International Journal of Law, Policy and Social Review
www.lawjournals.net
Online ISSN: 2664-6838, Print ISSN: 2664-682X
Received: 03-08-2021, Accepted: 19-08-2021, Published: 04-09-2021
Volume 3, Issue 3, 2021, Page No. 44-48

Legislative imprudence and the difficulty in determining when a personal income taxpayer's assessment is considered "final and conclusive" in Nigeria

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Abstract
No one enjoys paying tax–but the law compels people to fulfil this obligation in the higher interests of the public. In a constitutional democracy, such as Nigeria, no tax is imposed without a legislative support. It is the law that authorises the imposition and collection of taxes. It also defines the rights and liabilities of taxpayers and tax authorities. Therefore, clarity and avoidance of ambiguity in the law are essential elements of a good tax legislation. It is argued in this paper that legislative imprudence in the 2011 amendment of the Personal Income Tax Act ("PITA"), has complicated the legal determination of the term "final and conclusive" and its attendant contextual implications. This error must be fixed by another round of amendment to the principal legislation or through proactive judicial interpretation – at the risk of judges being accused of engaging in judicial legislation. The term "final and conclusive" is an important one in personal income tax administration and enforcement in Nigeria. The statutory definition of this term, which was part of the pre-2011 PITA, was omitted from the current law – with no equivalent replacement of it. This removal has created a lacuna in the law. As a result, the operational ambit of this term has been misconstrued to the extent that most taxpayers and lawyers think that the relevant time for calculation of penalties and interests associated with unpaid taxes could be shifted beyond the statutory due date – provided the administrative or judicial challenge processes are still open.

Keywords: tax, revenue, Nigeria, assessment, final and conclusive, legislative, taxpayer

Introduction

It is a general understanding amongst tax practitioners in Nigeria that no tax is imposed or collected in the country without a validly made law supporting the imposition and collection of it thereof [1] Therefore, compliance with tax laws is compulsory. In a society where tax laws are effectively enforced, no one evades tax (es) without some forms of penalties visited on him/her. Filing of tax return is a yearly ritual in most countries. In Nigeria, the PITA demands that every taxpayer files his or her income tax return – without notice or demand for same – in the prescribed form [2] within ninety (90) days from the commencement of each assessment year, *ie* on or before 31st March of every year [3] For Nigerian residents, the law requires they report all income earned from anywhere in the world to the tax authority responsible for their respective States or place of residence [4]. Non-residents are, only, required to report income derived from Nigeria to the Federal Inland Revenue Service [5]. If a taxpayer fails to report his or her income or under-reports it, the relevant tax authority is authorised by law to ensure that such taxpayer performs his/her fiscal responsibilities; and also suffers the pain of paying the accrued interests, charges and penalties for failure to comply timeously. S/he may also endure the execution of a warrant of distress against his or her assets once his or her personal income assessment is deemed "final and conclusive". In practice, once a tax authority notices a default on the part of a taxpayer, it generally sends out a demand note – mostly based on best of judgment rule ("BOJ") signifying that the assessed amount (as reflected in a notice of assessment and the demand note) [6] represents what the tax authority assumes the taxpayer has earned within the relevant basis period(s) [7].

This paper is divided into six parts. The first or preceding part introduces the paper. Part 2 sets the stage by briefly discussing the relevance of the term "final and conclusive" in the administration of personal income tax in Nigeria. Following this, is part 3 which examines the meaning of the term 'final and conclusive'. It demonstrates that the amendment of the PITA in 2011 resulted in the deletion of the sections that defined or explained what the term 'final and conclusive' stood for in Nigeria's tax jurisprudence. It shows that this has resulted in some form of hardship for taxpayers and tax authorities. Further, this part demonstrates that despite the deletion of the definition sections of the term 'final and conclusive' in the 2011 amendment of PITA, the remaining parts of the Act (as amended) have consistently used the term – showing that it is still relevant in tax administration in the country. Part 4 takes over to discuss the difficulties foisted on tax administration by the deletion of the pre-2011 PITA sections that defined the term 'final and conclusive'. Even without the deletion of the definition sections of the pre-2011 PITA, the practical implication resulting from a strict construction of the term suggests that it is not administration-friendly because of its oscillating nature resulting from opposing steps timeously taken by a taxpayer against decisions of tax authorities. Therefore, there must be a clear understanding of when interests and penalties arise regardless of oppositions to assessments or re-assessment – provided liability is established to give rise to cause of action. Part 5 discusses the

way out – that is, what could be done to fix the existing gap. In particular, this part argues that there is the need for the legislature to amend the principal legislation by returning the definition of the term with more clarity. Finally, Part 6 concludes the paper.

The relevance of the term "final and conclusive" in personal income tax administration

If the assessment of a taxpayer's obligation to pay income tax becomes "final and conclusive", it confers certain enforcement rights on the appropriate tax authority to collect the unreported, under-reported income and/or unremitted tax. For instance, the tax authority could invoke the section 104 PITA proceeding against the taxpayer. This proceeding allows a tax authority to apply for a warrant of distress via *ex-parte* motion – which means a defaulting taxpayer will not be heard when the motion is moved - to distrain his or her assets in satisfaction of the tax (es) owed, accrued interests, the costs of holding the assets and other incidental charges. The point to note here is that the warrant of distress cannot be granted except the assessment of the taxpayer has become "final and conclusive" and both notice of assessment and demand note duly served on him or her [8]. There is a prevailing misconception – perhaps caused by the use of the term "final and conclusive" – that interests and penalties due on tax debts only start to run from the time the obligation to pay the principal tax sum crystallizes (i.e. the time when assessment for payable tax has become "final and conclusive"). Even tax authorities appear to hold this view too. It is argued that the relevant time for the calculation of both interests and penalties should start to run at the expiration of 31st of March the year following the basis period in question.

From the above, it is evident that the term "final and conclusive" is a relevant phrase and clarity in relation to same is necessary for effective administration and enforcement of personal income tax in Nigeria. In practice, the phrase provides guidance to a tax authority in determining when it may legitimately raise its harmer against a defaulting taxpayer. It also assists a taxpayer know when to pay his or her taxes due to avoid penalties and interests or escape the pains of having his or her assets distrained. Given that the applicable period for determining when a taxpayer's assessment becomes "final and conclusive" may oscillate like a pendulum before it crystallizes, the phrase provides a helpful platform to a taxpayer in reacting timeously to correspondences emanating from relevant tax authorities – such as: notice of assessment, demand notice and/or notice of refusal to amend.

At what point does a personal income tax assessment become 'final and conclusive'?

The issue here is to determine the point at which the assessment or obligation of a taxpayer to pay his or her personal income tax in Nigeria becomes final and conclusive [9]. Is it immediately after a tax return is filed by a taxpayer? Or, when such return is accepted by the relevant tax authority without amendment or objection? What about when a notice of assessment is issued by a tax authority and the said notice of assessment is followed with or without objection from the assessed taxpayer? Or, could it be said to be final and conclusive when a notice of refusal to amend has been sent to the taxpayer? Or, when the court or tax appeal tribunal determines a dispute arising therefrom? These questions show that it is not quite easy to point at what stage the personal income tax assessment or the obligation to pay personal income tax becomes "final and conclusive" – especially in view of the glaring lacuna occasioned by 2011 amendment to the PITA.

The difficulty identified above notwithstanding, the search to determine the finality and conclusiveness of a taxpayer's assessment or obligation will be helpful if we consider the processes and/or steps expected of a taxpayer to take in the process of fulfilling his or her tax obligation to the State. First, it is expected of every taxpayer to conduct a self-assessment of his or her total earnings by calculating the amount of tax payable in the form prescribed by the relevant tax authority [10]. Upon the expiration of the period [11] allowed for self-assessment, the relevant tax authority can proceed to evaluate/assess the return filed; or where no return is filed, the tax authority can apply the best of judgment rule ("BOJ") to raise an assessment for the taxpayer concerned [12]. After the initial assessment, a relevant tax authority can conduct additional assessment on the earnings of a taxpayer if the authority discovers, or in its opinion is convinced, that the initial assessment did not accurately capture the true earnings of the taxpayer. However, such additional assessment must be raised within the year the taxpayer is assessed or six year thereafter: provided there is no fraud, willful default or neglect committed by or on behalf of the taxpayer [13].

From the above, it is necessary to determine the point at which assessment may be said to be 'final and conclusive'. Unfortunately, the present *Personal Income Tax Act, 2011* does not contain any provision stipulating or clarifying when the assessment may be considered "final and conclusive". Prior to the amendment, section 66 of the *Personal Income Tax Act, 1993* was helpful in determining when an assessment of a taxpayer could be declared 'final and conclusive'. This section was deleted during the 2011 amendment of the PITA [14]. The deletion created a lacuna, given that there is no re-enactment or replacement of the deleted section in the remaining parts of the PITA.

Generally, a deleted/repealed portion of a legislation is no longer part of the law and cannot be invoked to settle any issue arising from the law [15]. But whilst the deletion of a statutory provision absolutely robs such provision of legal effect, it may be necessary for our purpose and in the interest of analytical clarity to examine the deleted section so as to give us a glimpse of what the law was and, perhaps, should be. Thus, section 66(1) of the *Personal Income Tax Act, 1993* provides that assessment is 'final and conclusive':

Where no valid objection or appeal has been lodged within the time limited by section 58 or 61 of this Act or where- due notice has not been given of a further appeal against a decision of the Appeal Commissioners or a Judge, as the case may be, an assessment as made, or agreed to under the provisions of subsection (3) of section 58 of this Act determined under the proviso to that subsection or on appeal, as the case may be, shall be final and conclusive for all purpose of the Act as regards the amounts of the assessable, total or chargeable income and the tax charged thereby.

Section 58 mentioned above is still part of the PITA. It allows a taxpayer to file a notice of objection in writing against a notice of assessment served him or her. The notice of objection must be filed within thirty (30) days from the date the taxpayer is served the notice of assessment. This provision, essentially, gives room for the possibility of an agreement between a taxpayer and the relevant tax authority. But where such agreement has not been reached, the relevant tax authority will issue a notice of refusal to

amend the assessment earlier made. The authority may also revise the assessment earlier made according to the best of its judgment. Section 61 mentioned above was deleted alongside section 66, which provided that an aggrieved taxpayer could appeal against a decision of a relevant tax authority by giving notice thereof within thirty (30) days from the time he or she was served a notice of refusal to amend by the relevant tax authority.

From the provision of section 66 of PITA, a notice of objection or appeal must be filed within the time-limit set by law; [16]. Otherwise the notice of assessment or notice of refusal to amend served the taxpayer becomes final and conclusive [17]. Again, if the matter had come before a judge or the Body of Appeal Commissioners, now replaced by the Tax Appeal Tribunal (TAT) [18], an aggrieved party has thirty (30) days from the day a judgment is rendered by the tribunal or judge to file and serve a valid notice of appeal. If an aggrieved taxpayer fails to appeal a decision within this prescribed period, his or her obligation to pay tax will be considered final and conclusive.

It follows from the above that once an aggrieved party files a notice of appeal within the 30 days after judgment is given, the finality and conclusiveness of the obligation to pay the assessed amount is put in abeyance. This is a reasonable deduction from the analysis of section 66 of PITA. From provisions of section 66 of PITA, the finality and conclusiveness of an assessment depends on the reaction of a taxpayer to a notice of assessment, notice of refusal to amend and a judgment of tax appeal tribunal or a judge of competent jurisdiction. This suggests that the term "final and conclusive" in tax assessment and determination of a taxpayer's failure to fulfil his or her fiscal obligation is always in a constant shift: provided a taxpayer reacts timeously at every notices and decisions of a relevant tax authority and appellate bodies.

With a hindsight, it may be argued that the legislature might have considered the endless shift or fluctuating nature of the term "final and conclusive" and decided to do away with it by deleting sections 61 to 67 of PITA. The negative aspect of the fluctuation or shift is that it is capable of giving taxpayers a misleading hope that they may continue to delay the payment of their tax debts and perhaps escape the payment of interest and penalties. This wrong impression consequently encourages endless contests and appeals against tax authorities' assessments and decisions of relevant appellate bodies. There is no formal documentation – to the knowledge of this author – evincing the considerations surrounding the deletion of sections 61 to 67 of the PITA. Whatever the underlying reason(s) may be, it appears that in omitting these sections, the National Assembly was wanting in the optimal discharge of its legislative functions. It inadvertently created more problems by leaving out certain provisions of the Act that still contain the term "final and conclusive" with far reaching consequences. For instance, the term still appears in sections 83(4), & 104(1) of PITA and Paragraph 27(6) of the Fifth Schedule to PITA. Indeed, the repeated mention of the term suggests that it is still relevant in personal income tax administration in Nigeria.

The difficulty of locating the situs of the term "final and conclusive" under the current regime

Already we have seen that the very portions that define the term have been deleted or removed by the National Assembly; while other relevant provisions of PITA containing the term are left untouched. This means that the term is still relevant in personal income tax administration. How then will tax authorities and the court determine when an assessment of a taxpayer becomes "final and conclusive" under the present arrangement? Existing judicial decisions of the court, where the term was determined relied heavily on the deleted portions of the Act. [19] Following the common law principle of judicial precedents – *stare decisis* – which we practice in Nigeria, it is difficult to rely on a case that was based on a particular statutory foundation, which no longer exist, to determine current rights and liabilities founded on different legislative foundation. Put differently, a court will not rely on a case materially different from another to give that other the same interpretation it gave to the previous one – this is the practice of distinguishing a case from another. Now that sections 61 to 67 of the PITA is no longer the law, it is doubtful that the court will legitimately rely on its earlier definitions based on the old law.

This obviously has created a lacuna in the law. One option open to the court is to fill the gap through judicial interpretation by resorting to several legal techniques – including relying on similar provisions in other tax statutes [20]. But this practice may definitely attract criticisms against the bench for engaging in judicial legislation – especially when it is evident the legislature removed the relevant part(s) for whatever reason best known to it. The traditional role of the judiciary is to interpret the law the way it is without trespassing into the field of legislative business constitutionally reserved for the legislature.

The way out

It is shown above that two major problems exist. First, the lacuna. Secondly, even if the law is left the way it was, *ie* prior to the 2011 amendment, it is not clear when an assessment will be considered "final and conclusive" considering the continuous shift occasioned by timely protest and appeals against decisions of the relevant tax authority and administrative or judicial bodies' decisions. There is the need to draw a clear line. This can only be achieved through legislative enactment. Restoring the old position can only give an idea of where the pendulum swings. It does not help in permanently locating the situs of the term. The difficulty in reverting back to the old position is the possibility of giving wrong hope to taxpayers. There is need to strengthen personal income tax law enforcement in Nigeria. And one way of doing this is by amending the PITA to indicate in clear and unambiguous term that an assessment becomes final and conclusive and, therefore, crystallizes, when there is a timely contest and the moment TAT decides on the liability or otherwise of a taxpayer. The amendment should also state that this term does not affect the calculation of interests and penalties on tax debt. Rather, it should provide that the time for calculation of interests and penalties on unpaid tax due starts from 31st March following the assessed basis period. The only legal implication will be that section 104-proceeeding can only be invoked (at least via motion on notice) after TAT had decided. This will prevent the practice of some State authorities rushing to a State High Court to obtain an order of warrant of distress while there is a pending matter before the TAT. TAT has been confirmed by the Court of Appeal in *Federal Inland Revenue Service v. TSKJ Construcoes Internacional Sociadade Unipersoal Ida* (2017) LPELR-42868(CA) and *Cnooc Exploration and Production Nigeria Limited & Anor v. Nigerian National Petroleum*

Corporation & Anor (2017) LPELR-43800(CA) to be a mere administrative tribunal – which is part of the administrative processes of settling tax dispute. However, a successful appeal before the TAT or any other appellate body may reduce interests and penalties to the extent of the tax debt determined to be owed by a taxpayer.

In United States, for instance, payment of Federal Income Tax becomes due on 15th day of the third month following the close of the tax year – this date is equivalent to our 31st March following the close of the tax year in question. The Canadian deadline for filing individual income tax return for a particular year is 30th April of the following year. In certain circumstances, an extension of time to file late return could be granted by these tax authorities. Such extension may or may not waive the calculation of penalties from the original deadlines. This is expected to apply in Nigeria. Taxpayers are expected to pay the taxes they owe – even if they contest any overcharge. If the outcome of appeal processes is in favor a taxpayer, s/he will have nothing to pay back to the relevant authorities. If there is an overpayment, the relevant tax authority will refund the taxpayer. The same practice is traditionally expected of our personal income tax regime in Nigeria. The deadline as earlier noted is 31st March of every year. This means that if there is an unpaid tax and a taxpayer fails to file his or her personal income tax return on 31st of March following the basis period in question, penalty will kick in from this date. Interests are generally compounded on any unpaid amount a taxpayer owes.

The general impression in Nigeria, especially amongst lawyers, is that as long as the "final and conclusive" string swings, a taxpayer can hold off his or her payment without repercussion. Notwithstanding the apparent legislative error, this does not seem to be the right interpretation of the term. It is suggested that the deleted provisions of the PITA should be reinstated and, in addition, it should be clearly stated that the term "final and conclusive" is merely for tax dispute resolution purposes and does not affect payment of penalties and interest except in cases where there is an overcharge and such is overturned upon appeal.

Conclusion

It is argued in this paper that the legislative amendment made to the PITA in 2011 was not well thought out or, rather, carried out carelessly by deleting the sections of the Act that defined the all-important term of 'final and conclusive'. With the deletion, the interpretation of the rights and liabilities of a taxpayer may not be easily construed without extrinsic assistance outside the provisions of the PITA or proactive steps taken by judges who, unfortunately, may be accused of dabbling into the field of law-making.

It is suggested that this legislative error could be made by amending the principal legislation to restore the definition sections with better clarity to avoid the oscillating nature of a taxpayer's rights and liabilities, which continues to swing as long as s/he (taxpayer) opposes the decision(s) of tax authorities timeously.

References

1. Peace Mass Transit Limited v. Federal Capital Territory & Ors LPELR-23740(CA), 2014.
2. FIRS Form A.
3. Section 41 of PITA.
4. Sections 2(2) and 3 of PITA. See also Part 2 of the Schedule to the *Taxes and Levies (Approved List for Collection) Act* (TAL Act) With the enactment of the *Federal Capital Territory Internal Revenue Service Act* (FCT-IRS Act), Part 1 of the TAL Act has been amended to the extent that personal income taxes payable by residents of the FCT are now collected by the Federal Capital Territory Internal Revenue Service (FCT-IRS). See section 8 FCT-IRS Act.
5. Section 2(b) of PITA and Item 3 Part 1 of the Schedule to the TAL Act.
6. Note of assessment and demand note are two different things. The former assesses a taxpayer stipulating the amount owed; while the later commands a taxpayer to pay the assessed amount on or before a particular date. See Access Bank Plc v. Edo State Board of Internal Revenue (2018) LPELR-4456 (CA)
7. Section 54(3) of PITA.
8. Section 104(1) of PITA. The Court of Appeal in Access Bank Plc v. Edo State Board of Internal Revenue (2018) LPELR-4456 (CA) held that the grant of warrant of distress via *ex parte* application violates the principle of fair hearing enshrined in section 36 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). The court favours application for warrant of distress through motion of notice, which allows both parties to present their respective sides of the case.
9. In practice it appears that the moment the term "final and conclusive" crystallizes, then the obligation to pay personal income tax debt kicks in. In our view, the term obligation to pay tax kicks in the moment a taxpayer earns income. This obligation does not terminate until discharged.
10. Sections 41 and 44 of PITA
11. The PITA commands that a taxpayer must file his or her returns within 90 days from the commencement of every year of assessment to a relevant tax authority. See section 41(3) of PITA. To encourage honest filing of returns within this period, section 45 of PITA grants 1% of the tax payable to a taxpayer; provided s/he does not default in any payment arrangement s/he might have had with the relevant tax authority concerned.
12. See, section 54 of PITA. It must be noted that a relevant tax authority can decide to assess a taxpayer without waiting for the period allowed a taxpayer to file his returns to expire: section 54(4) of PITA. Also, the defaulting taxpayer could be prosecuted for tax evasion: section 47 of the *Federal Inland Revenue Service (Establishment) Act, 2007* ("FIRS Act").
13. See, section 55 of PITA. There is no limit to the number of times an additional assessment can be conducted on a taxpayer.
14. In fact, sections 61 to 67 of the *Personal Income Tax Act*, 1993 were all deleted.
15. See *Corporate Affairs Commission vs. Seven-up Bottling Company* (2017) 5 NWLR (Pt. 1558) 241 at 275, paragraphs

A – E, where the Court of Appeal held that: It is trite that where there is an amendment to the law, the later prevails. The legal consequences of the repeal of an enactment is that it ceases to exist from the date the repealing enactment comes into force. … It therefore cannot be the legal basis for anything done after it had been repealed. It was therefore wrong for counsel to argue on the basis of the laws that have been revised. For the same principle of law, see the following cases: *Ogbuehi Sylvester & 2 ors. Vs. Theophilus Ohiakwu & 2 ors.* (2014) 5 NWLR (Pt. 1401) 467 at 507; *Mantec Water Treatment Nig. Ltd vs. Petroleum (Special) Trust Fund* (2007) 15 NWLR (Pt. 1058) 451; *Oladoye & Ors. vs. The Mil. Administrator, Osun State & Ors* (1996) 10 NWLR (Pt. 476) 38; *Olufunsho & Ors. vs. Global Soap & Detergent Industries Ltd.* (2012) LPELR 9822 (CA).

16. From the provisions of the law, taxpayers are generally allowed 30-day period within which to file a notice of objection or notice of appeal starting from the time the decision rendered is served on him or her.
17. Once a notice of assessment becomes final and conclusive, it means that the obligation to pay tax, at that point, has becomes final and conclusive. The obligation to pay also becomes final and conclusive when the aggrieved party and the relevant tax authority agree on a particular amount after the taxpayer had lodged in his or her complaint against notice of assessment sent to him or her.
18. See section 59 of the Federal Inland Revenue Service (Establishment) Act and section 60 of PITA.
19. Lagos State Board of Internal Revenue vs. Shell Petroleum Development Company of Nigeria Limited (2011) 5 TLRN 60 at 75 - 76;
20. See Theodak Nigeria Limited vs. FIRS (FHC/ABJ/CS/17/2017) where the Federal High Court interpreted the phrase under the Companies Income Tax Act. See also the TAT's decision in Lagos State Internal Revenue Service vs. Star Deep Water Petroleum Limited (TAT/LZ/022/2012).