tax evasion if these legislations are not, as a matter of urgent national economic emergency, amended.

Also, Nigeria remains one of the most expensive places to do business in the world as a result of poor governance, poor systems and poor infrastructures; e.g. poor power supply, multiple taxation, high cost of funds, poor transportation network, insufficient twenty-first century compliant human capital resources, poor water supply, etc. In addition to these defects are the issues of poor public and private governance, and a high level of public and private corruption which further encourage tax evasion. It is expected that improvements in public governance and corruption will align the entire economy including promoting tax compliance and economic growth in the nearest future.

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