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The Province of (Substantive) Legitimate Expectation in Nigeria's Tax Administration: A Law and Policy Evaluation

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THE PROVINCE OF (SUBSTANTIVE) LEGITIMATE EXPECTATION IN NIGERIA'S TAX ADMINISTRATION: A LAW AND POLICY EVALUATION

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To Dr. Stella Ameyo Adadevoh and the many healthcare heroes around the world.

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ABSTRACT

The interplay between tax administration and legitimate expectation has been the subject of debate and scholarship in many jurisdictions. Questions around how much discretion tax authorities should be allowed and whether courts should uphold the (substantive) legitimate expectations of taxpayers – by implication, bind the tax authority – when the tax authority reverses itself on a guidance, promise, position, etc. feature prominently in this conundrum. In Nigeria, the disposition of both the tax authority and the court appears to lean towards outright dismissal of legitimate expectation. Put differently, it seems that the tax authority does not consider itself bound by its previous position, perhaps, irrespective of the implications for the taxpayer. The court likewise does not deem the tax authority bound, especially when that previous position appears to contradict the relevant statute, hence no legitimate expectation. This thesis puts these assertions to the test, in order to bring out better clarity on the subject. I argue that, as far as Nigeria is concerned, there are both legal and policy bases for upholding or enforcing tax-based legitimate expectation. Relying on Nigerian and English authorities, I discuss the possibilities of streamlining the enforcement of tax-based legitimate expectation in Nigeria. I also discuss the various factors that militate against the application of the doctrine. From a policy perspective, I argue that the tax authority respecting/upholding its commitments to taxpayers, in appropriate cases, could be more consistent with some important aspects of Nigeria's National Tax Policy – such as fairness, neutrality, certainty and administrability – and, perhaps, enhance the overall value base of Nigeria's tax system.

LIST OF ABBREVIATIONS USED

AG – Attorney-General

AGF – Attorney-General of the Federation

CbCR – Country-by-Country Reporting

CIT – Companies Income Tax

CITA – Companies Income Tax Act

CJN – Chief Justice of Nigeria

FBIR – Federal Board of Inland Revenue

FHC – Federal High Court

FIRS – Federal Inland Revenue Service

FMF – Federal Ministry of Finance

JCA – Justice of the Court of Appeal

JSC – Justice of the Supreme Court

KB – King's Bench

LFN – Laws of the Federation of Nigeria

LPELR – LawPavilion Electronic Law Reports

MAP – Mutual Agreement Procedure

MR – Master of the Rolls

NJR – Nigerian Juridical Review

NWLR – Nigerian Weekly Law Report

NSCC – Nigerian Supreme Court Cases

PPTA – Petroleum Profits Tax Act

SIRS – State Internal Revenue Service

TAT – Tax Appeal Tribunal

TLRN – Tax Law Reports of Nigeria

TPR – Transfer Pricing Regulations

UK – United Kingdom

UKSC – United Kingdom Supreme Court

US – United States (of America)

VAIDS – Voluntary Assets and Income Declaration Scheme

VAT – Value Added Tax

VOARS – Voluntary Overseas Assets and Revenue Scheme

WLR – Weekly Law Reports

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Chapter 1: Introduction

"*Things as certain as death and taxes, can be more firmly believ'd*."[1]

1.1 Background

This thesis examines the question whether there are legal and policy bases or justifications for the protection of tax-based legitimate expectations in Nigeria. In other words, the thesis examines the feasibility of applying the common law principle of legitimate expectation to the exercise of tax authority discretion in Nigeria. For some time, this issue has occupied the discussion space in many common law jurisdictions but not so much in Nigeria. However, this research reveals that the factors that make legitimate expectation important elsewhere also apply to Nigeria. Nigeria is Africa's largest economy, host to many local/foreign businesses/investors and home to an increasingly robust body of tax laws, with diverse and complex obligations. Nigerian taxpayers rely significantly on the tax authority for guidance on the implementation of the country's tax laws. Taxpayers encounter significant discomfort when they find that the tax authority is not reliable in providing guidance to taxpayers, and in some cases seek the assistance of the court to ensure that the tax authority acts "fairly." I invest the pages of this paper exploring whether the doctrine of legitimate expectation – a judicial remedy – fits the purpose of assuaging the strain of taxpayer discomfort discussed here. I also look at how the tax authority's approach to tax-based legitimate expectation interacts with Nigeria's tax policies considerations. I have identified five sub-questions to guide the discussion. First, I analyze whether Nigerian jurisprudence recognizes the doctrine of legitimate expectation as a remedy in tax cases. This clarification is necessary because the perception in Nigeria seems to be that Nigerian courts have no interest in accepting the doctrine as a protective remedy to taxpayers. Second, I venture into the normative and controversial debate

[1] Daniel Defoe, *The Political History of the Devil*, 1726.

on whether there *should* be judicial protection of tax-based legitimate expectation. My brief here is to examine the usual arguments about the appropriateness of legitimate expectation. The usual criticisms are that legitimate expectation undermines the public interest (because it risks reducing the tax base), fetters administrative discretion, contravenes the rule of law or statutory limitation and tramples on the cardinal principle of separation of powers. In a state like Nigeria, for instance, where the rule of law and the doctrine of separation of powers are engrained in the constitutional order, these considerations are sacrosanct. Would the court be unduly crossing the boundary by granting relief to a person or taxpayer who seeks protection?[2] Should the court fold its arms where there are no remedies?

Third, I examine closely the ingredients that the court should consider in determining whether a legitimate expectation has arisen and whether legitimate expectation ought to be protected in the particular case. The ingredients that courts typically look at are: (1) prior disclosure by the claimant; (2) a clear and unqualified representation; (3) communication to the claimant (or "class"); and (4) detrimental reliance.[3]

Fourth, I examine what some scholars regard as the "underlying principle" of legitimate expectation. Traditionally, the courts look at fairness, the prevention of abuse of power and good administration as the values driving the protection of legitimate expectation. However, over the years, scholarly examinations have adjudged these principles to be inadequate and urged the court to look elsewhere; the need to foster trust in public institutions, for instance. Here, I examine a

[2] A counterargument is that the rule of law also requires administrative bodies, such as the revenue, to not abuse their power, and when they do so, remedies like legitimate expectation ought to be invoked by the court as a facet of its mandate to do justice and uphold the rule of law.
[3] See Michael Fordham, "Legitimate Expectation II: Comparison and Prediction," (2001) 6:4 Judicial Rev 262.

variety of views to ascertain whether a particular principle is most apt, or still, whether legitimate expectation should be guided by a combination of underlying principles.

Finally, I explore the administrative perspective. I examine whether, given the important role of tax in revenue mobilization and economic management, there are policy implications that the revenue should consider in deciding whether to honour a legitimate expectation arising from its interaction with taxpayers. I explore a few reforms that may impact this aspect of tax policy and tax administration in Nigeria.

The above points are, of course, discussed in the context of tax administration and the important role that revenue discretion plays in administering tax laws.[4] Given the usual complexity of tax legislation, it is a common practice in many jurisdictions for taxpayers to rely on guidance provided, in various ways, by tax authorities to ascertain their tax positions. Incidentally, in Nigeria, reliance on guidance to determine one's tax status comes at a risk; because a taxpayer is never sure whether the tax authority, mainly the Federal Inland Revenue Service (FIRS), will abide by the guidance or assurance that it has exercised its discretion to give. The current policy seems to be that the FIRS does not consider itself obligated to abide by guidance provided to taxpayers. In any case no hard law compels the FIRS to do so. This may, at least in theory, pose problems for taxpayers who rely on such guidance to make business decisions or otherwise arrange their affairs.[5] The administrative flip-flopping is, perhaps, more concerning when you also consider that Nigeria

[4] It is important that I note at this stage that in the context of this thesis, I use the term "discretion" inclusively to refer to other terms such as promise, concession, guidance, ruling, representation. I use these terms to represent any advice, information, guideline, position statement, etc. issued or expressed by the tax authority to a taxpayer(s) either to enable their understanding of and compliance with tax law or to convey how the tax authority would treat any matter of fact or law in relation to the tax obligations of the taxpayer. I also use the terms "tax authority" and "the revenue" interchangeably to refer to the government authority that administers tax law.

[5] See Victor Onyenkpa & Abisoye Ayoola "FIRS and the Principle of Legitimate Expectation" (2014), online: http://www.blog.kpmgafrica.com/nigerias-firs-principle-expectation/.

operates a self-assessment tax system that requires a taxpayer to ascertain their own tax liability, in accordance with the provisions of the law; complexity or vagueness notwithstanding. What then is the fate of a taxpayer whose interest stands to be undermined by an abrupt resilement from a guidance or assurance given by the tax authority? Under Nigeria's court system, a person can, generally, seek judicial review of a decision or action of an administrative body if such decision or action is deemed to unfairly prejudice that person. Legitimate expectation is one of the remedies improvised by the courts to deal with such situations. However, as I have observed, its place in Nigeria's jurisprudence, especially as regards revenue matters, seems to be shallow-rooted. The pronouncement of Saidu J of the Federal High Court in *Saipem Contracting Nigeria Limited v FIRS* seems to capture the subsisting judicial attitude:

> It is not the issue of resiling of earlier statement [sic] that is important now. What is important are the various provisions of law guiding payment of tax in Nigeria.[6]

The attendant concern is whether the short shrift given to administrative guidance by the courts gives the revenue the carte blanche (subject to limits of legality) to waver as it deems fit in dealing with taxpayers. Put another way, it seems that the tax authority may dishonor its promises, provided it does not appear to contravene the express provisions of the relevant statute. This disposition may compound the uncertainty and further erode the confidence of the taxpayer in tax system. It is these ideas that I reflect on in this thesis. As the thesis title suggests, the themes of this thesis draw from law and policy perspectives.

1.2 Summary of Chapters

This thesis is divided into six chapters. Chapter 1 deals with introductory matters, sets out the research agenda and summarizes the methodological approach to research. Chapter 2 offers an

[6] (2014) 15 TLRN 76.

overview of discretion in Nigeria's tax administration. Chapter 3 discusses the concept of legitimate expectation. Chapter examines how Nigerian courts have adjudicated cases of legitimate expectations. Chapter 5 explores the principles underlying legitimate expectations. Chapter 6 examines tax policy issues surrounding the (non)observance of legitimate expectation by the tax authority. Chapter 7 summarizes the discussion and makes some suggestions on the way forward from multiple perspectives, mainly administrative and legislative.

1.3 Methodology

I deploy a variety of methodologies and theoretical approaches in this research, starting, naturally, with doctrinal research. Doctrinal research is concerned with the formulation of legal 'doctrines' through the analysis of legal rules.[7] The essential features of doctrinal scholarship involve a critical conceptual analysis of legislation and case law to reveal a statement of the law relevant to the matter under investigation.[8] In order to effectively explore the subject-matter of this thesis, I must make various conceptual examinations and clarifications. Thus, I use doctrinal analysis, for instance, to provide clarity on the concept of "discretion," its various manifestations and significance in tax administration; to explain legitimate expectation, as a concept, its judicial evolution, theoretical bases, ingredients, application (in administrative law generally and in tax matters specifically) and limitations. I discuss the concept of tax policy and its intersection with legitimate expectation. I analyze the relevant judicial decisions, as well as important official documents such as tax statutes and Nigeria's National Tax Policy,[9] which is central to the policy issues in this thesis. I analyze the works of authors who have attempted to shape the way legitimate

[7] Paul Chynoweth, "Legal Research", in A Knight & L Ruddock, eds, *Advanced Research Methods in the Built Environment* (Oxford, UK: Wiley-Blackwell, 2008) 28 at 29.
[8] Terry Hutchinson, "The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law", (2015) 8:3 Erasmus L Rev 130 at 130.
[9] See Nigeria, Federal Ministry of Finance, *National Tax Policy*, (Abuja, Nigeria: FMF, 1 February 2017).

expectation is deployed in tax and other matters.[10] The analysis shows significant divergence in opinions on these issues, not only in terms of what legitimate expectation means and how it should be deployed but in terms of the underlying basis for its deployment. It is observed that the opinions tend to be shaped by the theoretical dispositions of the writers.

In order to explain why courts *should* protect legitimate expectation, proponents lean on theories that include fairness,[11] trust,[12] social confidence,[13] good administration,[14] legal certainty,[15] and the rule of law.[16] Also, utilitarian arguments on the protection of legitimate expectation focus on the gains of protection vis-à-vis the ills of non-protection.[17] Similarly, but from an administrative perspective, administrative justice theorists[18] posit that in order to foster a good administrative system, public authorities should adopt policies that promote a broad range of values such as clarity, confidentiality, transparency, secrecy, fairness, efficiency, accountability, consistency, participation, openness, rationality, equity, and equal treatment, user-friendliness, accuracy,

[10] See, for instance, Michael Fordham, "Legitimate Expectation: Domestic Principles" (2000) 5:3 Judicial Rev 188; Sas Ansari & Lorne Sossin, "Legitimate Expectations in Canada: Soft Law and Tax Administration," in M Groves & G Weeks, eds., *Legitimate Expectations in the Common Law World* (2017) 293.

[11] This has been the predominant theme in judicial authorities. As a concept, fairness is traceable to general principles of natural justice as postulated by thinkers like Thomas Aquinas, Immanuel Kant and John Rawls.

[12] Paul Reynolds, "Legitimate Expectation and the Protection of Trust in Public Officials", (2011) Public Law 330.

[13] Jack Watson, "Clarity and Ambiguity: A New Approach to the Test of Legitimacy in the Law of Legitimate Expectations" (2010) 30:4 LS 633.

[14] Paul Daly, "A Pluralist Account of Deference and Legitimate Expectations" in M Groves & G Weeks, eds, *Legitimate Expectations in the Common Law World* (Oxford: Hart Publishing, 2017) 101.

[15] Carlo Romano, *Advance Tax Rulings and Principles of Law: Towards a European Tax Rulings System?* Vol 4 (Amsterdam, IBFD Doctoral Series, 2002) at 78.

[16] Daly *supra* note 14.

[17] See Daphne Barak-Erez, "The Doctrine of Legitimate Expectations and the Distinction between the Reliance and Expectation Interests, (2005) 11:4 European Public Law 583 at 584.

[18] See, generally, Joe Tomlinson, "The Grammar of Administrative Values" (2017) 39:4 J Social Welfare and Family L 524. Administrative bodies can *respect, observe, or uphold* legitimate expectations, and when they fail to, the court can *protect* or *enforce* legitimate expectation.

rationality, consistency, coherence, accessibility.[19] Unlike legitimate expectations which are *protected* by the court, the demands of administrative justice devolve on administrative bodies.[20] Some of the arguments against legitimate expectation – that it endorses *ultra vires* acts of tax authorities or fetters administrative discretion or offends statutory limitation – are rooted in legal positivism.[21] Others, such as separation of powers and the rule of law are rooted in constitutionalism.[22] Critics of constitutionalism argue that a pure theory of separation of powers no longer exists[23] and that it is sometimes necessary to blur the lines when it comes to discretion.[24] Some scholars have gone further to analyze judicial protection of legitimate expectation from the perspective of legal realism,[25] showing that the courts actually adopt a self-restrained attitude – mostly dismissing claims – which, to them, rubbishes the misgivings that legitimate expectation undermines separation of powers. Legal realism is further underlined by the fact that legitimate expectation was created by the court and has been shaped, rather narrowly, by the court.[26] It may

[19] The taxpayer is said to be a consumer of the services provided by tax administrators and, as such, a client. The taxpayer is perceived a consumer as a user of the processes and structures that constitute the tax system. From this perspective, tax administrators are obliged to create a system that is characterized by ease of utilization and maneuverability. Accordingly, tax authorities are urged to treat the interests of taxpayers with the maximum respect and to adopt policies that do not prejudice or jeopardize taxpayers. See Ifeanyichukwu Azuka Aniyie, "Consumer-Oriented Reforms in Tax Administration in Nigeria" in ML Ahmadu, ed, *Legal Prisms: Directions in Nigerian Law and Practice* (Sokoto: Usmanu Danfodiyo University Press, 2012) 554.

[20] See Cristian Radu Dragomir, "Autonomous Administrative Authorities - a Means to Achieve Administrative Justice in the Rule of Law" (2018) 57 RSP 96 at 98–99.

[21] See, for instance, Matthew H Kramer, *Defense of Legal Positivism: Law Without Trimmings* (Oxford: Oxford University Press, 2003).

[22] See, for instance, MA Ikhariale, "The Doctrine of Legitimate Expectations: Prospects and Problems in Constitutional Litigation in South Africa" (2001) 45:1 J African L 1.

[23] See Margaret Allars, *Introduction to Australian Administrative Law* (Sydney: Butterworths, 1990).

[24] See Michael Walpole & Chris Evans, "The Delicate Balance: Revenue Authority Discretions and the Rule of Law in Australia," in C Evans, J Freedman & R Krever, eds., *The Delicate Balance: Tax Discretion and the Rule of Law* (Amsterdam: IBFD: 2011) 121.

[25] Robert Thomas, "Legitimate Expectations and the Separation of Powers" in M Groves & G Weeks, eds, *Legitimate Expectations in the Common Law World* (Oxford: Hart Publishing, 2017) 53; Chintan Chandrachud, "Substantive Legitimate Expectation in India" in M Groves & G Weeks, eds, *Legitimate Expectations in the Common Law World* (Oxford: Hart Publishing, 2017) 254 at 263.

[26] See, for instance, *Schmidt & ors v Secretary of State for Home Affairs* [1969] 2 Ch 149*; R v North and East Devon Health Authority, Ex parte Coughlan* [2000] 3 All ER 850; *R v IRC Ex p. MFK Underwriting Agents Ltd* [1990] 1 WLR 1545.

also explain why courts may be more willing to protect legitimate expectation in non-revenue matters, such as immigration than in taxation, which may affect the revenue base of the state.[27] Another theory that explains this judicial hesitancy is public interest theory. This theory, which underlies many of the legitimate expectation cases, emphasizes the importance of the court not fettering the tax authority's ability to fulfill its public duty of collecting taxes.[28]

To substantiate my policy-based arguments, I rely on Adam Smith's widely accepted theory of tax policy.[29] The theory espouses the values of equity (fairness), neutrality, certainty and administrability as some of the virtues of a good tax system.[30] I use this theory to demonstrate how it may benefit Nigeria for the tax authority to honour its commitments to taxpayers rather than to repudiate them. I support these policy reflections with interdisciplinary research[31] that borders on economic analysis of law and policy. I rely on empirical work to explain that inconsistent tax administration creates uncertainty in the tax system, which may send the wrong signals to investors in a capital importing country like Nigeria.[32] Tax policy has long been the subject of law and economic analysis.[33] This thesis highlights that the inconsistency displayed by the tax authority

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[27] *R (GMAC Investment Limited Aozora) v HMRC* (2019) EWCA Civ 1643 (*Aozora*); *Phoenix Motors Ltd v NPFMB* [1993]1 NWLR (pt. 272) 718.

[28] For some explanation of this theory and how it influences judicial decisions see Glendon A Schubert, Jr., "The Theory of "The Public Interest" in Judicial Decision-Making" (1958) 2:1 Midwest J Political Science 1.

[29] Adam Smith, *The Canons of Taxation* (1776).

[30] See Allison Christians, "Introduction to Tax Policy Theory" (2018), online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3186791. See also Clinton Alley & Duncan Bentley, "A Remodelling of Adam Smith's Tax Design Principles" (2005) 20 Australian Tax Forum 582.

[31] Interdisciplinary research "combines components of two or more disciplines in the search or creation of new knowledge, operations, or artistic expressions. See Moti Nissani "Ten Cheers for interdisciplinarity: The Case for Interdisciplinary Knowledge and Research" (1997) 34:2 The Social Science J 201 at 203.

[32] See, for instance, Michael Devereux, "Measuring Corporation Tax Uncertainty Across Countries: Evidence from a Cross-country Survey" (2016) Oxford University Center for Business Taxation Working Paper No. 16/13 at 9, online: http://eureka.sbs.ox.ac.uk/6292/1/WP1613.pdf; Ernesto Zangari, Antonella Caiumi & Thomas Hemmelgarn, "Tax Uncertainty: Economic Evidence and Policy Responses" (2017), European Union (Taxation Papers) Working Paper No. 67, online: https://ec.europa.eu/taxation_customs/sites/taxation/files/taxation_paper_67.pdf; IMF-OECD's concurring report: "Tax Uncertainty", (2017) IMF/OECD Report for the G20 Finance Ministers, at 20–21, online: https://www.oecd.org/tax/tax-policy/tax-certainty-report-oecd-imf-report-g20-finance-ministers-march-2017.pdf

[33] Michael J Trebilcock, "Economic Analysis of Law" in Richard F Devlin, ed, *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery Publications, 1991).

runs contrary to Nigeria's National Tax Policy, which emphasizes certainty, fairness and good administration as some of the guiding principles of tax administration.[34]

Another crucial methodology that I deploy is comparativism. This entails the study of, and research in, law by the systematic comparison of two or more legal systems; or of parts, branches or aspects of two or more legal systems.[35] Comparative law "does not merely provide a reservoir of different solutions; it offers the scholar of critical capacity the opportunity of finding the "better solution" for his time and place."[36] Comparative research lends itself to many scholarship functions. Among its many aims, comparative law has been used to: (1) understand a legal rule or institution; and (2) understand one's own law better in order to develop the critical standards which might lead to its improvement.[37] These represent the primary reasons for my comparison. The literature on legitimate expectation in the United Kingdom (UK), on which I heavily rely, far outweighs that of Nigeria, where there has been limited scholarly attention. Not only is there more literature, legitimate expectation is more firmly established as a judicial remedy in the UK, including in tax.[38] The UK approach inspires great comparative appeal, especially since it encompasses the protection of both procedural and substantive legitimate expectations,[39] and since Nigerian jurisprudence in this area is modeled on English jurisprudence.[40] Both countries have experienced significant judicial influence on the development of their laws. Moreover, the usual stumbling blocks in the

[34] See National Tax Policy *supra* note 9, para 2.1.
[35] W J Kamba, "Comparative Law: A Theoretical Framework" (1974) 23:3 The Intl and Comp LQ 485 at 486.
[36] Konrad Zweigert & Hein Kötz *An Introduction to Comparative Law*, (1996), trans. T Weir, 3rd ed, (Oxford, UK: Clarendon Press Publication, 1998) 1 at 16.
[37] *Ibid* at 16, 19-20.
[38] See Tracy Bowler, "HMRC's Discretion: The Application of the Ultra Vires Rule and the Legitimate Expectation Doctrine" (2014), online: https://www.ifs.org.uk/uploads/publications/TLRC/TLRC_DP_10.pdf. Procedural legitimate expectation only entitles the taxpayer to be heard by the tax authority before a position is changed, while substantive legitimate expectation ensures not just a hearing but an outcome that binds the tax authority to the initial representation made to the taxpayer.
[39] See, for instance, *MFK Underwriting Agents Ltd supra* note 26.
[40] See *Stitch v Attorney-General of the Federation* (1986) LPELR-3119(SC); (1986) NWLR (Pt.46) 1007.

path of legitimate expectation – *ultra vires*, public interest, separation of powers, etc. – are common to both jurisdictions. The challenge of tax uncertainty, which is one of the core reasons why taxpayers rely on revenue guidance and other forms of discretion, is common to both jurisdictions. My approach, thus, reflects a functionalist view of comparative law in that I seek to identify the underlying social, economic, or political problem that law attempts to resolve then compare how different countries settle those problems using law.[41] Functionalism lends itself particularly well to the project of evaluating the effectiveness of different legal resolutions to common social, economic or political problems.[42]

A major criticism of the comparatist is that he or she is often eager to recommend approaches from one jurisdiction to another, perhaps, with insufficient understanding of the context of at least one of the jurisdictions being compared.[43] I am cautious to avoid these perceived pitfalls of inelegant comparison, by limiting my study of foreign literature largely to the goal of assisting understanding, in a doctrinal sense, of the principles discussed here. I am further encouraged by Junker's observation that functionalism seems especially to have an affinity for commercial law and some other areas of the law that are less culturally connected.[44] It is impossible to ignore the increasing *harmonisation* and cross-pollination of tax administration rules across the globe,

[41] See Kimberly Brooks, *A Hitchhikers Guide to Comparative Tax Law*, 2019 [unpublished, on file with author] at 1.
[42] *Ibid.*
[43] For further discussions and criticisms of comparativism, see, for instance, George A Bermann et al, "Comparative Law: Problems and Prospects" (2011) 26:4 Am U Intl L Rev 935; Jonathan Hill, "Comparative Law, Law Reform and Legal Theory" (1989) 9:1 Oxford J Legal Studies, 101; Edward J Eberle, "The Methodology of Comparative Law" (2011) 16:1 Roger Williams U L Rev 51; Jaakko Husa, "Comparative law in legal education – building a legal mind for a transnational world," (2018) 52:2 The Law Teacher 201; Ralf Michaels, "Transnationalizing Comparative Law" (2016) 23:2 MJ 352.
[44] See Kirk W Junker, "A Focus on Comparison in Comparative Law" (2014) 52:1 Duq L Rev 69 at 80.

especially in the areas of international taxation, which, in my view, makes it pertinent for tax law scholars to explore beyond their own borders when dealing with issues of that nature.[45]

A gratifying thing about being able to reflect on foreign authorities is that it affords me many useful materials. There are adaptable solutions. Moreover, while foreign authorities are only of persuasive influence, there is no doubt that they continue to be relevant in the development of Nigerian law.[46]

[45] Bird & Wilkie observe that "by reducing the degrees of freedom available to policy designers at the national level, globalization has in some ways shifted the terms of the national tax policy discussion closer to the 'model' commonly set out for tax policy design at the subnational level. See Richard M Bird & J Scott Wilkie, "Designing Tax Policy: Constraints and Objectives in an Open Economy" (2012) Georgia State University Intl Center for Public Policy Working Paper 12-24, online: https://icepp.gsu.edu/files/2015/03/ispwp1224.pdf at 4.

[46] See, for instance, the recent landmark decision of the Supreme Court of Nigeria in *In Re: Abdullahi* (2018) LPELR-45202(SC).

Chapter 2: Overview of Tax Administration and Discretion in Nigeria

2.1 Nigeria's Tax Structure and Federal Tax Administration

This chapter examines the legal framework for taxation in Nigeria and how this framework enables the FIRS to exercise discretion in tax matters. It provides a contextual understanding of the factual situations that may give rise to legitimate expectation claims.

Taxation is an essential sociolegal instrument used by the government in any society for the effective management as well as delivery of economic and sociopolitical dividends of governance.[47] A tax may be defined as a compulsory levy imposed by a public authority on incomes, consumption and production of goods and services.[48] Taxation may be regarded as an exercise of sovereign power especially as fiscal jurisdiction is an attribute of statehood and sovereignty.[49] In jurisprudential context, tax is a creation of legal positivism which by its nature implies that tax law flows from human sources.[50] This is certainly true of Nigeria where tax is imposed by government (at federal and state levels) by virtue of powers vested in them by the Constitution, a document that sets out the framework for the exercise of taxing powers and, incidentally, tax administration.[51]

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[47] Saka Muhammed Olokooba, *Nigerian Taxation: Law, Practice and Procedures Simplified* (Singapore: Springer, 2019) at 3.
[48] Karimu A Ishola, *Taxation Principles and Fiscal Policy in Nigeria,* 2nd ed. (Ilorin: Kastas Publishers, 2019) at 1.
[49] See Alfred Nizamiev, "The Main Characteristics of State's Jurisdiction to Tax in International Dimension" (LLM Dissertation, University of Georgia School of Law, 2003) at 5.
[50] Kareem Adedokun, "An Overview of Discretionary Powers in Tax Administration within the Context of the Nigerian National Tax Policy" (2017) online: https://www.academia.edu/34293220/an_overview_of_discretionary_powers_in_tax_administration_within_the_context_of_the_nigerian_national_tax_policy at 2.
[51] See also the Taxes and Levies (Approved List for Collection) Act, No. 21 of 1998, Cap T2 Laws of the Federation 2004.

The Federal Republic of Nigeria's written constitution embodies principles such as federalism, republicanism and separation of powers.[52] In terms of its vertical structure, Nigeria consists of three tiers of government (federal, state and local), each with specified taxing powers. For the purpose of this paper, however, I focus only on the federal government's broad taxing powers. Part 1 of the 2nd Schedule to the Constitution specifies various taxes and levies that the federal government may impose. These include taxes on incomes, profits and capital gains,[53] as well as stamp duties, as prescribed in the Exclusive Legislative List.[54] Horizontally, the federal government consists of the executive, legislative and judicial arms. The federal government's power to impose tax is exercised through legislation enacted by the National Assembly, the legislative arm, subject to presidential assent.[55] The power of the federal government to enact tax legislation has been exercised through various statutes in the Nigerian *corpus juris*.[56] These tax legislation typically prescribe tax bases, units, obligations, liabilities, compliance and enforcement instruments.[57] Administrative rules are, as well, contained in tax-imposing statutes such as the Companies Income Tax Act (CITA) as well as the Federal Inland Revenue Service (Establishment) Act (FIRS Act),[58] which is a statute entirely dedicated to tax administration. Administrative rules

[52] For instance, see sections 2, 4, 5 & 6 of the Constitution of the Federal Republic of Nigeria 1999, as amended.
[53] See Items 58 and 59. See also Item 68 which confers powers on the federal government to legislate on any matter incidental or supplementary to any matter mentioned elsewhere in the Exclusive Legislative List. This has been construed as meaning that the federal government can levy tax on those matters. See *Attorney-General of Ogun State v Aberuagba* (1985) 1 NWLR (pt. 3) 395. For more on this, see Nduka Ikeyi & Sam Orji, "How Much Force is Still Left in the Taxes and Levies (Approved List for Collection) Act?" (2011 – 2012) 10 NJR 73.
[54] The Exclusive Legislative List is a list of subject matters that only the federal legislature can legislate on. These include insurance, meteorology, immigration, external affairs, extradition, currency, exchange control, evidence, export duties, etc. There is also a concurrent list which contains matters that both the Federal and state legislatures can legislate on; matters such as education and healthcare. See, generally, Charles Nwalimu, *The Nigerian Legal System,* 2nd ed (New York: Peter Lang, 2009).
[55] See generally sections 4, 58 and 59 of the Constitution. Section 4 vests the legislative powers of the federation in the National Assembly, while sections 58 and 59 outline the process for exercising federal legislative power.
[56] See, for instance, the Companies Income Tax Act, Cap. C21, LFN 2004; Capital Gains Tax Act, Cap. C1, LFN 2004; Petroleum Profit Tax Act, Cap. P13, LFN 2004; Personal Income Tax Act, Cap. P8, LFN 2004; Stamp Duties Act, Cap. S8, LFN 2004; Tertiary Education Trust Fund (Establishment, Etc.) Act, 2011, No. 65; Value Added Tax Act, Cap. V1, LFN 2004.
[57] See Adedokun, *supra* note 50 at 2.
[58] 2007, No. 13.

typically govern procedural matters such as the filing of tax returns, deduction of tax at source, service of notices, information request and disclosure, compliance enforcement, issuance of tax identification numbers, tax refunds, etc.[59]

Nigeria's tax enactments, generally, confer diverse powers on tax administrators and adjudicators in the discharge of their various duties.[60] While, for instance, the power of adjudication vests in the courts and the Tax Appeal Tribunal (TAT),[61] the power to administer tax laws in Nigeria is vested in two main bodies. These are the FIRS and the Internal Revenue Service of a state.[62] The FIRS administers federal taxes while the Internal Revenue Service of a state administers the tax system of that state.[63]

In recognition of the fact that tax statutes rarely cover every situation that may arise in tax administration, the FIRS Act confers on the FIRS the power to make regulations for the administration of the Act. Section 61 provides that:

> the Board may, with the approval of the Minister, make rules and regulations as in its opinion are necessary or expedient for giving full effect to the provisions of this Act and for the due administration of its provisions and may in particular, make regulations prescribing the- (a) forms for returns and other information required under this Act or any other enactment or law; and (b) procedure for obtaining any information required under this Act or any other enactment or law.

[59] See, generally, the FIRS Act.
[60] The presupposition underlying the vesting of administrative powers by the legislature is that the legislators that enacted tax laws are human; so too are the tax administrators that implement the law and the judges that interpret. The trio of law making; implementation and adjudication must aim at securing maximum benefit for the people. Adedokun *supra* note 50 at 2.
[61] See section 251(1)(b) of the Constitution (which vests exclusive jurisdiction on the Federal High Court in respect of all matters connected with or pertaining to the taxation of companies and… all other persons subject to Federal taxation) and the 5th Schedule to the FIRS Act (which establishes the TAT).
[62] Local government authorities within the states also enjoy certain tax imposition and collection powers, as prescribed by state law, pursuant to section 7(5) and the Fourth Schedule to the Constitution. See Jude J. Odinkonigbo, "Does a Local Government in Nigeria Have the Power to Tax?" (2020) 48:6-7 Intertax 642.
[63] A unique tax statute in this respect is the Value Added Tax Act, which is administered by the FIRS, but a large chunk of the tax collected is distributed to the states. See sections 7 and 40 of the Value Added Tax Act.

Four things to highlight in this provision are: (1) the provision confers discretion on the FIRS to issue subsidiary legislation to facilitate tax administration; (2) the FIRS determines the necessity or expediency of the subsidiary legislation; (3) the discretion extends to any matter deemed to be relevant to the due administration of the Act; (4) the FIRS's discretion in this regard is only subject to the approval of the Minister.[64] The FIRS has issued several significant regulations in line with its mandate under section 61.[65] According to Freedman & Vella, the use of discretion to issue regulations or subsidiary legislation is an express power which may be categorized as "specific discretion."[66] The focus of this thesis is on the "general" discretionary powers that the tax authority exercises in the day to day administration of tax law. General discretion is more open-ended, compared to specific discretion which is confined to the issuance of regulations. In many cases, the activities that constitute general discretion are not at all mentioned in the tax statute. Some of these activities are discussed in the ensuing sections of this thesis.

2.2 The FIRS and Tax Discretion

Tax administration involves the assessment, collection and accounting for all forms of taxes as well as the implementation of the various tax laws and government policy guidelines on tax administration.[67] Tax administration is one of the three components of the Nigerian tax system; the others being tax policy and tax legislation.[68] As I have tried to show in the last section,

[64] "The Minister" here means the Minister charged with responsibility for matters relating to finance. See section 69 of the FIRS Act. The FIRS is generally subject to the supervision of the Minister. Section 60 of the FIRS Act provides that "the Minister may give to the Service or the Executive Chairman such directives of a general nature or relating generally to matters of policy with regards to the exercise of its or his functions as he may consider necessary and the Service or the Executive Chairman *shall* comply with the directives or cause them to be complied with."
[65] See, for instance, the Income Tax (Transfer Pricing) Regulations 2018; the Income Tax (Country by Country Reporting) Regulations 2018, Income Tax (Common Reporting Standard) Regulations 2019.
[66] See Judith Freedman & John Vella, "HMRC's Management of the U.K. Tax System: The Boundaries of Legitimate Expectation" in C Evans, J Freedman & R Krever, eds. *The Delicate Balance: Tax, Discretion and the Rule of Law* (Amsterdam: IBFD, 2011) 79 at 80.
[67] Aniyie *supra* note 19 at 3.
[68] *Ibid.*

discretion is an integral part of tax administration, although its role has been controversial. It is said that an explanation of tax discretion might be approached from two directions.[69] First, a descriptive definition might be offered, that explains the source or consequences of the powers in question. Second, a normative account might be favoured, which describes an ideal system of tax rules and shows the role that discretion would play within its proper context. Underneath these headings, further distinctions might be made.[70] My approach reflects both patterns and it is evident throughout this thesis. I start by examining mainly judicial attempts at defining "discretion", then I proceed to demonstrate tax discretion, in its various manifestations. I also, of course, examine how tax discretion plays in the tax system, bearing in mind both judicial and scholarly responses to tax discretion.

Nigerian courts have severally attempted to define and explain the concept of discretion.[71] In *Akinyemi v Odu'a Investment Co. Ltd*[72] the Supreme Court, per Tanko Muhammad, J.S.C. (as he then was), defined discretion, "in its general usage," as "that freedom or power to decide what should be done in a particular situation." In *Artra Ind. Nig. Ltd v NBCI,*[73] the Supreme Court, defined discretion as the "equitable decision of what is just and proper under the circumstance or a liberty or privilege to decide and act in accordance with what is fair and equitable under the peculiar case guided by the principles of law."[74] In *Achie v Ebenighe & ors,*[75] the Court of Appeal noted that discretion means "a power or right conferred upon public functionaries by law of acting

[69] Dominic De Cogan, "Tax, Discretion and the Rule of Law" in C Evans, J Freedman & R Krever, *The Delicate Balance: Tax, Discretion and the Rule of Law* (Amsterdam: IBFD, 2011) 1 at 2–3.
[70] *Ibid.*
[71] This is usually done in the context of judicial discretion.
[72] (2012) 17 NWLR (pt. 1329) 209 at 240.
[73] (1998) LPELR-565(SC); (1998) 4 NWLR [pt.545] 1.
[74] Per Onu JSC at 35, paras B-D. See also *Sumaila v State* (2012) LPELR-19724(CA); *Ero & ors v Ero & ors* (2018) LPELR-44154(CA).
[75] (2013) LPELR-21884(CA).

officially in certain circumstances according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others." Meanwhile, in the case of *Ibigbami & anor. v Military Governor Ekiti State & ors*[76] the Court of Appeal, per Nsofor, JCA warned that "discretion is not freedom. Discretion does not empower a man to do what he likes because he is minded to do so; he must in the exercise of his discretion do, not what he likes but what he ought."[77] This follows the track of the old case of *Iwuji v Federal Commissioner for Establishment & anor,*[78] where Karibi-White, J.S.C., quoting several English authorities, explained, *inter alia,* that:

> The concept of discretion even in its legal usage, implies power to make a choice between alternative courses of action. Thus, where the exercise of a discretion is vested, it follows that there is really no absolute answer to the solution of the question… a science of understanding to discern between falsity and truth, between right and wrong, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections… that the exercise of a discretion, which was not confined to the Courts, imports a duty to be 'fair, candid and unprejudiced; not arbitrary, capricious, or biased; much less warped by resentment or personal dislike.' Very concisely stated, the exercise of discretion is subject to the well settled rules of natural justice. The exercise of a discretion presupposes consideration of all the factors relevant and requisite to the exercise of the discretion.[79]

The common theme of these judicial postulation is that discretion entails the exercise of judgment by public authorities in performing their functions. Although freedom to act one way or another is inherent in discretion – and the court would ordinarily not intervene – it is also important that discretion is exercised fairly, properly, reasonably and responsibly, and, of course, in accordance with due process. If discretion is abused, there is a possibility that the court intervenes to impeach what has been done. In other words, the freedom that discretion confers is not absolutely unreviewable.

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[76] (2003) LPELR-5619(CA).
[77] At 39, paras D-F.
[78] (1985) LPELR-1568(SC).
[79] At 39-40, paras A-E.

Discretion is an integral part of public administration globally. In Nigeria, public authorities are often conferred discretion – express or implied, broad or narrow – in the performance of their functions. In the context of tax administration, significant residual power is vested in the FIRS to exercise its discretion in managing Nigeria's tax system. To start, section 25(1) of the FIRS Act simply provides that:

> The Service shall have power to administer all the enactments listed in the First Schedule to this Act and any other enactment or law on taxation in respect of which the National Assembly may confer power on the Service.

A few steps back, paragraph 8(1)(t) of the FIRS Act provides that the FIRS shall – in addition to its express functions – "carry out such other activities as are necessary or expedient for the full discharge of all or any of the functions under this Act."[80] The scope of the discretion conferred in this section is not easily determinable, especially in the context of the wide language used. Is the discretion limited to the functions that are explicitly imposed by the Act or does it extend to matters that are not explicitly mentioned, but which are nevertheless, in the opinion of the FIRS, necessary, incidental or expedient?[81] Functions commonly performed by the FIRS, such as the issuance of tax rulings or explanatory notes to taxpayers, are not expressly prescribed by statute. Yet, legal authority to perform these functions can be linked to an omnibus provision such as the described paragraph of the FIRS Act. Since the FIRS indulges in such activities in the course of tax administration, the issue of what weight to attach to these "indulgences" is the overarching concern of this thesis. These indulgences demonstrate the exercise of general discretion.[82]

Professors Freedman & Vella identify three broad categories of general discretion:

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[80] Subsection 8(2) of the FIRS Act further provides that "the Service may, from time to time, specify the form of returns, claims, statements and notices necessary for the due administration of the powers conferred on it by this Act."
[81] Again, there is no requirement that such functions must be performed in a manner prescribed by specific legislation or policy document, for instance.
[82] See Freedman & Vella, *supra* note 66 at 81.

a. Discretion as to non-application of the law where its proper interpretation is agreed;
b. Discretion as to how to interpret the law;
c. Discretion in management of legislation and litigation; and
d. Hybrids of the above categories.[83]

The first category of this taxonomy refers to those situations where there is no dispute as to the meaning of a statutory provision, but the tax authority, nevertheless, decides, either unilaterally or in agreement with the taxpayer, not to apply that provision whether in whole or in part. The second category refers to situations where the import of the tax statute is unclear and the tax authority decides to adopt a particular line of interpretation, which it conveys to the taxpayer by way of guidance or ruling. The third category, used broadly, covers situations where the tax authority decides for the purpose of expediency to waive or narrow a tax obligation or liability, perhaps by compromising a potential or pending dispute.[84]

Discretion may also be viewed in terms of the taxonomy adopted by Professors Ahmed & Perry as to how legitimate expectation may be generated. The authors group discretion giving rise to legitimate expectation into the categories: promises, policies and practices.[85] A promise suggests that a fairly direct form of communication has been employed by the tax authority to the taxpayer. A policy, rather than being directed to a specific person or group of persons, tends to be published for the information of people generally and need not be brought to the specific attention of any one of them. A practice is less certain than a promise or a policy. It connotes a situation that makes a person conclude that a course of action adhered to in the past will continue to be adhered to in the

[83] *Ibid.* Specific discretionary acts of general discretion identified by the authors include concessions, guidance, waivers, deals and litigation strategies.
[84] Put in the income tax context, discretion may be expressly granted by tax statute, may be implied in the implementation of public policies, may materialize in the interpretation given to unclear or ambiguous, or may be implicit in the everyday interactions of tax administrators with taxpayers. See Lorne Sossin, "The Politics of Discretion: Toward a Critical Theory of Public Administration" (1993) 36:3 Canadian Public Administration 364 at 384.
[85] See Farrah Ahmed & Adam Perry, "The Coherence of the Doctrine of Legitimate Expectations" (2014) 73:1 Cambridge LJ 61 at 64–66.

future.[86] There are various forms of general discretion that may be catalogued into these categorizations. The usual forms include advance tax rulings (private rulings), information circulars, departmental circulars, interpretation bulletins, technical interpretations, taxpayer bills of rights, guidelines, public notices, etc.[87] In the next section, I use the taxonomy devised by Ahmed & Perry to elaborate on the various forms of general discretion that exist in Nigerian tax administration. My aim is to provide practical insights on how discretion is a part of Nigerian tax administration.

2.2.1 Private Tax Rulings or Promises

Advance tax rulings (also called advance, private or letter rulings) are legal instruments under which taxpayers (or their advisors) may obtain a more or less binding statement from the tax authorities concerning the treatment of a transaction or a series of contemplated future (or sometimes past) actions or transactions.[88] It is "a letter ruling, which is a written statement, issued to a taxpayer by tax authorities, that interprets and applies the tax law to a specific set of facts."[89] An advance tax ruling is issued to a specific taxpayer or group of taxpayers, rather than the general public.[90] For there to be an advance tax ruling, the taxpayer would ordinarily put before the tax authority a specific set of facts and, accordingly, request the tax authority to state its position on how the law would apply to those facts. While studies show that various countries have established

[86] See Greg Weeks, "What Can We Legitimately Expect from the State?" in M Groves & G Weeks, eds, *Legitimate Expectations in the Common Law World* (Oxford: Hart Publishing, 2017) 147 at 149–50.
[87] See, for instance, Kim Brooks, "A Reasonable Balance: Revenue Authority Discretions and the Rule of Law in Canada" in C Evans, J Freedman & R Krever, eds. *The Delicate Balance: Tax, Discretion and the Rule of Law* (Amsterdam: IBFD, 2011) 63 at 66–68. The various forms of discretion mentioned here and discussed in this paper can be fitted into Ahmed & Perry's groupings and I have opted to go generally with these groupings. I observe, for instance, that private rulings and concessions can fall under promises, while publicly provided guidance such as circulars can fall under policy. Practice means just that even if qualified with prefixes like "regular" or "established".
[88] Romano *supra* note 15 at 78.
[89] See OECD Glossary of Tax Terms, online: http://www.oecd.org/ctp/glossaryoftaxterms.htm
[90] *Ibid.*

a framework for the issuance of advance tax rulings, the same cannot be said of Nigeria.[91] Thus, while some countries have a legislative or published policy framework that governs the practice, the FIRS framework is relatively informal. A sub-unit of the FIRS, the Tax Enquiries and Appeals,[92] issues private rulings. However, just like the rulings that it issues, this unit only exists by administrative fiat. It is not a creation of statute. This differs from some other countries; India, for instance, where there is an Authority for Advance Tax Rulings (AAR) statutorily saddled with this responsibility.[93] Some UK tax legislation provide that statutory advance clearance or approval may be obtained from Her Majesty's Revenue & Customs for certain transactions (HMRC).[94] For businesses, HMRC will provide a non-statutory clearance if there is material uncertainty as to how tax law will apply to a specific transaction and if the issue is commercially significant.[95] Such non-statutory clearances provide taxpayers with HMRC's view of what is the correct tax treatment.[96] FIRS tax rulings are not binding on a taxpayer. Thus, a taxpayer may choose whether or not to follow the ruling. Private tax rulings are not published in Nigeria, and there is no precedential value to them, not being judicial decisions.[97] There is also no obligation on the tax authority to issue a ruling, even if it would be sensible to do so in certain cases. Case law suggest that the FIRS

[91] See Christophe Waerzeggers & Cory Hillier, "Introducing an Advance Tax Ruling (ATR) Regime," Tax Law Technical Note Vol 2, *IMF* (2016), online: https://www.imf.org/external/pubs/ft/tltn/2016/tltn1602.pdf.
[92] A subdivision of the Tax Policy and Advisory Department.
[93] "Tax Rulings: A Global Practice Guide"; *Lex Mundi Tax Group*, (2012), online: https://www.acc.com/sites/default/files/resources/vl/membersonly/Article/1449528_1.pdf at 55; Chapter XIX-B (Section 245N-245V) of the Income Tax Act 1961, as amended.
[94] See https://www.gov.uk/guidance/seeking-clearance-or-approval-for-a-transaction.
[95] See https://www.gov.uk/hmrc-internal-manuals/other-non-statutory-clearance/onscg1200
[96] See Benjamin Alarie *et al*, "Advance Tax Rulings in Perspective: a Theoretical and Comparative Analysis", (2014) 20 New Zealand J Taxation L and Policy 362, cited in Elly Ban De Velde, "Tax rulings' in the EU Member States: In-depth Analysis" (2015) European Parliament Directorate General For Internal Policies Policy Department A: Economic And Scientific Policy, Economic and Monetary Affairs Committee, online: http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/563447/IPOL_IDA(2015)563447_EN.pdf
[97] This is also the case in South Africa. See MJ Malukele, "A Critical Analysis of the Doctrine of Legitimate Expectation in the Context of the Advanced Tax Rulings System and Tax Assessment Measures by SARS, with Specific Emphasis on Substantive Legitimate Expectation" (LLM Dissertation, University of Pretoria Law, 2011) at 28.

may issue a ruling in respect of an ongoing transaction.[98] Whatever the case, the FIRS would ordinarily include a caveat warning the taxpayer that the ruling was subject to superior interpretation of the law, either by the tax authority itself or by the court.[99]

Finally, in dealing with taxpayers, the FIRS may engage in arrangements which may in some cases result in a "forgiving" of some tax liabilities such as assessed taxes, interest or penalties. It is relevant to note that the FIRS is conferred with discretion to compound tax offences,[100] which may entail the forgiveness of due tax debt or penalties. Such compromise settlement may occur prior to or during litigation and may be initiated at the instance of the tax authority, the taxpayer or the court. It may even occur prior to the transaction or during audit, as a way of resolving disputed tax liabilities. In other cases, the tax authority may compromise tax liabilities pursuant to the directives of the President of the Federal Republic of Nigeria, acting through the Honourable Minister of Finance.[101] There are recent examples of this process: the Voluntary Assets and Income Declaration Scheme (VAIDS)[102] and the Voluntary Offshore Assets Regularization Scheme in Switzerland (VOARS).[103] Although these instruments of subsidiary legislation were promulgated

[98] See *Saipem Contracting Nig. & ors Ltd v Federal Inland Revenue Service* (2018) LPELR-45118(CA).
[99] *Ibid.*
[100] Section 4 of the FIRS Act.
[101] Section 89 of CITA empowers the President to remit, wholly or in part, the tax payable by any company if he is satisfied that it will be just and equitable to do so. Although this power is exercised by the President, the actual implementation of the President's Order rests on the FIRS. It is implicit that the FIRS would play some role in determining which cases are suitable for applying the remission order to. This is especially so in cases where the order is made generally rather than to a specific taxpayer.
[102] VAIDS, launched via Executive Order No. 004 of 2017 to last for an original period of 9 months (later extended), was a tax amnesty scheme designed to encourage voluntary disclosure of previously undisclosed assets and income for the purpose of payment of all outstanding tax liabilities. Taxpayers who complied fully were guaranteed to enjoy interest and penalty waivers, confidentiality, immunity from prosecution, exemption from tax audits for the periods covered as well as flexible payment of tax due.
[103] VOARS, established by Executive Order No. 008 of 2018, provided a one-year conditional amnesty to persons, entities and their intermediaries who held offshore assets and were in default of their tax liabilities, during which such persons could declare their offshore assets and income from sources outside Nigeria that relate to the preceding 30 years of assessment, regularize their tax status and ensure full compliance.
In exchange, qualified taxpayers shall obtain permanent immunity from criminal prosecution for tax offences and offences related to offshore assets, waiver of interest and penalties on the declared and regularized offshore assets and waiver from tax audit of the declared and regularized offshore assets.

by a higher authority, such as the President or the Minister, the FIRS has the responsibility of implementation, which entails determining those taxpayers whose cases deserve to take benefit of the scheme. Once the tax authority has reached a compromise with a taxpayer pursuant to these instruments, it can be taken that a promise has been made.

2.2.2 Policy Publications (Circulars)[104]

Apart from the issuance of private tax rulings, the content and statistics of which are not publicly available, the FIRS regularly publishes tax circulars, guidelines, public notices and explanatory notes on various aspects of tax law, policy and administration in Nigeria.[105] These publications, among other purposes, provide insights to taxpayers on relevant developments in taxation and offer the interpretive position on how the FIRS will apply tax legislation. Circulars may simply state what the law is on some issue or offer technical explanation or clarification on the law, thus, serving the same purpose as technical notes. For instance, the Information Circular on the Taxation of Non-residents in Nigeria[106] attempts to clarify the meanings of various terms used in tax legislation, such as "resident individual," "resident corporation," "dual residence," "fixed base," "dual residence." The circular also contains numerous examples to illustrate the applicability of

[104] An Israeli Professor of Law, Yoav Dotan uses "policies" as an umbrella term that includes various types of administrative discretion such as guidelines, circulars, codes of practice etc. He uses these terms interchangeably to indicate soft laws or "informal administrative rules which administrators create to guide their discretion, and as opposed to other types of delegated legislation, which I will call statutory regulations. In the latter case, the rules are created **by** a minister or other authority under an authorization by a parent statute which confer on them the power to legislate, and therefore have 'full legislative force'…" He observes that "it is not always simple to decide to which of these two categories a given rule should be related, and the whole area is bewildered by complexities of both terminology and substance." See Yoav Dotan, "Why Administrators Should be Bound by Their Policies" (1997) 17:1 Oxford J Leg Stud 23. See also Freedman & Vella who opine that the term "general discretion" does not include powers conferred by primary legislation on the revenue to issue subsidiary legislation. See Freedman & Vella *supra* note 66 at 81.

[105] Examples include the Country-by-Country Guidelines 2018; the Guidelines for the Appropriate Use of Information Contained in CBC Reports; and the Guidelines on Mutual Agreement Procedure 2019. See, generally, FIRS, "Tax Circulars, Regulations and Public Notices", online: https://www.firs.govng/TaxResources/TaxCircularsRegulationsandPublicNotices

[106] FIRS, Information Circular 9302, "Taxation of Non-residents in Nigeria," (22 March 1993).

the principles to real situations. Some circulars try to fill gaps in tax legislation, relying on experience. An FIRS circular published in 2010,[107] for instance, acknowledges that a definition of the word "trade" cannot be found in Nigerian tax statutes but that the issue has been addressed in several legal cases, the rulings of which provide some *legal certainty* regarding how the courts interpret the word.[108] The circular states that in line with these rulings, 'trade' can be regarded as "*the business of buying and selling or bartering goods or services*". The circular affirms that "the one-off nature of an activity in no way invalidates that activity as constituting a trade" and adds that "where one or more of the criteria on the badges of trade apply, FIRS will treat such transaction as trade."[109]

A closely related publication of the FIRS is the 2019 Information Circular on the Claim of Tax Treaties Benefits in Nigeria.[110] This circular explains some important provisions of Nigeria's Double Tax Treaties (DTTs) and describes some important recent developments reflecting how the FIRS will treat certain taxpayer activities. Topics addressed include the application of the principal purpose test, an anti-treaty shopping policy,[111] and the beneficial ownership policy.[112] Another publication with cross-border implication is the FIRS information circular on the tax implications of asset leasing.[113] The circular conveys the FIRS's position on the liability of leases to companies' income tax, value added tax and capital gains tax. The circular seeks to clarify the

[107] FIRS, Information Circular PC-T10.2.3. 1021, "What Constitutes 'Trade' for Tax Purposes: Guidelines for The General Public," (August 2010).
[108] While lawyers may be abreast of such cases or can more easily access and interpret them the same cannot be said for the ordinary taxpayer whose duty it is, after all, to pay taxes.
[109] The relevant criteria are listed in paragraph 4.0 of the circular. This last line could be taken as an assurance, or at least, a suggestion, that where none of these criteria exists, FIRS will not treat the activity as a trade.
[110] FIRS Information Circular 2019/03, "Claim of Tax Treaties Benefits in Nigeria," (4 December 2019).
[111] See para 3.3.
[112] See para 4.3.2.
[113] FIRS, Information Circular 2010/01, "Guidelines on the Tax Implications of Leasing," (12 April 2010).

"misconceptions" and "misinterpretations"[114] of the principles guiding lease arrangements in Nigeria. The circular proceeds to define "lease" in its various relevant forms before then stating the FIRS's position on the tax implications of lease transactions. For instance, the FIRS posits that the interest portion of the rent earned by the lessor constitutes taxable income in the hand of the lessor; while the capital portion is deemed a repayment of initial investment and has no tax implication[115] The circular adds that the lessor is not entitled to claim capital allowances on the leased assets; only the lessee is entitled to make such claims. (If the lessor makes any such claim for capital allowances, FIRS will disallow it).[116]

These publications, on their face, have varying degrees of implication on the scope of application of tax legislation. For instance, FIRS Information Circular on the Taxation of Non-residents in Nigeria states that:

> The word "habitually" as used in the legislation implies that the operation of the non-resident company must be repetitive. An isolated case will therefore not quality as "habitual" where a dependent agent makes an isolated sale of goods on behalf of a principal, that may not necessarily constitute the income from such an operation as deemed profit liable to Nigerian tax. However, where the facts show that the sale of goods on behalf of the principal or of any company associated to it by the agent is on a regular pattern, this arrangement will conform with the intention of the term "habitually"[117]

This statement conveys the FIRS's understanding of CITA as regards when it (the FIRS) can tax the activities of a non-resident company deemed to have carried on business in Nigeria through a dependent agent. The activities carried on through the dependent agent must be repetitive to qualify for tax.

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[114] The terms "interpretation" and "clarification" feature in some of FIRS's publications. See, for instance, FIRS *supra* note 107 at 2; FIRS, Information Circular 9801, "Explanatory Notes on the Application of Withholding Tax Provisions to Contracts and Agency Arrangements", (1 October 1998).
[115] Para 4.1.1
[116] *Ibid.*
[117] Information Circular 9302, "Taxation of Non-residents in Nigeria," (22 March 1993), para 4.3.

Paragraph 4.4 of the above circular states that "*a turnkey project is defined as a "single contract involving survey, deliveries, installation or construction." The profit on a turnkey project is liable to tax in Nigeria. Such a profit should not be split between the so-called "Nigeria source" and "off-shore" profits but taxed wholly in Nigeria*." The underlined part of this statement may be regarded as an enlargement on the implication of substantive legislation. This is because the relevant statutory provision[118] does not specify that a taxpayer cannot split a "single contract," for instance between onshore and offshore components. However, the FIRS's anti-splitting stance shows just how the tax authority's perspective can impact the practical application of tax legislation.[119]

For the avoidance of doubt, not all tax authority publications seek to shrink benefits possibly accruable to taxpayers from tax legislation. Indeed, in some cases, such publications may seek to relieve a taxpayer or a class of taxpayers from the strict – perhaps detrimental – application of tax legislation. A good example, perhaps, is the Explanatory Notes on the Critical Tax Issues for The Operation of Bank Holding Company Structure in Nigeria.[120] This circular was issued to provide clarity and simplicity on the tax implications of certain changes triggered by a policy of the Central Bank of Nigeria (CBN) which barred Nigerian banks from "universal banking."[121] As a result of this CBN policy, the banks were made to split their operations (such as commercial banking, insurance, capital market, fund management) between as many subsidiaries as were necessary, while incorporating a holding company that would coordinate the subsidiaries. The new arrangement created a tax compliance problem for the banks because they then had to withhold

[118] CITA, para 13(2)(c).
[119] For a detailed exposition on this subject, see Okanga Ogbu Okanga, "The Single Contract Basis of International Corporate Taxation: A Review of Saipem & FIRS" (2018) 9:4 The Gravitas Rev of Business & Property L 33.
[120] FIRS, Information Circular PC-T12.2.3.1027, "Explanatory Notes on the Critical Tax Issues for the Operation of Bank Holding Company Structure in Nigeria," (April 2012).
[121] See *Central Bank of Nigeria Regulations on Scope of Banking Activities & Ancillary Matters,* CBN/2010-3.

taxes on payment of dividend to their taxpayers at both subsidiary and holding company levels.[122] To provide administrative relief, the FIRS circular stated that the subsidiaries would not be required to deduct and remit withholding tax, but rather they could pay gross dividend to the holding company and the holding company would then distribute the dividend to the shareholders net of withholding tax which it (the holding company) would deduct and remit to the relevant tax authority. Of course, under this arrangement, shareholders of the subsidiaries had to give up their shares in those companies in exchange for shares in the holding company. That way they would be able to receive the dividends directly from the holding company.

The FIRS, in exercising its powers under section 29 of CITA to approve business restructurings (such as mergers, acquisitions and takeovers) where a new company emerges from a restructuring, has the discretion to waive the application of the business commencement or cessation rules contained in subsections 29(3) & (4) of CITA.[123] The FIRS's position on this provision is partly contained in the circular entitled Tax Implication of Mergers And Acquisition[124] where it is stated that the "commencement rule as provided under Section 29(3) will apply to the new company. However, where the merging parties are connected parties (Section 29(10) of CITA) or the new business is a reconstituted company (under Part II of the CITA) taking over the trade or business formerly run by its foreign parent company (Section 29(10) of CITA), then the FIRS may direct that the commencement rule be sidestepped, in which case, the new company will file its returns as a going concern in which case it will be assessed on a preceding year basis.[125]

[122] This was in addition to the fact that withholding tax on dividends paid to human shareholders were remitted to the relevant state tax authority while withholding tax on dividend payable to a corporate shareholder was to be remitted to the FIRS.
[123] See section 12 of CITA.
[124] FIRS, Information Circular 2006/04, "Tax Implication of Mergers and Acquisition," (February 2006).
[125] *Ibid*, para 4.3.2.

2.2.3 Practice

It is not unusual in tax administration that an unprescribed mode of tax treatment assumes the status of a rule by virtue of consistent application.[126] This is in the form of prevailing or established practice. As a working definition, the term 'established practice' refers to a regular, consistent predictable and certain conduct, process or activity of the decision-making authority.[127] In such cases, whether or not there is an express statement as to how the tax authority would act, the consistent conduct of the tax authority conveys that impression to the taxpayer, to a point where the taxpayer comes to see it as the norm and such that in certain circumstances the court may not allow the tax authority to resile from it.[128] For example, prior to the issuance of Nigeria's first Transfer Pricing Regulations in 2012, the FIRS usually accepted prices approved by the National Office for Technology Acquisition and Promotion (NOTAP)[129] as the "arm's length price" for intangibles acquired by Nigerian entities from foreign entities; and taxpayers came to expect this as an acceptable practice even though there was nothing in the law that required the FIRS to do so.[130]

In some cases. the tax statutes confer various discretionary powers on the FIRS that are so flexible that they can be exercised through any one or more of the three categories of discretion discussed in this section (promise, policy or practice). Okoro, a Nigerian tax lawyer, identifies some of these discretionary powers.[131] These include: discretion to assess a taxpayer not by its actual assessable

[126] Jerome Okoro, "Holding the Taxman to His Word: The Doctrine of Legitimate Expectation and Tax Administration in Nigeria" (2019) *SSRN,* online: https://dx.doi.org/10.2139/ssrn.3322382 at 2.
[127] See the Indian Supreme Court decision in *Ram Pravesh Singh & ors vs. State of Bihar & ors* (2006) 8 SCC 381; (2006) 8 SCJ 721, para 14.
[128] See *R v Inland Revenue Commissioners Ex p. Unilever Plc* [1996] S.T.C. 681.
[129] This administrative body has the power to approve, mainly for ease of payment repatriation, the prices agreed in technology transfer agreements between resident and nonresident entities in Nigeria.
[130] See Joshua Bamfo, Amaka Samuel-Onyeani & Emmanuel Onasami, "Nigerian Transfer Pricing Audit Challenges: Arm's-Length Rates vs. NOTAP-Approved Rates," (2017) Tax Notes Int'l 181.
[131] See Okoro, *supra* note 126 at 12-18.

profit, but by a fair and reasonable percentage of that profit;[132] discretion on the selection of transfer pricing method;[133] and discretion to extend time for tax compliance.[134] In the latter case, the author argues that the extension of time also implies a waiver of the penalty that would have applied if time was not extended.[135] The FIRS is also empowered, *inter alia,* with discretion to reopen assessment, raise additional assessment[136] and to levy tax by distress of goods.[137] The tax laws contain provisions that allow the tax authority to make adjustments as it deems fit for the purpose of protecting the revenue base from erosion.[138]

The nature of tax administration is such that once tax legislation is enacted, the tax authority assumes the role of implementing the legislation to meet its intended effect. The administrators ensure the practicability of the law by ensuring compliance.[139] Tax guidance is an integral part of this function. Since the positions expressed in tax guidance emanate directly from the responsible tax authority it is only logical for taxpayers to rely on them, more so when the guidance conveys how the FIRS prefers to exercise its discretionary powers. A taxpayer who is keen to avoid conflict with the tax authority would readily play along. In the next section, I shed some more light on the importance of discretion in tax administration, especially as regards Nigeria.

2.3 The Significance of Discretion in Tax Administration

Taxation provides a critical point of contact between the individual and the state. It requires a number of delicate balances to be negotiated, ensuring on the one hand that the tax imposed by the

[132] Section 30(1) of CITA.
[133] Regulation 5 of the Transfer Pricing Regulation 2018.
[134] Section 59 of CITA and section 34 of the PPTA.
[135] See Okoro *supra* note 126 at 16 – 17.
[136] Section 66 of CITA.
[137] Section 33(1) and section 86 of CITA.
[138] See, for instance, sections 13(2)(d) & 22 of CITA.
[139] Olokooba *supra* note 47 at 71.

legislature is collected efficiently and, on the other, that the taxpayers' rights and interests are respected.[140] The government cannot carry on its functions, particularly the enforcement of taxes, without wide discretionary powers granted to the administrators by different tax statutes.[141] Statutory provisions cannot contemplate all circumstances, hence the provisions for the exercise of discretion.[142] This situation leaves gaps that administrative discretion attempts to fill. Davis forcefully asserts that it is impossible to have a government of laws and not of men to the extent that officers exercise vast discretionary power. He affirms that we cannot change that – the exercise of discretion by public officers – because we simply cannot have a governmental or a legal system without a large amount of discretionary power.[143] He asserts that discretion, even unguided discretion, is an absolute necessity for every legal system.[144] Except if the Act of Parliament were made with super-natural prescience, the enduring relevance of the exercise of discretion in tax administration cannot be over-emphasized. Therefore, the justification for discretion is often the need for individualized justice.[145]

The sheer size and complexity of the tax *corpus juris* also necessitates the exercise of discretion. In a given tax system, governments levy different forms of taxes under different names. In some instances, taxpayers do not know when to pay, mode of payment, who to pay to as well as how to ascertain whether the payment is a tax or something else.[146] Clearly worded and easy to understand representations by public authorities will, in some cases of ambiguity, serve to guide an

[140] Freedman & Vella, *supra* note 66 at 79.
[141] Brian Thompson & Michael Gordon, *Cases and Materials on Constitutional & Administrative Law,* 11th ed (Oxford, UK: Oxford University Press, 2011) at 97 cited in Adedokun, *supra* note 50 at 4.
[142] MT Abdulrazaq, *Taxation System in Nigeria*, (Lagos: Gravitas Legal and Business Resources Ltd, 2016) at 98.
[143] Kenneth Culp Davis, "Confining and Structuring Discretion--Discretionary Justice: Chapter 3" (1970) 23:1 J Leg Educ 56 at 58.
[144] *Ibid.*
[145] Adedokun, *supra* note 50 at 4.
[146] See Olokooba *supra* note 47 at 3-4.

individual's actions and decisions.[147] The words of the UK Court of Appeal, per Moses LJ, in *Gaines-Cooper*[148] provide some useful explanation on the importance of revenue guidance specifically:

> The importance of the extent to which thousands of taxpayers may rely upon guidance, of great significance as to how they will manage their lives, cannot be doubted. It goes to the heart of the relationship between the Revenue and taxpayer. It is trite to recall that it is for the Revenue to determine the best way of facilitating collection of the tax it is under a statutory obligation to collect. But it should not be forgotten that the Revenue itself has long acknowledged that the best way is by encouraging co-operation between the Revenue and the public… Co-operation requires fair dealing by the Revenue, and frank and open dealing by the public. Of course the Revenue may refuse to give guidance and re-create a situation in which the taxpayers and their advisers are left to trawl through the authorities to find a case analogous to their own, or, if they are fortunate, a statement of principle applicable to their circumstances.[149]

The importance of guidance through advance tax ruling was stressed further by the former US Commissioner of the Internal Revenue Service, Mortimer Caplin, who noted in 1962 that "with complex tax laws and high tax rates, it is understandable why taxpayers frequently hesitate to move on important business transactions without some official assurance of the tax consequences.[150]

A specific factor that makes discretion indispensable in the tax system is the self-assessment regime. Nigeria is one of many countries that operate a self-assessment system of tax compliance. Under self-assessment, the taxpayer is granted the right, by law, to accurately compute their own tax liability, pay the tax due (at the designated bank or other deposit location) and produce evidence of tax paid at the time of filing their tax returns at the tax office, on due date.[151] On the other hand,

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[147] Soren Schonberg, *Legitimate Expectations in Administrative Law* (Oxford: Oxford University Press, 2000) at 29.
[148] *R (on the application of Gaines-Cooper) v HRMC* [2010] EWCA Civ 83.
[149] *Ibid* at para 12.
[150] Mortimer M Caplin, "Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles," (1962) 20 NYU Proc. of the Twentieth Ann. Inst. On Fed Tax'n 1 at 1, cited in Yehonatan Givati "Resolving Legal Uncertainty: The Unfulfilled Promise of Advance Tax Rulings" (2009) 29:1 Va Tax Rev 137 at 147.
[151] Gabriel Nkwazema Ogbonna, "Self-Assessment Scheme and Revenue Generation in Nigeria," (2014) 4:10 IIEST 110; Carlos Silvani & Katherine Baer, "Designing a Tax Administration Reform Strategy: Experiences and Guidelines" (1997) IMF Working Paper No. WP/97/30 at 12. Online https://www.imf.org/external/pubs/ft/wp/wp9730.pdf

the tax authority has the responsibility of ensuring taxpayers' compliance with the tax law and administration process through enablement, compliance and compliance enforcement activities that may include the application of statutorily prescribed sanctions.[152]

Self-assessment tax compliance in Nigeria is governed by the Tax Administration (self-assessment) Regulations 2011. Overall, the Regulations seek to provide some guidance and introduce some level of consistency in the filing of self-assessment tax returns.[153] It is implicit that an understanding of the requirements of the substantive tax legislation is a precursor to this do-it-yourself method, since a taxpayer that does not know how to ascertain their tax liabilities would almost certainly not know what to file. Given that the tax rules are not always as simple as breaking an eggshell, it is sacrosanct that the taxpayer receives some form of external assistance on how to efficiently make computations. While some taxpayers can afford the services of competent tax advisors, not all taxpayers can. Moreover, even expert tax advisors cannot always tell with certainty how the tax authority would apply a specific tax provision, especially one that is ambiguous. Further, the absence of guidance may also circumvent the ability of the taxpayer to plan its affairs prudently, even in the most genuine of cases. All these factors considered, the importance of tax guidance cannot be lost.[154]

Again, guidance enables taxpayers to better apply filing rules, which reduces the need for the revenue to conduct intense tax audits. This can allow the revenue to channel limited resources to

[152]Silvani & Baer *ibid.* Ogbonna *ibid* at 110.
[153] See Taiwo Oyedele, "Tax Administration (Self Assessment) Regulations 2011: What you need to be aware of," *PWC:* https://www.pwc.com/ng/en/pdf/tax-administration-self-assessment-regulations-nigeria.pdf
[154] The self-assessment system is not without cost. It provides greater opportunities for tax avoidance and evasion, undermining the tax base and reducing government revenues. See Vito Tanzi & Parthasarathi Shome, "A Primer on Tax Evasion, (1993) 40:4 Staff Papers – International Monetary Fund 807 at 810, cited in Sas Ansari & Lorne Sossin, Legitimate Expectations in Canada" in in M Groves & G Weeks, eds, *Legitimate Expectations in the Common Law World* (Oxford: Hart Publishing, 2017) 293 at 297.

matters that require closer attention. Guidance can also help ensure a uniform application of tax law to taxpayers, which engenders equity among similarly placed taxpayers. When guidance is publicly provided, all taxpayers can more readily ascertain the position of the tax authority on specific matters, which reduces the likelihood of similarly placed taxpayers being treated differently by individual tax officers.

Despite the foregoing, it should be emphasized that tax discretion is not without concerns. Tax rulings, for instance, can expose the tax system to base erosion, increase administration costs, cause unwanted delays or lead to the "privatization" of tax law.[155] Further, a peep into some of the statutory discretions in Nigeria reveals that they are too wide and susceptible to abuse particularly in Nigeria where there are high levels of politics and corruption in the public service.[156] Corruption is said to be prevalent in the administration of taxes and duties in Nigeria, such that until recently, it was commonplace for tax officers to collect tax payments partly on behalf of one's self and partly for the government.[157] Evaders take advantage of these corrupt systems to bribe officials rather than pay taxes; and tax assessors collude with taxpayers, particularly with regard to the personal income tax, or in some cases, in connection with the assessment.[158] In that respect, the social context of discretion, and the need for oversight must be emphasized.

Because discretion also exposes taxpayers to abusive practices by tax officers, it is important that the rights of taxpayers are adequately protected. Taxpayer protection is guaranteed ultimately by the constitutional principles which underpin each national tax system.[159] Debate on the level of

[155] Waerzeggers & Hillier *supra* note 91 at 4.
[156] Adedokun *supra* note 50 at 15.
[157] Leyira Christian Micah, Chukwuma Ebere & Asian Umobong, "Tax System in Nigeria – Challenges and the Way Forward" (2012) 3:2 Research J Finance and Accounting 9 at 12.
[158] *Ibid.*
[159] Freeman & Vella *supra* note 66 at 80.

discretion that the tax authority may be allowed to exercise should, thus, take place against the backdrop of each country's specific constitutional principles. These principles will define the outer boundary of the discretion that is allowed under that particular legal system.[160] In Nigeria, these may include principles such as the separation of powers, the rule of law and the right to own property, as embodied in Nigeria's written constitution.

Nigeria does not have specific legislation that outlines or codifies all the rights that a taxpayer is entitled to enjoy. Some rights are guaranteed by the Constitution, while others may be picked from tax statutes. Section 42 of the Constitution, for instance, guarantees to an individual the right to own and acquire both movable and immovable property in any part of Nigeria and the right against compulsory acquisition of property. Rights contained in statutes include the right to notice in certain circumstances,[161] to a refund of excess tax,[162] to confidentiality of information,[163] to relief due to error or mistake in assessment,[164] to appeal,[165] to legal representation,[166] to privacy,[167] etc.[168] All these rights are listed in statutes. In contrast, there is no taxpayer right to legitimate expectation prescribed in any tax legislation or any legislation for that matter.[169] However, as I demonstrate in the ensuing sections, legitimate expectation evolved as a remedy devised by the courts to ensure that taxpayers – members of the public that interact with other public authorities, generally – are

[160] *Ibid.*
[161] See, for instance, section 26(1) of the FIRS Act; sections 57 and 69 of CITA.
[162] See, generally, section 23 of the FIRS Act.
[163] See subsections 39(1) and 50(3) of the FIRS Act and regulation 34 of the Tax Administration (self-assessment) Regulations 2011.
[164] See section 83 of PITA.
[165] See generally the 5th Schedule to the FIRS Act, which provides for appeal of assessments to the Tax Appeal Tribunal.
[166] Paragraph 18(1) of the 5th Schedule to the FIRS Act.
[167] See section 29(6)(7) & (8) of the FIRS Act. See also section 39 of the Constitution of the Federal Republic of Nigeria 1999, as amended.
[168] For a broader discussion of these rights, see Olokooba *supra* note 47 at 62–67
[169] In contrast with Nigeria, legitimate expectation is a constitutional right in South Africa, for instance. It is also encoded in the Promotion of Administrative Justice Act, No. 3 of 2000.

treated fairly by the tax authority when they interact with the discretionary functions of the authority.

Chapter 3: Legitimate Expectation

3.1 The Concept, Origin and Evolution of Legitimate Expectation

Having discussed the formalities of discretion in the preceding chapter, the aim of this chapter is to discuss how revenue discretion interfaces with judicial supervision, especially in the form of judicial review. Although there are various principles of judicial review, the focus of this paper is on the doctrine of legitimate expectation, which, in theory, provides a certain brand of protection to taxpayers when the revenue is deemed to abuse its discretion.

Legitimate expectation is a shorthand for the public law principles that will, in some circumstances, place limitations on a public authority's ability to act inconsistently with a person's expectation as to how the authority would exercise its powers in a particular situation or case, where the expectation is reasonably based on a representation by, or consistent past practice of, the authority.[170] Simply put and in the context of tax authorities, the concept of legitimate expectation provides that where a tax authority gives an opinion or clarification on a tax issue (either on its own or in response to a specific request by a taxpayer, with full disclosure of the facts) and the taxpayer has relied on the clarification, then the tax authority should not retrospectively reverse its position.[171] Legitimate expectation creates a basis upon which taxpayers can adopt and rely on official representations and patterned tax practices with the assurance (which is indeed the legitimate expectation) that the relevant tax body would maintain its expressed position or promise; or at least that the courts would intervene if the tax authority reneges.[172]

[170] Alan Bates, "Taxation and Protection for Legitimate Expectations," (2011), online: https://www.monckton.com/wp-content/uploads/2011/05/TAXATIONLEGITIMATEEXPECTATIONSPLC.pdf
[171] Onyenkpa & Ayoola *supra* note 5.
[172] Okoro *supra* note 126 at 2.

The concept was absorbed into Nigerian law from English common law some three decades ago.[173] In that respect, it seems that the origin of the doctrine can be traced to the reasoning of Lord Denning MR in his concurring opinion in the prominent case of *Schmidt & ors v Secretary of State for Home Affairs.*[174] In that case, the plaintiffs, US citizens, had been granted leave by the UK Home Office to enter the UK for a specified period of time to study at the Hubbard College of Scientology, East Grinstead. The College was at the time a recognised educational establishment under the Aliens Order of 1953. Around 1968, during the pendency of their study, the UK Government resolved that scientology was "a pseudo-philosophical cult" whose practices were socially harmful. The government thus resolved to "take all steps to curb its growth." The steps taken included denying leave to aliens who sought to enter the UK to study scientology. It happened that the plaintiffs could not conclude their studies within the time specified in the leaves granted them to stay in the UK and, consequently, applied to the defendant for extension. Their applications were rejected on the basis of the new anti-scientology policy. The plaintiffs' stay was, however, extended for a period of two months to allow them time to plan their departures. The plaintiffs filed a representative action for themselves and 50 other alien students of the college, claiming declarations that the defendant's decision not to consider further similar applications was unlawful, void and of no effect and that the defendant was bound to consider such applications on their merit. The lower court ordered that the plaintiffs' statement of claim be struck out as an abuse of process of the court and that the action be dismissed for showing no reasonable cause of action. The court's main basis was that the plaintiffs had no legal right to challenge the defendant's

[173] The protection of legitimate expectations is, however, said to derive from the principle of *Vertrauensschutz*, which seeks to ensure that "everyone who trusts the legality of a public administrative decision should be protected". See Meinhard Schroeder, "Administrative Law in Germany" in R Seerden and F Stroink, eds, *Administrative Law of the European Union, Its Member States and the United States - A Comparative Analysis* (Antwerp: Intersentia Uitgevers Antwerpen, 2005) 119.
[174] [1969] 2 Ch 149.

decision because their entry into and extension of stay in the UK was a privilege that the defendant had the absolute right to grant or refuse, even without having to show cause. The appeal to the Court of Appeal was dismissed on the same grounds. Lord Denning MR in giving his concurrent decision made the following observations:

> The speeches in Ridge v Baldwin [1964] A.C. 40 show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.[175]

So marked the birth of the common law doctrine of legitimate expectations, a doctrine that now enjoys varying degrees of acceptance and application in the jurisprudence of many countries.[176] Over the years, legitimate expectation has become a key principle within judicial review. Many cases succeed, or at least get off the ground, by relying on legitimate expectation. The applicant will say to the court: (a) I have one; (b) it is under threat; and (c) the court should protect me.[177] In *Attorney-General of Hon Kong v NG Yuen Shiu* it was stated that the word "legitimate" means "reasonable", and that, accordingly, "legitimate expectations" includes expectations which go beyond enforceable legal rights, provided they have some reasonable basis.[178]

In *Council of Civil Service Unions & Ors. v Minister for the Civil Service,*[179] it was held, *inter alia*, that an aggrieved person was entitled to invoke judicial review if he showed that a decision of a public authority affected him by depriving him of some benefits or advantage that in the past he had been permitted to enjoy and which he legitimately expected to be permitted to continue to

[175] *Schmidt supra* note 26 at 170 paras E–F.
[176] See, generally, Matthew Groves & Greg Weeks, eds, *Legitimate Expectations in the Common Law World* (Oxford: Hard Publishing, 2017). See also Qaisar Abbas, "Doctrine of Legitimate Expectations: Prospects and Problems in Pakistan" (2008) Pakistan LJ 448.
[177] Fordham *supra* note 10 at 188.
[178] *Attorney-General of Hong Kong v NG Yuen Shiu* [1983] 2 AC 629, [1983] 2 All ER 346.
[179] (1984) 3 All E.R. 935.

enjoy, either until he was given reasons for its withdrawal and the opportunity to comment on those reasons, or because he had received an assurance that it would not be withdrawn before he had been given the opportunity of making representation against the withdrawal.

The extent to which Lord Denning intended the doctrine to play out in subsequent cases was not elaborated on in his reasoning. In the *Schmidt* case, the court's discussion focused on procedural fairness. The legitimate expectation referred to in *Schmidt* did not give the alien students an enforceable substantive right to stay for the time originally permitted but an enforceable right to be heard before the decision to revoke their permit was taken: a procedural protection only.[180] In *Schmidt,* Lord Denning did not pause to explain the rationale of legitimate expectation.[181] He did so three years later in *R v Liverpool Corporation; ex parte Liverpool Taxi Fleet Operators' Association*[182] where he stated that:

> So long as the performance of the undertaking is compatible with their public duty, they must honour it… At any rate they ought not to depart from it except after the most serious consideration and hearing what the other party has to say; and then only if they are satisfied that the overriding interest requires it. The public interest may be better served by honouring their undertaking than breaking it.

Thus, traditionally, English administrative law recognized only procedural protection for legitimate expectations (so that when legitimate expectations were infringed, only additional procedural rights, such as a hearing, were granted).[183] If Lord Denning intended legitimate expectation only as a procedural safeguard, the frontiers evolved with time into the realm of substantive protection. The potential extension of the principle to substantive benefits emerged

[180] BN Pandey, "Doctrine of Legitimate Expectation" (2002) 31 Banaras LJ 57 at 58.
[181] Philip A Joseph, "Law of Legitimate Expectation in New Zealand" in M Groves & G Weeks, eds, *Legitimate Expectations in the Common Law World* (Oxford: Hart Publishing, 2017) 189 at 191.
[182] [1972] 2 QB 299 at 304.
[183] Barak-Erez, *supra* note 17 at 584.

later in English law.[184] The cases of *R v Secretary of State for the Home Department, Ex p Asif Mahmood Khan*[185] (Court of Appeal) and *R v Secretary of State for the Home Department, Ex p Ruddock*[186] are commonly cited in connection with this development. Both cases concerned the application of published government policy criteria (relating respectively to entry clearance for children, and telephone tapping). In the former case, the UK Court of Appeal equated the criteria to procedural benefits, applying the principles stated by Lord Fraser in the *AG Hong Kong* case, as follows:

> I have no doubt that the Home Office letter afforded the applicant a reasonable expectation that the procedures it set out, which were just as certain in their terms as the question and answer in Mr. Ng's case, would be followed, that if the result of the implementation of those procedures satisfied the Secretary of State of the four matters mentioned a temporary entry clearance certificate would be granted and that the ultimate fate of the child would then be decided by the adoption court of this country. I have equally no doubt that it was considered by the department at the time the letter was sent out that if those procedures were fully implemented they would be sufficient to safeguard the public interest. The letter can mean nothing else. This is not surprising. The adoption court will apply the law of this country and will thus protect all the interests which the law of this country considers should be protected. The Secretary of State is, of course, at liberty to change the policy but in my view, vis-a-vis the recipient of such a letter, a new policy can only be implemented after such recipient has been given a full and serious consideration whether there is some overriding public interest which justifies a departure from the procedures stated in the letter...[187]

In the latter case, Taylor J, although dismissing the case on the facts, treated the principle as one of "fairness" not limited to procedural benefits.[188] The extension to substantive benefits remained controversial for some years.[189] It was not until around the end of the 20th Century that the UK

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[184] See, generally, HWR Wade & CF Forsyth, *Administrative Law,* 9th ed (Oxford: Oxford University Press, 2004) at 372–376.
[185] [1984] 1 WLR 1337.
[186] [1987] 1 WLR 1482.
[187] *Supra* note 178, per Parker LJ at 1346—1347.
[188] *Ex p Ruddock ibid* at 1497. See also *Oloniluyi v Secretary of State for the Home Department* [1989] Imm. AR 135 where the UK Court of Appeal quashed a decision of the Home Secretary refusing leave to reenter to the UK for a Nigerian student who went home for Christmas, having been assured that she would have no issues reentering the UK.
[189] See, for instance, the case of *R v Secretary of State for the Home Department, Ex p Hargreaves* [1997] 1 WLR 906 at 921, where the suggested departure from Wednesbury principles (as advocated by Sedley J in *R v Ministry of Agriculture, Fisheries and Food, Ex p Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714) was described by the Court of Appeal as "heretical".

Court of Appeal in *R v North and East Devon Health Authority, Ex parte Coughlan.*[190] undertook a comprehensive analysis of the authorities and the principles underlying them.[191]

Coughlan involved a severely disabled woman, Miss Coughlan, who was receiving nursing care in Mardon House, a National Health Service facility managed by the defendant. The defendant had made several representations to her that she would be able to spend the rest of her life in Mardon House. The defendant decided to shut down the facility due to the overwhelming cost of maintenance. On an application for judicial review of the closure decision, the judge quashed the decision to close Mardon House, holding that the applicant and other patients had been given a clear promise that Mardon House would be their home for life *and the health authority had not established an overriding public interest which justified it in breaking that promise*. The decision was upheld by the UK Court of Appeal.

Coughlan, accordingly, defused any doubt that legitimate expectation could be a substantive remedy of judicial review. Indeed, some now only accord utilitarian weight to the substantive strand of legitimate expectation.[192] As such, going by case law, there are three situations where legitimate expectation may arise.[193] The first situation is where a public body makes a representation to the claimant (by an express promise or by pursuing a course of action) which it subsequently retracts. The second situation is where a public body departs from a general policy or practice in the circumstances of a particular case.[194] Third, a legitimate expectation may be

[190] *supra* note 26.
[191] The principle was not long after *Coughlan* recognised as "well established" in the House of Lords, but without detailed argument. The cases of *R v Ministry of Defence, Ex p Walker [2000] 1 WLR 806; Secretary of State for the Home Department v Zeqiri* [2002] Imm AR 296 and *R (Reprotech (Pebsham) Ltd) v East Sussex County Council* [2003] 1 WLR 348 refer.
[192] See Reynolds, *supra* note 12 at 345–346.
[193] See Richard Clayton, "Legitimate Expectations, Policy, and the Principle of Consistency" (2003) 62:1 The Cambridge LJ 93 at 95–96.
[194] See *ex p. Khan supra* note 185; *ex p. Ruddock supra* note 186.

established where a public body replaces one general policy or practice with a new policy or practice, although this proposition remains contentious.[195]

It is worth noting, perhaps, that at the time the *Coughlan* case was decided, the Nigerian Supreme Court had introduced legitimate expectation into Nigerian jurisprudence, and, invariably, recognised substantive legitimate expectation, even though the UK authorities that the Court relied on were mainly procedural. It is only proper that I pause my analysis of the English experience and take a detour to Nigeria.

3.2 Legitimate Expectation in Nigerian Administrative Law Jurisprudence

Legitimate expectation made its debut in Nigerian adjudication decades ago in the prominent case, *Stitch v Attorney-General of the Federation & 3 ors*.[196] In that case, the appellant, a Nigerian citizen, while in Western Germany (as it then was) bought a used 1976 Model Mercedes Benz 280 Saloon car, which she shipped to Nigeria on 2nd February, 1982. The car arrived at the Lagos harbor on 3rd April 1982. While the appellant's shipping agent was dealing with the Nigerian Customs, the appellant went over to the Ministry of Commerce to obtain an import licence, the conditions for which she knew, and fulfilled, before that date.[197] At the Ministry she made her application for import licence, which she said she expected to receive the same day or the next day. That was not to be. Instead, she was told, after submitting her application, that there was "a directive" that no import license was to be issued. She was naturally disturbed and, thus, complained to the Permanent Secretary who told her to return the next day. She returned only to

[195] Clayton *supra* note 193 at 96. See *ex p. Hamble supra* note 189; *ex p. Hargreaves supra* note 189.
[196] *supra* note 40.
[197] These conditions, which were adjudged to have been the practice for years, were: (i) That the car should actually have arrived in a Nigeria Port; (ii) That provision of foreign exchange by the Nigerian Government would not be required in connection with purchase price of the car; and (iii) That the prospective importer of the car should have been abroad in foreign country from which the car was being imported.

be told by the Permanent Secretary that she should be regularly coming to the Ministry as they would soon resume the issuance of import licences. It was not until 29th April 1982 that an import license was issued to her. In the meantime, on 20th April 1982 the then Economic Stabilisation (Temporary Provisions) (Customs Duties) Order 1982 was promulgated. This Order increased the rate of duty payable on the type of car the appellant imported, from 33$^{1/3\%}$ to 500%. On the basis of 33$^{1/3\%}$, the duty which the Board of Customs assessed for the appellant to pay on 13th April 1982 was ₦1,449.22. She presented 'a certified cheque' for that amount to the Customs, but the Customs would not accept it until she produced the import licence. After the import license was issued to her on 29th April 1982, she re-presented the certified cheque with it but the Board of Customs told her she would have to pay, not the ₦1,449.22, as they originally assessed, but a sum of ₦14,500.00 on the basis of the new 500% rate. The appellant refused to pay this new amount, arguing that the car had arrived in the country before the 20th April 1982 Order was made. The Customs thereupon accepted the certified cheque but stated that it was only accepted as part of the ₦14,500.00 duty. The appellant deposed that she concluded that the federal government (1st respondent) deliberately suspended the issue of import license to her when she applied for it, in order that she would be caught by the new Order. She argued that the government had no power to do so and that the duty payable was the rate of duty applicable when the car arrived in Nigeria. The appellant, thus, filed an action for judicial review, contending, *inter alia,* that she had a legitimate expectation that the 1st respondent would treat her application for import license the way it used to at the time that she applied and that the 1st respondent's decision to withhold deliberately the license until the Economic Stabilisation Order came into force amounted to an abuse of power. The appellant averred that the Ministry of Commerce had always issued import licences as a matter of course in respect of motors cars which satisfied these conditions and the Ministry was aware that Nigerians

had arranged their affairs accordingly, and that in reliance upon this policy, Nigerians imported cars to the Nigerian Ports confident of being issued with an import license when the conditions were satisfied, and that she had complied with all the said conditions and was therefore entitled to be issued with an import license. Both the Federal High Court and the Court of Appeal dismissed the appellant's case, holding that the appellant could not prove that the Minister acted arbitrarily. The Supreme Court of Nigeria overturned the decisions of the lower courts and held unanimously in favour of the appellant.[198] According to the Court:

> It has to be remembered that the Appellant is a Nigerian Citizen and as had been shown earlier, she had relied on the conditions laid down by the Minister for importation of the type of car she brought in. She had fulfilled those conditions. There was no denial that those conditions were the conditions applicable to the Appellant's case and that the Appellant had fulfilled them. Was the Appellant who was returning home to her country from a sojourn into a foreign land, not entitled to rely upon the word of the Minister of her country that if she fulfilled the conditions put out by the Minister, she would be entitled to the benefits of that fulfillment? Would those conditions put out to the whole world by the Minister not amount (to say the least) to a promise to the Appellant that if she fulfilled those conditions the Minister would act in the way therein prescribed, namely, that she would be entitled to bring into Nigeria her car paying in respect thereof the prevailing customs duty? I must answer these questions in the affirmative, just as such a question was answered by the Privy Council in Attorney-General of Hon Kong v NG Yuen Shiu (1983) 2 A.C. 629 referred to us by Appellant's Counsel.[199]

After reviewing a number of foreign authorities, the Court held further as follows:

> The rationale which I gather from these decided cases is that a Government in which the citizen is entitled to repose confidence and trust, is not expected to act in breach of the faith which it owes to the citizen, and if it does so act, the courts will intervene. The right of the appellant in this case to be issued an import licence, on terms prescribed by the Minister on compliance with those terms, had vested. It was the right of the citizen which could not be ignored.[200]

In conclusion of the leading judgment, it was held as follows:

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[198] The Appellant's third relief, an order for the release of the vehicle to her could not be granted because the 2nd respondent (the Nigerian Customs Service) had sold the vehicle, during litigation, to the 3rd respondent who in turn sold to the 4th respondent who started cannibalizing and selling its parts. The Supreme Court held that since the car was virtually a wreck, the court would, in lieu, order the trial court to take evidence as to what a fairly used car similar to that of the appellant's car would cost and award the purchase price as damages to the appellant.

[199] *Supra* note 40 at 1027, paras D–F.

[200] *Ibid* at 1029, paras A–B.

> It was an improper exercise of the Minister's discretionary power for him to suspend the issue of a license to the Appellant when the duty payable was $31^{1/3\%}$ in order that the Appellant might be made to pay, at a later date, duty charged at the rate of 500%, thus steeping her into an additional financial liability of about N13,000.00. It was unjust and retrospectively punitive. The Legislature had not given to the Minister authority to levy that amount from the Appellant. Accordingly, this appeal must be allowed and is hereby allowed. The judgment of the Court of Appeal delivered on 26th November 1984 is hereby set aside and in its place Claims 1 and 2 of the Appellant's claims succeed.[201]

The application of legitimate expectation in the above case is emphatic. Without much elaboration at this stage, there are certain points that I would like to note. The first is that the decision was made by the Supreme Court, which means that it is binding on all other courts in Nigeria and makes legitimate expectation an integral part of Nigerian administrative law jurisprudence, at all levels. Second, the application of legitimate expectation is not merely procedural but substantive, even though most of the foreign authorities discussed by the court were based on procedural legitimate expectation. Third, the decision portrays legitimate expectation as an enabler of – rather than a deviation from – the rule of law.[202] Fourth, the case asserts the importance of checks and balances vis-à-vis separation of powers. Fifth, the decision reemphasizes the authority of the court, by judicial review, to evaluate the exercise of discretion by administrative bodies. Sixth, the advancement of judicial review by the court is based on principles such as fairness, non-abuse of

[201] *Ibid* at 1029, para E–G.

[202] It has elsewhere been soundly argued that "whenever a person relies on an administrative policy and acts upon it, both the interests of efficiency and fairness require that the expectations entailed by such a policy will gain suitable legal protection. Such policies laid down by the administration operate in various fields of human activities and affect the way individuals plan the course of their actions. In this respect the duty of the authority to comply with the rules which it creates is no more than a necessary application of the fundamental principle of the rule of law in its formal meaning. This principle demands governmental power to be exerted only by known, predictable rules, which can provide guidance and enable individuals to plan and control their course of action." When an authority publishes its policies and acts upon them, it improves the ability of individuals to plan their actions and fosters the notion of the rule of law. See Dotan, *supra* note 104 at 28. See also Hysni Ahmetaj, "Legal Certainty and Legitimate Expectation in the EU Law" (2014) 1:2 Interdisciplinary J Research and Development 20.

power, good administration, confidence and trust.[203] Seventh, legitimate expectation is recognised as a 'right', the breach of which the court has a duty to intervene to protect.[204]

A second case that follows the pattern of *Stitch,* but this time directly in the realm of taxation, in lending support to the existence of legitimate expectations is *Shell Petroleum Development Company Limited v Federal Board of Inland Revenue.*[205] In that case the Supreme Court upheld an extra-statutory agreement between the Nigerian government and the appellant, the effect of which was the reduction of the petroleum profits taxes payable by the appellant. The Court held that given that payable tax constituted a debt owed by the taxpayer to the state, the debt obligation could be compromised. The court regarded the agreement as an accord and satisfaction on the original tax debts. The court held that the tax authority, as an agent of the federal government was bound by the agreements between its principal and the taxpayer. Accordingly, exchange losses and Central Bank commissions incurred by the appellant in complying with the agreements were deductible by the appellant in computing its tax liabilities, even though the deductions inevitably led to a significant reduction in the taxes that the respondent could collect from the appellant. Uwais, C.J.N., who read the lead judgment held:

> It is clear that the profits tax to be paid by the appellant for the 1973 period had been assessed. But for Exhibits 1,2,3 and 4, the tax would have been paid in Nigeria and in Nigerian currency which is Naira. However, the appellant was under the additional obligation by virtue of the Exhibits to effect payment in England. Failure to do so would have undoubtedly rendered the appellant liable to sanction at the instance of and by the Federal Government. There is also the legal effect to be given to the agreements entered between the appellant and the Federal Government. There is no doubt that the agreements (Exhibits 2 and 3) are not illegal contracts because their terms vary the obligations of the appellant and the respondent

[203] The importance of these will become particularly clearer in chapters 4 and 5.
[204] The 'right' contemplated here is not in the classic sense of legal right to which the principles of natural justice, for instance, apply. The doctrine of legitimate expectations, instead, concerns itself with the protection of 'interests' which by themselves would not attract legal protection. In contrast to other situations where, for example, fairness and natural justice are demanded by the very nature of the thing being sought, the doctrine is able to intervene (and, properly understood, only intervenes) where interests have crystallized into 'protectable rights' by virtue of some action of the decision-maker. See Reynolds, *supra* note 12 at 334.
[205] (1996) LPELR-3049 (SC); (1996) 8 NWLR (pt. 466) 256.

> under the Petroleum Profits Tax Act, 1959; nor are they against public policy - See Solanke v Abed (1962) 1 SCNLR 371; (1962) 1 All NLR 230 at pp. 233-4. Since the agreements are not illegal it follows that the principles of contract can rightly apply to them. Hence the issue of accord and satisfaction becomes pertinent to this case.[206]

Further, Ogundare, J.S.C., in his concurring judgment, observed that:

> In any event, it is my considered view that payments made by the appellant to the account of the Central Bank of Nigeria with the Bank of England in London were in satisfaction of its obligations under Exhibits 3 and 4. By the agreement, the Federal Government had discharged the appellant of its liability under section 8 of the Act to pay tax in Lagos in Naira currency and had substituted therefore a new liability to make payment in London in pounds sterling… The court below, per Awogu J.C.A, was right when it observed: "Clearly, if Shell paid their tax in sterling abroad, as agreed, and the Board issued the necessary receipts in acknowledgement of the payments, how can it be argued that the payments did not discharge the tax obligations of the Company? It was no longer open to the Board to approbate and reprobate. Ayinde J. appears to have been right in so holding.[207]

What these pronouncements drive home is that the state can consummate extra-statutory compromises on tax matters and those compromises may not be deemed illegal. A taxpayer who relies on those compromises may be entitled to judicial protection should the state chose to reprobate. By allowing the deductibility of the foreign exchange losses, for instance, the Supreme Court impliedly endorsed the payment agreement between the government and the taxpayer, despite the agreement not being within the contemplation of the Petroleum Profits Tax Act and despite those expenses being, at best, a stretch of the meaning of expenses incidental to petroleum operations, as defined in the relevant statute. It is my view that the same weight can be ascribed to legitimate expectation. In other words, the court can, in appropriate cases, uphold a legitimate expectation where a taxpayer has reached some understanding or compromise with the revenue on

[206] *Ibid.* Due to location reasons, the author was unable to access a paper law report, such as NWLR, with pinpoint citations. An electronic version of the case (LPELR) is on file with the author. The author regrets that pinpoints to this citation are not available on the electronic version. This quote can be found on page 15 of the author's E-copy
[207] *Ibid.*

how the affairs of the taxpayer would be treated, such that, in those circumstances, the revenue may not be allowed to reverse itself if to do so would be unfairly detrimental to the taxpayer.

Although legitimate expectation is not mentioned, *Azubuike v Govt of Enugu State*[208] is another case that lends credence to the contention that the Nigerian court may in an appropriate case invoke judicial powers to bind a public authority to a representation made to a private person. In that case, the Court of Appeal reasoned that:

> The courts over time have continued to be confronted with this kind of situation where members of the public rely to their detriment on the unauthorized acts or assurances of state officials. The question has always been whether equitable estoppel should be allowed to operate to ameliorate the hardship that the member of the public would suffer from strict application of the doctrine of ultra vires. The over time is that the judicial approach to the determination of this question in each case is influenced by the subject matter and the peculiar facts of each case. It has become judicially accepted that in some situations a citizen is entitled to rely on the organ or government having the authority it has asserted if he cannot reasonably be expected to know the limits of that authority and he should not be required to suffer for his reliance on such assertion if it turns out that the organ lacks the necessary authority… It is clear from the long line of judicial decisions on the point that it is extremely difficult to define with any degree of precision the circumstances in which the courts will be prepared, in the interest of "Fairness" to the individual, to derogate from orthodox notions of ultra vires. This is particularly so with cases of detrimental reliance on the negligent misstatements and assurances of government officials.[209] [Emphasis added]

It is apparent from the above pronouncement that what the court had in mind to protect was a legitimate expectation. The pattern of the above cases, few as they are, lays the foundational framework for the contention that Nigerian jurisprudence does recognize legitimate expectation and that the court may be moved to invoke the doctrine in an appropriate tax matter. In practice, however, despite the continued prominence of judicial review in Nigerian adjudication, litigants and courts alike have largely ignored legitimate expectation, more than three decades after *Stitch.* There has been next to no doctrinal or normative advancement of the doctrine in Nigeria. As I will

[208] (2014) 5 NWLR (pt. 1400) 364.
[209] *Ibid* at 396.

show, even in a case where legitimate expectation would, perhaps, have represented a more plausible argument, parties relied instead on other principles, particularly estoppel. The reason for this is not clear. It is, however, pleasantly surprising that the few subsequent cases that border on legitimate expectation are tax-related cases. In the next chapter of this thesis, I discuss the application of legitimate expectation in Nigerian tax jurisprudence.

Chapter 4: Legitimate Expectation and Taxation in Nigeria

4.1 Legitimate Expectation in Nigerian Tax Jurisprudence

The romance between taxation and legitimate expectation in Nigeria is controversial. The few relevant cases mainly reveal that judicial attitude to legitimate expectation in tax matters in Nigeria is not very accommodating.[210] I commence this chapter with *Federal Board of Inland Revenue v Halliburton (WA) Limited*.[211] The FBIR made additional assessments of US$6,927,248[212] for the tax years of 1996, 1997, 1998 and 1999 on Halliburton. This was affirmed by the Body of Appeal Commissioners (the BAC).[213] Halliburton appealed the additional assessments to the Federal High Court (FHC), on points of law alone, seeking to set aside the judgment of the BAC by declaring the additional assessments invalid, null and void and directing the appellant to refund to Halliburton the US$6,927,248, with interest. The additional assessment arose from contractual transactions between Halliburton, a nonresident company incorporated in the Cayman Islands, and its Nigerian affiliate, Haliburton Energy Services Nigeria Limited (HESNL). It was agreed between Halliburton and HESNL that Halliburton would obtain contracts from third parties in Nigeria for execution by HESNL with billing for the contracts made in United States (US) Dollars. It was the US Dollars income derived by Halliburton from the services rendered by HESNL to third parties that the FBIR taxed additionally in 2002.

Halliburton's challenge of the tax assessments at the BAC was unsuccessful, but an appeal to the Federal High Court succeeded, which prompted the revenue to appeal to the Court of Appeal. The Court of Appeal granted the relief sought by the FBIR. Having resolved the main appeal against

[210] Okoro *supra* note 126 at 2.
[211] (2014) LPELR-24230(CA).
[212] Six million, nine hundred and twenty-seven thousand, two hundred and forty-eight dollars.
[213] This adjudicatory body is defunct, and its functions are now performed by the TAT.

Halliburton, the Court of Appeal then proceeded to resolve a cross-appeal filed by Halliburton. The issues raised by Halliburton in the cross-appeal were as follows:

> (1) whether the original assessments were final and conclusive and if they were, whether the respondent could re-open them on the same facts and issue;
>
> (2) whether 'the lower court was right to hold that Exhibit S (the Information Circular No. 93/02) is merely 'the personal opinion' of its maker;
>
> (3) whether a legitimate expectation had been created by the combined reading of Exhibits B, C and S in favour of the applicant (sic) such that the respondent is barred in the circumstance from denying.

Issues 2 and 3 are of importance to this paper, so I restrict my discussion to them. On issue 2, Halliburton argued that Exhibit S,[214] contrary to the holding of the FHC, was not merely an opinion on a point of law upon which there was no *estoppel*, but rather had the force of law. Halliburton argued that the circular was valid as it did not conflict with the parent law, and was, therefore, binding on the FBIR who should have followed the circular in assessing Halliburton's tax liabilities. Halliburton argued that the FBIR could not be allowed to resile from the representations made to the effect that recharges were allowable deductions for a non-Nigerian company as the representations were caught by the doctrine of legitimate expectation. Halliburton argued further that the FHC misunderstood the argument on the doctrine of legitimate expectation by likening it to estoppel. Estoppel, Halliburton submitted, applies when a party is not allowed to approbate or reprobate, while legitimate expectation is based on the idea of fairness, certainty and equality in the conduct of public affairs, to ensure that public authorities do not alter abruptly existing policies to the detriment of the legitimate expectation of members of the public who arranged their affairs in accordance with the policy.

[214] An information circular issued by the tax authority in 93 pursuant to Sections 2(1)(4) and 3(1)(3) of CITA.

The FBIR countered, *inter alia,* that taxpayers seeking revenue allowances for their proposal must make clear and unambiguous full disclosures before there would be legitimate expectation by the taxpayer from the assurance given by the tax authority, which the Halliburton failed to make at the initial or original tax assessment. FBIR further argued that clear statutory words override any expectation. The FBIR added that the circular could not override the clear provisions of Section 26(1) of CITA; that while there was arbitrariness in the exercise of ministerial powers amounting to ministerial perfidy in *Stitch*, such was not the situation in the instant case; that, whether the lower court confused estoppels with legitimate expectation was immaterial since the ultimate decision reached by the court lower favoured Halliburton, showing the conclusion reached by the court below did not lead to a miscarriage of justice, especially as there is overlap between legitimate expectation and estoppel. The Court of Appeal pronounced on legitimate expectation as follows:

> The doctrine of legitimate expectation is not in the realm of estoppel. The court below thought it is a specie of estoppel. It slipped… What the doctrine postulates is that where a public body or person acting in public authority has issued a promise or has 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 promise or practice to be honoured or kept by the public body or person acting in public authority, save where there exists sound basis not to so insist on the settled scheme of conducting public affairs. The doctrine, therefore, enjoins public bodies to be fair, straightforward and consistent in their dealings with the public. In other words, the doctrine of legitimate expectation is based on the existence of regular practice by a public body which the claimant can reasonably expect to continue or subsist and thus relies on the state of affairs to conduct or arrange his business or affairs in anticipation of the availability of the regular practice to cater for the case of the claimant. Fair and open dealing are the pillars of the doctrine. And fairness requires that the exercise of the doctrine of legitimate expectation be moored to full disclosure or utmost food faith by the potential beneficiary of the doctrine. See the apt English case of R.V Board of Inland Revenue (supra) 91 at 111 (per Bingham, LJ).[215]

The Court then proceeded to apply the principles to the case before it:

> In the instant case, the cross-appellant had not made full disclosure of the income from the transaction. It omitted to declare the income or profit its subsidiary, HESNL, was to derive

[215] *Halliburton supra* note 211 at 40–41, paras G–G).

> from the transaction for assessment to tax at the original assessment to tax which covered the declared income or profit of the crossappellant from the transaction only. In the absence of full disclosure by the cross-appellant of the total income in the first exercise, the cross-appellant could not reasonably rely on Exhibits B, C and S to reap benefit from the doctrine of legitimate expectation which is rooted in utmost good faith by stakeholders concerned with tax matters.
>
> Again, Wade and Forsyth's Administrative Law (supra) states that clear or unambiguous statutory words, such as Sections 26(1) and 48(1) of CITA dealing with additional assessment to tax of taxpayers, would "override any (legitimate) expectation howsoever founded." In addition, the Privy Council case of A. - G., Hong Kong v Ng.Yuen Shiu (1983) 2 AC 629 638(F) Lord Fraser of Tullybelton, delivering the judgment of the Privy Council, aptly held inter alia that - "It is in the interest of good administration that [a public authority] should act fairly and should implement its promise, so long as the implementation does not interfere with its statutory duty." (my emphasis). Further, in the useful case of Ex P. Begbie (2000) 1 WLR 1115, it was held that the application of the doctrine of legitimate expectation was aborted or frustrated by the operation of statute. A similar result was reached in the case of Birkdale District Electric Supply Co. Ltd. (1926) AC 355 at 364 followed in Ex P. Liverpool Taxi Fleet Operators' Association (1972) 2 Q.8., 299 to the effect that a person of public authority entrusted with statutory functions for public purpose cannot compromise the functions by entering into any agreement or taking any action incompatible with the discharge of the statutory functions. Since Section 26 of CITA supersedes Exhibits B, C and S, the doctrine of legitimate expectation lavishly argued by the cross-appellant yields ground to the clear words of Section 26 of CITA. See Administrative Law by Wade (supra).[216]

It is clear from the above passages that the court resolved the issue of legitimate expectation against the taxpayer on grounds of both law and fact. The factual aspect is the nondisclosure of relevant fact by the taxpayer. The legal aspect concerns statutory limitation. The legal aspect is of greater interest to this research because it is a theme that plays in the other cases. Legality is a point that the courts have been quick to stress in the few relevant cases. Regardless of the outcome, however, *Halliburton* bears significance as the first judicial exploration of tax-based legitimate expectation in Nigeria. As such there are significant implications that can be drawn from the case; the main one being, as noted here, that the case has *ultra vires* or statutory limitation underpinnings. In other words, the court cannot deem an expectation to be legitimate if it is induced by a representation that is legally “incorrect”, since the statute is supreme. A wrong interpretation is only “a personal

[216] *Ibid* at 41– 42.

opinion" of the person interpreting. Any assurance arising from it cannot be upheld by the court because the court would not endorse an "*ultra vires"* act or position. This will be further discussed below.[217]

In *Transocean Drilling UK Limited v Federal Inland Revenue Service,*[218] Global Offshore – a Nigerian resident company – provided logistic support services to Transocean. In return, Transocean paid recharges to Global Offshore (costs plus 10% mark-up). In filing its CIT returns for 2008–2013, Transocean deducted the recharges it had paid to Global Offshore. The respondent rejected the deductions and assessed the appellant to additional CIT on the recharges. The appellant contended that the recharges were allowable, relying on paragraph 5.2(i) of the respondent's Information Circular No. 93/02, which purports to allow the deduction of recharges. The TAT followed the decision of the Court of Appeal in Halliburton in holding that a circular is not a subsidiary legislation and has no force of law. Even if it were a subsidiary legislation, it would still be overridden by the CITA in the event of any conflict. Instructively, the TAT also observed that:

> The doctrine of legitimate expectation thrives on fairness and openness. To benefit from the doctrine, a person must have made full disclosure or displayed ultimate good faith in the transaction. The doctrine cannot stand when it conflicts with a *clear* statutory provision. Since the Appellant did not declare its profits to the Respondent, the Respondent had to compute the Appellant's tax liability using the deemed profit mode. Section 30(1) of CITA is clear and it supersedes any legitimate expectations the Appellant might entertain.[219]

The *Halliburton* and *Transocean* decisions appear to follow a consistent view held by Nigerian courts on the legal status of circulars. For instance, in *Omatseye v Federal Republic of Nigeria,*[220]

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[217] A rather important takeaway from *Halliburton* is the submission of the tax authority that "taxpayers seeking revenue allowances for their proposal must make clear and unambiguous full disclosures before there would be legitimate expectation by the taxpayer from the assurance given by the tax authority." While it is the view of the court that ultimately counts, this, in my view, implies an admission by the tax authority that its "assurance" can indeed give rise to an enforceable legitimate expectation.
[218] (2017) 29 TLRN 67.
[219] *Ibid.*
[220] (2017) LPELR-42719(CA).

the Court of Appeal, quoting the Supreme Court in *Maideribe v Federal Republic of Nigeria* stated as follows:

> Administrative circulars or notices have its (sic) place in government but cannot create an offence. The apex Court in the case of MAIDERIBE v. FRN (2013) LPELR-21861(SC) on circulars held thus: "In Administrative Law Book, Eight Edition Co Authored by Prof. W. Wade and C. Forsyth page 851 throws light on the status of departmental circulars generally. Such circulars are- "a common form of administrative document by which instructions are disseminated; Many such circulars are identified by serial numbers and published and many of them contain general statements of policy... they are therefore of great importance to the public giving much guidance about Governmental organization and the exercise of discretionary powers. In themselves they have no legal effect whatsoever, having no statutory authority.[221]

The main theme of these two cases is that a circular cannot create an offence. This, of course, goes without saying given the *nullum crimen sine lege nulla poena sine lege* principle enshrined in section 36(12) of the Constitution, which forbids charging a person for an offence that is not created by a written law.[222] However, without disputing the point that a circular cannot create an offence, it is my respectful opinion that these cases should be viewed in the narrow context of criminal law: that is, the principle that a circular cannot create an offence does not necessitate the inference that a circular cannot create a legitimate expectation, especially when it conveys the discretionary intentions of the issuer.

The above line of authorities was reiterated in an almost identical case to *Halliburton*. In *VF Worldwide Holdings Ltd v Federal Inland Revenue Service,*[223] the appellant, a nonresident company, was awarded a contract to render visa related services to United Kingdom Border Agency (UKBA) in many countries, including Nigeria, in 2007. To execute the Nigerian portion of the contract, the appellant set up a Nigerian company called VF Nigeria Limited (VF Nigeria)

[221] Per Nimpar, J.C.A at 15–16, paras A–A.
[222] The term "written law" means an Act of the National Assembly or a Law enacted by a State House of Assembly. See *George v Federal Republic of Nigeria* (2013) LPELR-21895(SC).
[223] (2016) 21 TLRN 101.

with which it executed a Service Agreement. Under the Service Agreement, the appellant appointed VF Nigeria to perform the Nigerian portion of the contract in respect of which the latter was entitled to cost plus 8%. For the 2007 year of assessment, the appellant paid a total sum of GBP2,547,874 to VF Nigeria for the performance of the contract (out of the total contract sum of GBP2,902,577). Based on the practice of the respondent, the information circular issued by the respondent and judicial decisions, the appellant made its self-assessment on turnover assessment. The appellant deducted the sum of GBP 2,547,874 it paid to VF Nigeria as recharges from the contract sum of GBP 2,902,577 to arrive at its own turnover for the purpose of the turnover assessment. The appellant thereafter subjected 20% of the excess to tax at the rate of 30%, resulting in a tax liability of GBP21,281.

After a tax audit, the respondent disallowed the appellant's treatment of recharges as deductible, contending that it is 20% of the gross turnover of the appellant that should be subjected to tax at the corporate tax rate. The respondent's position was that all costs incurred by the appellant, including the recharges, were covered or captured by the 80% turnover that was not assessed to tax under the Turnover Basis of Assessment.[224] The appellant disputed the assessment and consequently appealed to the TAT.

The second contention of the appellant was that based on the information circular issued by the respondent stating that recharges were deductible, VF Worldwide was entitled to a legitimate expectation that it would not be penalized for complying with a guideline issued by the respondent. The appellant submitted that it acted in good faith by disclosing the total contract sum, including the amount paid to VF Nigeria, in its tax returns, and applied the formula set out in the respondent's

[224] The respondent did not dispute the fact that recharges were incurred, and that VF Nigeria paid tax on the amount it received from the Appellant as contained on page 2 of Exhibit VF3.

information circular. The appellant relied on the UK cases of *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)*[225] and *R v IRC Ex p. MFK Underwriting Agencies Ltd* in support.[226]

The TAT adopted the reasoning of the Court of Appeal in *Halliburton* to the effect that a circular is not a subsidiary legislation and, therefore, has no force of law; and that even if the circular were a subsidiary legislation, CITA (the relevant statute) would prevail. With regard to the doctrine of legitimate expectation, the TAT also adopted the opinion of the Court of Appeal that the doctrine of legitimate expectation thrives on fairness and openness of dealings; to benefit from the doctrine, a person must have made full disclosure or displayed utmost good faith in the transaction; and that the doctrine cannot stand when it conflicts with a clear statutory provision. The TAT held that the appellant did not declare its profits to the respondent, as a consequence of which the respondent had to compute the appellant's tax liability using the deemed profit mode. The TAT, following the precedent in *Halliburton* and *Transocean Drilling*, concluded that Section 30(1)(b)(i) of CITA is clear and supersedes any legitimate expectations that the appellant might harbor. The TAT, thus, reaffirmed the supremacy of statute over legitimate expectation.

Although none of these cases went the way of the taxpayer, the way the courts went about dissecting the facts of each case also elicits the conclusion that had the courts found sufficient factual basis, they may have upheld the legitimate expectations of the respective taxpayers.

The Court of Appeal in *Saipem Contracting Nigeria Ltd & 2 ors v Federal Inland Revenue Service & 2 ors*,[227] although upholding the taxpayer-adverse decision of the FHC, adopted a similarly

[225] (2008) UKHL 61
[226] *Supra* note 26. Both cases feature prominently in this thesis.
[227] *supra* note 98.

analytical approach that suggests that a court may, in an appropriate case, be inclined to protect legitimate expectation. The appellants, related multinational corporations, entered into a consortium agreement with Shell to supply certain oil and gas services. The contract had onshore and offshore work components. The nonresident companies were to perform their tasks outside Nigeria, while Saipem Nigeria was responsible for the onshore work. In a bid to ascertain their potential tax liabilities in Nigeria, the appellants, prior to commencing the performance of the contract, obtained advance tax rulings from the FIRS to the apparent effect that the nonresident companies (NRCs) would not be liable to CIT, etc., if they performed their responsibilities outside Nigeria. However, the FIRS subsequently reversed its position and assessed tax on the income of the NRCs. The FIRS reckoned that the incomes all derived from a "single contract", the proceeds of which were under Nigerian tax law fully subject to tax in Nigeria irrespective of place of performance. The appellants challenged these assessments at the FHC, Lagos. The challenge was unsuccessful, except as regards VAT, which the Court determined was not payable by the appellants, the providers of the services. The appellants, thus, appealed to the Court of Appeal, which dismissed the appeal for lack of merit and upheld the decision of the lower court. One of the arguments raised by the appellants was that the FIRS was "estopped" from resiling from the tax ruling. The Court, upon examination of the exhibits, found that the appellants had entered the contracts before seeking the opinion of the tax authority, so there was no reliance. Consequently, the court concluded that since there was no reliance there could be no estoppel. The case, thus, failed on the facts.

Although what was argued in this case was estoppel, the facts are such that legitimate expectation might be argued instead. Be that as it may, it is comforting that the court performed a surgical screening of the facts to determine whether the appellants did rely on the representation made by

the FIRS. The court concluded that the appellants did not. In principle, however, taken together with the pronouncements of the Court of Appeal in *Halliburton,* it seems there is ample evidence to assert the existence of judicial recognition of tax-based legitimate expectation in Nigeria. All the tax cases considered here can be regarded as consistent on this point, only taking the adverse position based on their peculiar facts or in deference to limitations imposed by statute. What is more, in the *Saipem* case, the Court of Appeal found not only that the appellants did not rely on the tax authority's guidance but also that the representation was made subject to certain conditions, which were not fulfilled.[228]

A theme that flows through the above pronouncement is that some crucial elements to support a plea of estoppel, as well as legitimate expectation, were missing. Even the representation did not meet the required levels of unambiguity. There appeared to be no full disclosure on the part of the appellants. There appellants appeared not to have relied on the FIRS's representations. Also, the appellants appeared to have misconstrued the message received from the tax authority, which also suggests that the message was ambiguous.

Ndibe,[229] a Nigerian tax solicitor, offers a forceful criticism of *Saipem,* a decision which, he asserts, has done more harm than good in terms of providing a definite position on the binding force of advance tax rulings (ATRs) in Nigeria. He submits that the court failed to provide any legal analysis or conclusion on whether ATRs issued by Nigerian tax authorities are binding, and in what circumstances such ATRs can be revoked. According the commentator, the Court merely made a general statement on the conditions for the applicability of estoppel and proceeded to

[228] *Ibid* at 19-28, paras A-F.
[229] Chukwuebuka Ndibe, "*Advance Tax Ruling in Nigeria; can the tax man eat his cake and have it"?* (2018), online: https://www.linkedin.com/pulse/advance-tax-ruling-nigeria-can-man-eat-his-cake-have-ndibe/.

evaluate the evidence before it (an issue of fact), and drew a conclusion that the FIRS could not be estopped by law from determining Saipem's tax liability. He contends that the decision is so fluid that it is capable of more than one interpretation. On the one hand, it may be taken that the court upheld and reiterated the decision of the FHC to the effect that ATRs are not binding and all that is relevant is the court's interpretation of the tax statute. In support of this inference, he points to the conclusion of the Court of Appeal to the effect that: "*the 1st Respondent (i.e. the FIRS) is not estopped from applying the provisions of the law to determine the tax liability of the Appellants* (*i.e. Saipem*)…"[230] On the other hand, Ndibe contends, the court's deep factual analysis seems to have impliedly endorsed the position that the FIRS may not resile from its representation to Saipem. In other words, if Saipem had proved that it relied on the representation, the FIRS would have been bound.[231] These criticisms can be adjudged fair in some respects. However, I must emphasize that the court, it seems, was not particularly aided by the arguments that were advanced by the appellants. Perhaps, if the appellants had put forward a public law claim of legitimate expectation rather than private law estoppel the court may have done a better job of analysing that doctrine and its applicability to tax rulings. It seems unlikely to me that such an analysis would have changed the outcome, but, at least, there could be better doctrinal clarity on whether the notion of tax-based legitimate expectation subsists. As Ndibe rightly suggests, it is inferable from the judgment, as well as *Halliburton,* that there is a place for tax-based legitimate expectation in Nigeria; which means that there might be circumstances where the tax authority is bound to an ATR. It is implicit that the court is now inclined to thoroughly examine the facts and circumstances of each case vis-à-vis the related ATR to determine if legitimate expectation is

[230] *Ibid.* See *Saipem supra* note 98 at 28, para F.
[231] Ndibe *ibid.*

applicable against the tax authority.[232] The challenge lies in meeting the threshold for a successful plea of the doctrine.

In cases like *Azubuike* and *Saipem*, although the court discussed estoppel rather than legitimate expectation, it is apparent from those discussions that the court was in a broader sense contemplating the possibilities of holding a public authority to a representation made in official capacity. The opinion of the court in *Azubuike,* in particular, may pass as an opinion in support of substantive legitimate expectation. English authorities also show that in the early stages of the development of legitimate expectation there were mentions of "estoppel" in the context of estopping the public authority from acting against the interest of the claimant.[233] English law building on legitimate expectation has developed constantly: from the recognition of estoppel in public law, to the development of substantive remedy in public law cases, to the relocation of equitable doctrine within the newly developed public law arrangements.[234] As far as Nigeria is concerned, arguments of estoppel are mainly relevant to legitimate expectation from a historically persuasive perspective, as I attempt here. This is because it is firmly established that estoppel does not operate against a statutory obligation.[235] This trenchant assertion brings us back to some legal principles that militate against legitimate expectation. These principles, all revolving around the supremacy of statute, impress that legitimate expectation is not enforceable because to do so would be to endorse a waiver of statutory mandate or to endorse the ultra vires act of a public authority.

[232] Okoro *supra* note 126 at 10.
[233] See *R. v IRC ex parte Preston* [1985] A.C. 835*; Coughlan; ex parte Reprotech (Pebsham) Ltd supra* note 191.
[234] Weeks *supra* note 86 at 156. See also David Pievsky, "Legitimate Expectation as a Relevancy" (2003) 8:3 Judicial Rev 144.
[235] *Menakaya v Menakaya* (2001)16 NWLR (pt. 738) 203. The FIRS in *Saipem* made this argument but the court did not deal with it.

4.2 **Legitimate Expectation and Estoppel, Waiver, Statutory Limitation and Ultra vires**

As stated above, a cord that runs through these intertwined principles is that they all resist legitimate expectation on the general notion that legitimate expectation offends statutory supremacy. For instance, the principle of waiver is as captured in the *locus classicus* case of *Ariori & ors v Elemo & ors*:

> The concept of waiver must be one that presupposes that the person who is to enjoy a benefit or who has the choice of two benefits, but he either neglects to exercise his right to the benefit, or where he has a choice of two, he decides to take one but not both...The exercise has to be a voluntary act. There is little doubt that a man who is not under any legal disability should be the best judge of his own interest. If therefore having full knowledge of the rights, interests, profits or benefits conferred upon or accruing to him by and under the law, but he intentionally decides to give up all these or some of them, he cannot be heard to complain afterwards that he has not been permitted the exercise of his rights or that he has suffered by his not having exercised his rights. He should be held to have waived those rights. He is, to put it in another way, estopped from raising the issue.[236]

A literal implication of this principle is that once the revenue has made a representation to a taxpayer, which implies a waiver of a certain right, the revenue cannot go back to reassert that right. This is, however, subject to the settled principle that a mandatory statutory provision of a public nature cannot be waived.[237] In *Menakaya v Menakaya,*[238] the Nigerian Supreme Court asserted this position as follows:

> When therefore it is argued that a statutory provision has been waived, it has to be considered whether the statute confers purely private or individual rights which may be waived or whether the statutory provision confers rights of a public nature as a matter of public policy. If it is the latter, the provision of such statute cannot be waived as no one is permitted to contract out of or waive a rule of Public Constitutional Policy.[239]

In that case, it was further held that:

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[236] (1983) N.S.C.C 1 at 8. See also *Olatunde v Obafemi Awolowo University & anor* (1998) LPELR–2575 (SC).
[237] See *Attorney-General of Bendel State v Attorney-General of the Federation* (1981) 10 SC.1*; Ogbonna v Attorney-General of Imo State* (1992) 1 NWLR (pt. 220) 647 at 696*; Akinsanya & ors v Shoneye & ors* (2016) LPELR-41939(CA).
[238] *supra* note 41.
[239] Per Onu, J.S.C at 60-61, paras G–B.

> A mandatory statutory provision directing a procedure to be followed in the performance of any duty is not a party's personal right to be waived. You cannot resort to estoppel to compromise a statutory provision of a public nature. Estoppel is the inhibition to assert a personal right, benefit or advantage in consequence of previous conduct, admission or in consequence of a final adjudication of the matter in a court of law. Any decision made by a court contrary to a mandatory statutory provision is a nullity.[240]

A plea of estoppel (or even legitimate expectation) may in some respect – depending on whether the statute is interpreted as mandatory – be construed as imputing a waiver by the tax authority of its statutory duty to act in a certain way or do certain things (in the extreme cases, statutory duty/obligation to collect tax) – a duty that the tax authority performs, not for himself, but for the public. Such an outcome may not be judicially acceptable in the light of the nonwaiver principle.[241]

Ultra vires, in affinity with the nonwaiver principle, dictates that a public authority cannot exceed the powers conferred on it by statute.[242] In a tax and legitimate expectation context, this is further underlined by the pronouncement of the Nigerian Court of Appeal in *Halliburton* to the effect that the doctrine of legitimate expectation cannot stand when it conflicts with a clear statutory provision.[243] Again, in a sense, these principles can also be anchored on the rule of law; that is, the widely accepted principle that government should govern by known rules rather than by whim or discretion.[244]

In my view, there are three counterarguments that can be made against the unmitigated adherence to statutory limitation in legitimate expectation cases, as captured in the preceding judicial

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[240] Per Mohammed, J.S.C at 21, paras C–F.
[241] Given how firmly rooted the anti-estoppel and nonwaiver principles appears to be in the context of statutory limitation, it is probable that even if the appellants in *Saipem* had satisfied all the requirements for an ordinary plea of estoppel, the plea may still not have held. Incidentally, the Court of Appeal did not go into this argument, having already found that the appellants did not meet the first set of hurdles.
[242] See *Psychiatric Hospital Management Board v Ejitagha* (2000) LPELR-2930(SC).
[243] *Supra* note 211.
[244] See Adam Tomkins, *Public Law* (Oxford, UK: Oxford University Press, 2003) at 22, cited in Freedman & Vella, *supra* note 66 at 94.

pronouncement. First, the prohibition does not apply where the statutory provision in question is unclear. Second, the prohibition does not apply where the wordings of the statute, although clear, allow for the exercise of discretion by the revenue.[245] Third, the extreme view, even if the statute is clear and mandatory and the tax authority has applied it ultra vires, there may be compelling reasons, in some cases, for the court to allow a plea of legitimate expectation.

The first counterargument is simply implied from the wordings of the court's pronouncement itself. The inference to be derived from that pronouncement is that in those circumstances, the revenue should be deemed – as a matter of judicial deference – to have discretion to apply the provision as it deems reasonable or appropriate; and if the revenue has exercised discretion in a given case, it should not be allowed to reprobate simply because it now has a "better" view, especially if the reverse cause would be detrimental to the taxpayer. The court should bear in mind, as some have urged, that the fact that the FIRS held a view one day and changed the view another day, in itself, attests to the "greyness" of the law, on the matter.[246]

Regarding the second counterargument, it seems that the statutory limitation to the doctrine of legitimate expectations, which is not meant to take absolute effect, has unduly influenced the courts.[247] This is, perhaps, why the FHC in *Saipem v FIRS* simplistically declared that:

> It is not the issue of resiling of earlier statement [sic] that is important now. What is important are the various provisions of law guiding payment of tax in Nigeria.[248]

[245] This is one of the predominant themes of this thesis.
[246] See Onyenkpa & Ayoola *supra* note 5.
[247] See Okoro *supra* note 126 at 2.
[248] *Supra* note 6, per Saidu J.

No case-specific analysis, on the face of it, went into this far-reaching declaration by the court, prompting skepticism about the status of legitimate expectation in Nigerian tax administration.[249] This dismissive approach, thankfully, contrasts with what the courts have done in the other cases discussed here, including the Court of Appeal decision in *Saipem,* where the approach was more detail-oriented. Along these lines, in what I deem to be the proper approach, Okoro argues that the statutory limitation rule is not meant to be absolute but should be applied based on the circumstances of each case and with painstaking reading of the relevant law to determine if the law gives legitimate expectation any chance of survival. He observes that a major flaw of the approach adopted by the Nigerian court is that it erroneously interchanged the existence of a tax liability with the mode of assessing tax. While statutory law may create a tax liability with a strict provision, leaving no escape route, the law can also make permissive provision on how to assess the tax.[250] The dogmatic thought that wide discretionary power is incompatible with the rule of law cannot be taken seriously today, and indeed, it never contained much truth.[251] What the rule of law demands is not that wide discretionary power should be eliminated, but that the law should be able to control its exercise.[252]

Although it is not always clear as to what the extent of discretion is in a given case, it goes without saying that the law has long recognised that where a body is vested with power to do certain things, such power includes a discretion on the part of that body to do so. In *Shitta-Bey v Federal Public Service Commission*[253] the Supreme Court observed that:

[249] See, for instance, Onyenkpa & Ayoola *supra* note 5; Moshood Olajide & Simisola Salu, "Pioneer Tax Holiday: Matters arising from recent developments and the doctrine of legitimate expectation." *PWC* (2015), online: https://www.pwc.com/ng/en/assets/pdf/tax-watch-april-2015.pdf; Ndibe *supra* note 229.
[250] Okoro *supra* note 126 at 6.
[251] Wade & Forsyth *supra* note 184 at 343.
[252] *Ibid.*
[253] (1981) LPELR-3056(SC).

> My Lords, I have earlier endeavoured to show that the power of the respondent under Section 147 of Act No. 20 of 1963 includes power to "re-appoint" and "re-instate". Now, there is no doubt that where power is vested in a body to do certain things, there is prima facie a discretion on the part of that body to do so.[254]

It is naive to assume that the operations of the revenue or any administrative body with complex functions are wholly teleguided by statute with no room to improvise.[255] The wide discretionary powers conferred on the FIRS by tax statutes, as discussed in chapter 2, invariably allow the FIRS in many cases to act as it deems appropriate at the particular time and occasion.[256] This is a matter of expediency; and although it is generally undesirable, enforcement of legitimate expectation will always involve the fettering of the discretion of the decision maker.[257] Contrary to the impression which most of the post-*Stitch* decisions may have created, statutory law is not a rigid barrier to

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[254] Per Idigbe, J.S.C. at 37-38, paras B-B.

[255] Logue points out that:

> Although the tax system is primarily a system of rules, it is inevitably a system of standards... This is because, even in a system with highly complex rules - in fact, perhaps especially in such a system - there can be difficult questions of how the rules are to be applied to complex transactions.
> The rules/standards distinction in law is well known. With a rule, the relevant lawmaker (whether it be Congress or some agency acting as rule-promulgator) determines ex ante - that is, before the conduct being regulated takes place - relatively precisely what conduct is permitted or compelled under what particular circumstances. With a standard, by contrast, the ex ante lawmaker provides relatively few details regarding the regulated conduct, leaving more of the content of the command to be provided ex post. Thus, with rules, the ex ante lawmakers, be they part of a legislature or agency, must provide most of the normative content of the rule; while ex post adjudicators, be they judges, jurors, or agency officials, are responsible primarily only for applying law to facts. With standards, the job of the ex ante lawmaker is somewhat easier, but the ex post adjudicator must both provide content to the law and apply the law to the facts at hand.

See Kyle D Logue, "Tax Uncertainty and the Role of Tax Insurance" (2005) 25 Va. Tax Rev 339 at 363. See also Louis Kaplow, "Rules Versus Standards: An Economic Analysis," (1992) 42:3 Duke LJ 557.

[256] Foreign jurisprudence shows that even in cases where there are precise stipulations in tax statute as to how certain things are to be done, such as time specifications, the court can still uphold a legitimate expectation if the tax authority deviates from a consistent or agreed practice, even if the practice is not in line with the statutory provision. An apt example is the UK Court of Appeal decision in *Ex p. Unilever Plc supra* note 128.

[257] Watson *supra* note 13 at 639. Some scholars posit that matters of change of policy and practice should be completely outside the reach of legitimate expectation in order to ensure that the court does not fetter administrative discretion. See Jason Ne Varuhas, "In Search of a Doctrine: Mapping the Law of Legitimate Expectations" in M Groves & G Weeks, eds, *Legitimate Expectations in the Common Law World* (Oxford: Hart Publishing, 2017) 17 at 20–29. I do not think that such a distinction should be drawn. Rather, it should be a matter of cautious case-specific evaluation by the court to ascertain whether the policy or practice is capable of giving rise to an expectation – they rarely do – and whether the tax authority or public authority should be allowed to make the change with regard to the specific beneficiary of the policy.

legitimate expectation in taxation. It limits the doctrine only when the language of the law indicates a mandatory duty. The wording of a statutory provision should be examined in each case to determine if exercise of powers under that provision is subject to any fairness rule or consideration.[258] A statutory provision can create a substantive power, but the mode or procedure of exercising the power would be by discretion bestowed on the tax authority by the same law, another law or an executive policy instrument enabled by law.[259]

Where the tax authority elicits an expectation which it then sees fit to repudiate, the court should scrutinize the relevant statute(s) to see whether there is an ounce of discretion in the power conferred. If the answer is in the affirmative, then, following *Stitch,* the tax authority should not be allowed to casually ride on the taxpayer's detriment.[260] The Supreme Court decision in *Stitch*, which is binding on all other courts in Nigeria, provides ample basis that the court has a duty to act in appropriate cases. The court should not turn a blind eye to allow the tax authority or any public authority hide unapologetically behind the wall of statutory limitation.

I should add, and it is fundamental, that there is no statutory obligation on the revenue, at least not as far as Nigeria is concerned, to give guidance or assurance to a taxpayer, even though it can be inferred from statute that there is *discretion* to do so in some instances. Thus, if the revenue, in its best judgement, decides to exercise that discretion, having not been misled, like a private person who enters into an undertaking or makes a representation, the revenue should not always be

[258] Okoro *supra* note 126 at 11.
[259] Okoro at 12.
[260] In *Stitch v AG Federation,* the Supreme Court held the public authority bound to the previous representation made by the authority to the appellant refused to excuse the public authority's change of position in her case. The court clamped down on the unfair treatment meted out to the plaintiff, taking cognizance of the detriment that she suffered, including the loss of her vehicle.

allowed to resile simply because it is not statutorily bound. Again, the relatable views of Judge J in *Ex p. MFK Underwriting Agency Ltd* are instructive:

> In the present case the revenue promulgated a number of guidelines and answered questions by or on behalf of taxpayers about the likely approach to a number of given problems. The revenue is not bound to give any guidance at all. If however the taxpayer approaches the revenue with clear and precise proposals about the future conduct of his fiscal affairs and receives an unequivocal statement about how they will be treated for tax purposes if implemented, the revenue should in my judgment be subject to judicial review on grounds of unfair abuse of power if it peremptorily decides that it will not be bound by such statements when the taxpayer has relied on them. The same principle should apply to revenue statements of policy. In those cases where the taxpayer has approached the revenue for guidance the court will be unlikely to grant judicial review unless it is satisfied that the taxpayer has treated the revenue with complete frankness about his proposals. Applying private law tests the situation calls for utmost good faith on the part of the taxpayer. He should make full disclosure of all the material facts known to him.[261]

On the third, even more controversial counterargument, I argue that even where the revenue or any public authority has exceeded its powers in issuing a promise, representation or policy, the dictates of justice may yet require that the court lift the veil of *ultra vires*. Courts from other common law jurisdictions have held often that *ultra vires* representations cannot create enforceable rights, interests or obligations.[262] Nigerian courts have likewise fully recognized and invoked the *ultra vires* doctrine as a measure to forestall a public body from acting beyond its powers.[263] Yet, like any normative doctrines, *ultra vires* is not without its shortcomings, and there are circumstances where other prevailing factors demand that the court enforces legitimate expectations even though to do so may impliedly endorse an *ultra vires* act.[264] A blanket rule for nonenforcement of *ultra vires* representations clashes with the rule of law and good administration values for the protection

[261] *Ex p. MFK Underwriting Agents Ltd supra* note 26 at 1574-1575.
[262] See *Rowland v Environmental Agency* [2005] Ch 1; *Immeubles Jacques Robataille Inc v Quebec (City)* [2014] 1 SCR 784; *F&I Services Ltd v Customs and Excise Commissioners* [2001] STS 939; *Southern Cross Employment Agency Ltd v HMRC* [2014] UKFTT 088 (TC); *R v HMRC, ex parte Wilkinson* [2005] UKHL 30.
[263] See, for instance, *Magit v University of Agriculture, Makurdi & ors* (2005) LPELR-1816(SC); *Oniga v Government of Cross River State* & anor (2016) LPELR-40112(CA); *Olaniyan & ors. v UNILAG & anor* (1985) LPELR-2565(SC).
[264] See, generally, Daly *supra* note 14 at 118–120.

of legitimate expectations.[265] It is unreasonable to expect a taxpayer who has relied upon a statement to accept, even to their detriment, that because the statement was *ultra vires* they have no remedy where they have relied upon it.[266] In *Azubuike v Government of Enugu State,* Abdul-Kadir, J.C.A stated that:

> It has become judicially accepted that in some situations a citizen is entitled to rely on the organ or government having the authority it has asserted if he cannot reasonably be expected to know the limits of that authority and he should not be required to suffer for his reliance on such assertion if it turns out that the organ lacks the necessary authority.[267]

Great unfairness may befall an individual who relied on a representation which they had no reason to doubt.[268] It is also wrong for the innocent party, the representee, to be made to bear alone the brunt of a misrepresentation, while the public officials walk free.[269] Similarly, it seems like missing the point to argue that the taxpayer does not suffer if a statement, while *intra vires*, is changed as a result of a change in the understanding of the law, because the treatment that they thought applied was wrong. Allowing the tax authority to walk away from the consequences of statements undermines confidence in the system and in the relationship between the tax authority and taxpayers.[270] A more nuanced approach which permits enforcement in appropriate circumstances would do less violence to the values underpinning legitimate expectations.[271] This call for loosening the grip is necessitated by the fact that judicial reluctance to acknowledge that legitimate expectations can give rise to a substantive benefit has had a detrimental effect on the goal of

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[265] *Ibid* at 118.
[266] Bowler *supra* note 38.
[267] *Azubuike supra* note 208 at 37–38, paras C-E.
[268] Daly *supra* note 14 at 118.
[269] *Ibid.* See also Paul Craig, "Representations by Public Bodies" (1977) 93 LQ Rev 398 at 420, cited in Daly *ibid.* This, arguably, also runs contrary to the customer/service relationship that is supposed to exist between taxpayers and tax authorities in the context of modern administration.
[270] Bowler *supra* note 38 at 35–36. Taxpayers are sometimes caught between, for some, the unacceptable position of choosing between relying upon HMRC's guidance, which could be withdrawn or changed at any time, and applying their own analysis of the legislation, which may then be contested by HMRC or, for others following guidance, unaware of the risk that in so doing they may be found to have accounted for tax incorrectly. See Bowler *ibid* at 37.
[271] Daly *supra* note 14 at 118.

achieving fairness in public administration.[272] What is required in those circumstances is a delicate balancing act by the court between the need to entrench what is fair and the need to forestall administrative indiscretion. Professor Craig has advocated such a balancing test: "where the harm to the public would be minimal compared to that of the individual, there is good reason to consider allowing the representation to bind"[273] by focusing on more sensitive ways of reconciling the needs of… innocent individuals and the requirements of the public body."[274]

Finally, while estoppel may be a no-go, the Nigerian Supreme Court's resounding endorsement of legitimate expectation in *Stitch,* which invariably placed the interest of the individual over the state's revenue generation objective in that case, significantly underlines the plausibility that a court may do the same with regard to tax.[275] This is another reason why legitimate expectation appears to be the most tenable helmet to protect a taxpayer from a detriment that may result from unfair changes of policy. In appropriate cases, the court may find itself looking beyond the somewhat simplistic view that a public right statute is involved and inquire into the fairness of the specific situation. After all, it is sometimes the case that where rigid or strict adherence to the letter of the statute will result in absurdity, unfairness or injustice the courts in their interpretative and equitable jurisdiction will yield to overriding interest of justice and allow substantial justice to prevail.[276] The Nigerian cases discussed in this thesis, especially *Stitch,* underline a notion, even if bleak, of judicial response to the demands of fairness in public administration even when the revenue of the state is at stake. As aptly observed by Okoro, *Stitch* itself also involves government

[272] Hilary Biehler, "Legitimate Expectation - An Odyssey" 50 Ir Jur 40.
[273] Craig *supra* note 269 at 711, cited in Daly *ibid* at 120.
[274] *Ibid* at 89, cited in Daly *ibid* at 120.
[275] Perhaps even Mrs. Stitch may have encountered a different outcome at the Supreme Court if she had based her case on estoppel rather than legitimate expectation.
[276] *Uzoma v Asodike* (2009) LPELR-8421(CA).

revenue that was rooted in a statute.[277] The case of *Shell Nig. Ltd & 3 Ors. v FIRS*[278] further buttresses the pro-legitimate expectation notion. In that case the Tax Appeal Tribunal (TAT) made a pronouncement which seems to support a more friendly approach to legitimate expectation in the context of tax administration:

> the Respondent is required to view taxpayers claims and objections within the overriding objective of its responsibilities for the entire tax regime. It is not fair for the Respondent to use the NNPC as a sham to deny the Appellants of their legitimate expectations of a fair treatment of their tax matters.[279]

These factors, in my view, ameliorate some of the obstinate barriers to the enforcement of tax-based legitimate expectation in Nigeria. The next section examines how Nigerian courts derive power to enforce legitimate expectation.

4.3 Legitimate Expectation and Nigerian Judicial Power

The next issue that I (briefly) examine is how the court derives power to enforce legitimate expectation, especially considering that legitimate expectation, as stated in chapter 2, is not a legally vested right. Nigerian courts are created either by the Constitution or by statute[280] and their powers derive from those instruments.[281] Constitutionally, the judicial power vested in the Nigerian court broadly extends "to all inherent powers and sanctions of a court of law; and to all matters between persons, or between government or authority and to any persons in Nigeria, in and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person."[282] Accordingly, the courts have power of judicial

[277] Okoro *supra* note 126 at 11.
[278] (2016) 24 TLRN 51.
[279] *Ibid* at 85.
[280] See, generally, Chapter 5 of the Constitution, particularly sections 230 (the Supreme Court), 237 (the Court of Appeal) and 249 (the Federal High Court). See also the Fifth Schedule to the FIRS Act (Tax Appeal Tribunal).
[281] See section 6(1) of the Constitution. See *Falae v Obasanjo & ors* (1999) LPELR-6584(CA); *Ecobank Nigeria Plc v Intercontinental Bank Plc & ors.* (2011) LPELR-4071(CA).
[282] Section 6(6)(a) & (b) of the Constitution.

review over the actions of administrative bodies and can, where necessary, confer traditional judicial review remedies such certiorari, mandamus and prohibition.[283] Unlike these remedies which are firmly established and are contained in the various rules of court,[284] legitimate expectation is only an emerging remedy that is not prescribed in any form of legislation in Nigeria. The implication is that the court can only enforce legitimate expectation by invoking its inherent judicial powers.[285] The doctrine of legitimate expectation has been developed in the context of judicial review.[286] The inherent power of the court is that which is not expressly spelt out by the constitution, or in any statute or rule of court but which can, of necessity, be invoked by any court of record to supplement the express jurisdiction or powers conferred on it.[287] It is the power which is itself essential to the existence of the court as an institution charged with the dispensation of justice.[288] The inherent judicial power of the court has been invoked in a vast range of cases, even

[283] See *ACB Plc. v Nwaigwe & ors*. (2011) LPELR-208(SC), where Onnoghen J.S.C., as he then was, stated that: "judicial review is the supervisory jurisdiction of the High Court exercised in the review of the proceedings, decisions and acts of inferior courts and tribunals and acts of governmental bodies. The remedies available are for orders of mandamus, certiorari and prohibition and also the writ of Habeas corpus." At 18, paras C-F.

[284] See, for instance, Order 34 of the Federal High Court (Civil Procedure) Rules FHC/2019-72; Order 44 of the High Court of Lagos State (Civil Procedure) Rules, LSHC/2019.

[285] It has been said that "every court is equipped with inherent powers, inherent powers can be invoked in the interest of justice to supplement the statutory jurisdiction of the court, where the exercise of such jurisdiction as it is may result in injustice, such exercise of inherent powers is what makes the court feel sufficiently fulfilled that it can do substantial justice where necessary in a particular case; See: *Universal Oil Ltd v NDIC* (2008) 6 NWLR (pt. 1083) 254; *Abacha v State* (2001) 3 NWLR (pt. 699) 35 at 45; *Nigeria Social Insurance Trust Fund v Iyen & ors* (2014) LPELR-22438(CA).

[286] Freedman & Vella, *supra* note 66 at 102.

[287] *Fawehinmi v Akilu* (1989) 3 NWLR (Pt. 112) 643. It should be noted that judicial power is not the same thing as jurisdiction. Jurisdiction has been defined as the limits imposed on the power of a validly constituted court to hear and determine issues between persons seeking to avail themselves of its process by reference to the persons between whom the issues are joined or the kind of relief sought. See *AG Lagos State v Dosunmu* (1989) 3 NWLR (Pt 111) 552, SC; *Daplanlong v Dariye* (2007) 8 NWLR (Pts 1036) 332; *Lufthansa Airlines v Odiese* (2006) 7 NWLR (Pt 978) 39 CA; *Messrs N.V Scheep v The M.V "S Avaz"* (2000) 12 SC (Pt 1) 64. On the other hand, "the inherent power of a court… is entirely supplementary to and dependent on the statutory jurisdiction of the court in a cause. A court may have or exercise inherent power or inherent jurisdiction in respect of a cause or matter within its jurisdiction. It has, however, no inherent power or jurisdiction over a cause or matter not within its jurisdiction." See *Gombe v P.W. (Nigeria) Ltd & ors* (1995) LPELR-1330(SC) at 27-28, paras F-C). By implication, where a court lacks jurisdiction, the court would not be able to invoke its inherent powers, regardless of how sympathetic it may be to the cause of the plaintiff. See *NIIT Zaria v Dange* (2008) LPELR-8666(CA).

[288] *Tubonemi v Dikibo* (2006) 5 NWLR (Pt. 974) 565 at 584 (CA).

where there was no obvious right due the plaintiff.[289] The invocation of this power stands on the pillar of justice. The principle of *ubi jus ibi remedium*, which connotes that where there is a wrong there ought to be a remedy to redress the wrong[290] also provides justification for the court to invoke its inherent powers and, thus, enforce legitimate expectation. The demonstration of this principle was implicitly evident in *Stitch,* in two senses. First, it is evident in the sense that the court enforced a remedy (legitimate expectation) that was previously unknown to Nigerian law, and, second, because when it was realised that Mrs. Stitch's vehicle – the release of which she claimed – had been damaged beyond repair while the suit progressed through the courts, the court invoked its inherent powers to order that she be compensated financially to the value of the vehicle, even though she had made no such claim. The court saw a wrong and improvised or adopted a remedy.[291] To the extent that legitimate expectation is not one of the legally recognized rights, it is only by the court invoking its inherent judicial powers to right an administrative wrong that legitimate expectation can be enforced. Such assertion of judicial power can, however, result in friction between different arms of government, in the context of constitutionalism.

[289] See, for instance, *Amaechi v I.N.E.C. (No.3)* (2007) 18 NWLR (Pt.1065) 105; (2008) LPELR-446(SC) where the court ordered that a person that was wrongfully disqualified from a general election by his political party – after winning the party nomination – which his party went on to win, be sworn into office. See also *Erisi v Idika* (1987) 3 NWLR (Pt. 66) 503 where it was held that every court has inherent powers to make orders considered to be consequential to and arising from the evidence before it, needed to give effect to it decision in a given judgment; *Crown Flour Mills Ltd v Olokun* (2008) 4 NWLR (Pt. 1077) 254: the court has inherent power to join any party whose interest would be affected and whose presence will enable the issues in the suit to be effectually determined once and for all; *Universal Trust Bank Limited & ors v Dolmetsch Pharmacy (Nigeria) Limited* (2007) LPELR-3413(SC): the court that makes an ex parte order of interim injunction has the inherent power in an appropriate case (in the interest of justice) to vary, or discharge same

[290] See *Amaechi v INEC ibid; BFI Group Corporation v Bureau of Public Enterprises* (2012) LPELR-9339(SC); *Saleh v Monguno & ors* (2006) LPELR-2992(SC).

[291] In *Wema Bank Plc v Oloko* (2014) LPELR-22574(CA) the court invoked its inherent powers to award damages in favour of the respondent even though the respondent made no such prayer. The court held that a party may be given such equitable relief as he may be entitled to even though he has not specifically asked for one.

4.4 Legitimate Expectation and Separation of Powers

A notable objection to (substantive)[292] legitimate expectation is that it involves courts descending into the merits of administrative decision-making and, thus, undermines the separation of powers between the executive and the judiciary.[293] Many critics of substantive legitimate expectation fear that the doctrine represents the judiciary straying beyond their appropriate institutional and constitutional limits.[294] For these critics, supporters of substantive legitimate expectation fail to acknowledge that the doctrine clearly narrows the freedom of the executive government, and more importantly, the effect that this may have on the judicial and executive arms of government.[295] Legitimate expectation is said to impose unacceptable constitutional restrictions on the ability of public bodies to change their policies and is thus out of step with the broader constitutional framework because it oversteps the limits between the judiciary and the executive.[296] In sum, the courts are, from the standpoint of such critics, perceived as inappropriately conducting so-called 'merits review' [of administrative decisions].[297]

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[292] Procedural expectations are generally regarded as not problematic. By contrast, substantive legitimate expectations are potentially more problematic. See Thomas *supra* note 25 at 54–55. Daly, however, opines that this distinction should not be overemphasized; that the line between procedure and substance is a notoriously slippery one, especially so in this area because individuals will typically seek to use additional procedural rights to develop additional substantive arguments. See Daly *supra* note 14 at 102–103. See also David Dyzenhaus & Evan Fox-Decent, "Rethinking the Process/Substance Distinction: *Baker v Canada* (2002) 51:3 University of Toronto LJ 193.

[293] Malukele, *supra* note 97 at 91.

[294] Joe Tomlinson, "The narrow approach to substantive legitimate expectations and the trend of modern authority," (2017) 17:1 Oxford University Commonwealth Law J 75 at 80. Critics cited by Tomlinson include: Cameron Stewart, "Substantive Unfairness: A New Species of Abuse of Power?" (2000) 28 Federal L Rev 617; Christopher Forsyth, "Legitimate Expectation Revisited" (2011) 16:4 Judicial Rev 429. On the idea of the courts having constitutional and institutional limitations, see Jeffrey Jowell, "Of Vires and Vacuums: The Constitutional Context of Judicial Review' in Christopher Forsyth, ed, *Judicial Review and the Constitution* (Hart Publishing, 2000) 330.

[295] Matthew Groves, "Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32:2 Melbourne UL Rev 470 at 487.

[296] See Mark Elliott, "Coughlan: Substantive Protection of Legitimate Expectations Revisited" [2000] 5 JR 27, cited in Clayton, *supra* note 193 at 104.

[297] Tomlinson *supra* note 294 at 80.

The doctrine of separation of powers is an integral constituent of Nigeria's constitutional order. Separation of powers works against the concentration of power by allocating governmental power to different institutions, the legislature, executive and judiciary, which then operate as a check on each other.[298] The doctrine posits that neither the legislature, the executive, nor the judiciary should exercise the whole or part of another's power.[299] The doctrine, in its pure version, is based on three theoretical principles: that each arm of government has a separate and identifiable set of functions; that the arms do not interfere with each other in the exercise of their separate functions; and that the personnel of one arm should not be members of another arm exercising the functions of that other arm of government.[300] The Nigerian Court of Appeal in *Ahmad v Sokoto State House of Assembly & anor*[301] observed that:

> The doctrine of separation of powers has three implications:- (a) that the same person should not be part of more than one of these three arms or divisions of government. (b) that one branch should not dominate or control another arm. This is particularly important in the relationship between executive and the Courts. (c) that one branch should not attempt to exercise the function of the other, for example a President however, powerful ought not to make laws indeed act except in execution of laws made by legislature. Nor should a legislature make interpretative legislation if it is in doubt it should head for the Court to seek interpretation. We owe this concept or doctrine to the French political philosopher, and one of proponents of American revolution Baron De Montesquieu who reasoned as follows: "Political liberty is to be found only when there is no abuse of power. But constant experience shows us that every man invested with power is liable to abuse it and to carry his authority as far as it will go... To prevent this abuse, it is necessary from the nature of things that one power should be a check to another. There will be an end of everything if the same person or body, whether of the nobles or of the people, were to exercise all three powers.[302]

The Nigerian Supreme Court in *Attorney-General of Abia State & ors v Attorney-General of the Federation*[303] pronounced on separation of powers, as follows:

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[298] Thomas *supra* note 25 at 57.
[299] *Adeyemi (Alaafin of Oyo) & ors. v Attorney-General of Oyo State & ors.* (1984) LPELR-169 (SC); *Kayili v Yilbuk* (2015) 7 NWLR (Pt. 1457) 26.
[300] See Margaret Allars, *Introduction to Australian Administrative Law* (Sydney: Butterworths, 1990) at 35, cited in Walpole & Evans *supra* note 24 at 121.
[301] (2002) LPELR-10996(CA).
[302] Per Salami, J.C.A. at 23–25, paras A–A.
[303] (2003) LPELR-610(SC).

> The principle behind the concept of Separation of Powers is that none of the three arms of government under the Constitution should encroach into the powers of the other. Each arm - the Executive, Legislative and Judicial - is separate, equal and of coordinate department and no arm can constitutionally take over the functions clearly assigned to the other. Thus the powers and functions constitutionally entrusted to each arm cannot be encroached upon by the other. The doctrine is to promote efficiency in governance by precluding the exercise of arbitrary power by all the arms and thus prevent friction.[304]

Accordingly, respect for legislative choice and a concern to ensure that some sort of distinction can be drawn between legislative, executive and judicial power underpins and motivates arguments for judicial deference in the enforcement of legitimate expectations.[305]

A basic problem of the separation of powers discussion is that it often confuses institutions with functions. In practice, it is often difficult to distinguish between the exercise of these functions.[306] A pure theory of separation of powers is functionally unrealistic under Nigeria's current governmental framework. Although Nigeria's Constitution recognises three separate arms of government, with primarily diverse functions, the same Constitution positively sanctions "a degree of blurring of separation of powers," to borrow the words of Walpole & Evans.[307] Indeed, only the third aspect of pure separation of powers is deeply entrenched in Nigeria, because Nigeria has ceased to be a parliamentary system of government since 1966. Assuming that administrative discretion does amount to lawmaking[308] and upholding legitimate expectation amounts to an endorsement of executive encroachment on legislative functions, it has to be said that that sort of encroachment is already an integral element of the lawmaking process dictated by the Nigerian Constitution. For instance, bills passed by the National Assembly become law only when they are

[304] Per Belgore, J.S.C. at 23-24, paras F–A.
[305] Daly *supra* note 14 at 110.
[306] Thomas, *supra* note 25 at 57.
[307] See Walpole & Evans *supra* note 24.
[308] Soft laws in this case.

assented by the President.[309] Second, the executive is often responsible for the conceptualization and drafting of bills initiated in the National Assembly, including tax-related bills.[310] Third, the Constitution empowers the President of Nigeria, the head of the executive arm, to make modifications to "existing laws". This entails the modification of federal statutes.[311] Fifth, the law allows both the executive and the legislature to perform quasi-judicial functions, such as the convention of administrative tribunals, commissions of inquiry and legislative inquiry committees. Sixth, the legislature recognizes the need for administrative flexibility in dealing with regular or emerging circumstances, which is why delegated legislation, as well as discretion, is enshrined in Nigerian tax administration.[312] Seventh, the Constitution empowers the courts to interpret and apply the laws, which sometimes shapes administrative policy and results in the creation of judicial precedent. Eighth, the Constitution allows the courts to determine disputes between the other arms of government and to invalidate the actions of the other arms of government including the invalidation of statutes enacted by the legislature.[313] Ninth, statutes establishing courts permit the heads of court to make rules of court and other subsidiary legislation incidental to the administration of justice and the coordination of certain quasi-judicial functions. All these features

[309] See subsections 58(3) & (4) of the Constitution. See the case of *National Assembly v President* (2003) 9 NWLR (Pt. 824) 104.

[310] A quintessential example which falls into the fiscal class is the appropriation bill or the national budget. Even though passed by the legislature, its conceptualization and drafting are predominantly done by the executive. The judiciary also sends is budget proposal to the executive to be included in the Appropriation Bill. See sections 59 and 81 of the Constitution.

[311] The term "existing law" generally refers to statutes inherited (as decrees or edicts) from Nigeria's past military administrations, which are deemed suitable for preservation either as Acts of the National of the National Assembly or state Laws. The essence of modification by an "appropriate authority" such as the President is to bring them into conformity with the provisions of the Constitution, as the appropriate authority deems necessary or expedient. See generally section 315 of the Constitution, particularly subsection (2) and paragraph (4)(a). See also *Attorney-General of Abia State supra* note 303; *Edet v Chagoon* (2008) 2 NWLR (Pt. 1070) 85.

[312] See sections 8 and 61 of the FIRS Act.

[313] See *Attorney-General of Abia State supra* note 309; *Nigeria Employers Consultative Association (NECA) and Another v AG Federation & ors* (Suit No. FHC/ABJ/CS/965/2017); *Attorney-General of Ogun State v AG Federation* (1982) 13 NSCC 1.

taken together show that the notion of a pure theory of separation of powers is, as far as Nigeria is concerned, nonexistent.

My aim here is, of course, not to dismiss or downplay separation of powers – a doctrine that makes constitutional democracies functional – but rather to emphasise that separation of powers has its limitations and can be blurred in certain expedient situations. Perhaps, tax administration is one of those situations. It seems that there are many advantages for blurring the lines of separation of powers. From a tax perspective, one such positives would be to take advantage of the expertise of the executive and judicial branches.[314] Another advantage of delegating the task of developing interpretative positions and discretionary administrative practices to the revenue, as supervised by the courts, is that it enables a flexible and textured response to emerging issues in tax that takes account of changing social and economic dynamics.[315] Also, given the relatively slow pace of the legislative process – which may not be apt for dealing with everyday realities of administering tax laws, the expediency of administrative discretion enables taxpayers and tax authorities alike to leverage on the quicker pace of decision making in the executive.[316] In any case, resorting to the legislature to fill every blank in the law might make legislation too unwieldy and administration detrimentally static.

Another way to assess the implications of legitimate expectation on separation of powers is to look at outcomes, i.e. the eventual results that the cases have brought about. As Tomlinson observes:

> If one was to advance a claim about a legal principle usurping the decision-making powers of public authorities, it would be of great concern – perhaps of greater concern than what is merely said in judgments – to build a detailed account about the extent to which such powers are actually usurped in practice through the outcomes of cases… it would be that it is fairly

[314] Brooks *supra* note 87 at 69.
[315] *Ibid.*
[316] This is even more crucial in a country like Nigeria where the legislative process can be rather slow. Tax statutes are not amended as often as they should, despite often highlighted flaws.

> difficult to find cases where substantive legitimate expectations arguments have succeeded, and more difficult still to find cases where the courts have actually directed the public authority concerned to uphold the expectation.[317]

Empirical conclusions reached by English Professor, Robert Thomson, support this view, highlighting that, in quantitative terms, the number of successful legitimate expectation cases is small.[318] He observes also that a detailed analysis of the five cases that did succeed, all of them were justifiable instances of judicial intervention to correct injustices caused by unfair administrative behaviour.[319] Even more telling, in another common law jurisdiction, India, a survey of the Supreme Court decisions on substantive legitimate expectation shows that of 34 cases litigated between 1992 and 2012, none was successful.[320] I think that it is equally discernible in the small quantity of Nigerian cases discussed that there is only one – *Stitch* – where the court upheld a legitimate expectation (or like) claim.[321] This shows that the fears of encroachment are far from realistic.[322] Moreover, a methodical, rather than whimsical, enforcement of legitimate expectation by the courts will ensure that legitimate expectation only succeeds in "appropriate" cases where the courts can be seen as exercising their adjudicatory obligation to dispense justice to those who rely on the choices of public authorities. In the next chapter I examine how legitimate expectation can be approached methodically by the court.

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[317] Tomlinson *supra* note 294 at 80–81

[318] The five cases considered by Thomas are: *R v Secretary of State for the Home Department; ex parte Khan* [1984] 1 WLR 1337 (CA); *R v (Luton Borough Council and others) v Secretary of State for Education* [2011] EWHC Admin 217; *Coughlan supra* note 26; *R (Bibi) v Newham London Borough Council* (2002) 1 WLR 237 (CA); and *R (HSMP Forum) v Secretary of State for the Home Department* [2008] EWHC Admin 664.

[319] See Thomas *supra* note 25 at 64–76. This author, commenting on English experience, outlines some reasons why there have been very few successful legitimate expectation cases. These include: the fact that the principle is concerned with exceptional situations; its requirements are stringent; the burden of proof placed on the applicant; the courts' reluctant to intervene when the policy changes concern the macroeconomic field; judicial respect for government discretion, etc. See *Ibid* at 62–63.

[320] See Chandrachud, *supra* note 14 at 263.

[321] This assertion should not be applied to judicial review cases, generally, because there is no available data on the success rate of judicial review cases that are based on the traditional forms of mandamus, certiorari and prohibition.

[322] Since it is courts that set the rules of judicial review, and can almost do as they please, an inference premised on legal realism that can be drawn from these modest outcomes is that the courts themselves have chosen to adopt an arm's length approach to legitimate expectation, and this largely accounts for the low successful turnover.

Chapter 5: Refining the Application of Tax-based Legitimate Expectation in Nigeria

This chapter examines the various factors that the court may consider in deciding whether the facts of a tax case give rise to a legitimate expectation and, further, whether the legitimate expectation is worth protecting. I also examine the underlying principles that may guide the court's examination or justify the protection of legitimate expectation in a given case.

5.1 What Factors Are Relevant?

If it is taken as established that legitimate expectation is part of Nigerian jurisprudence and, by inference, that the Nigerian taxpayer can, at least in theory, make a legitimate expectation claim, it is also pertinent to iterate that it is not every assurance or representation that is made to a taxpayer that can give rise to a legitimate expectation. The law is, after all, concerned not simply with what the applicant expected, but also with what they were entitled to expect.[323] As Bingham LJ observed in the UK case of *R v IRC ex parte MFK Underwriting Agencies Ltd:*[324]

> I am, however, of opinion that in assessing the meaning, weight and effect reasonably to be given to statements of the revenue the factual context, including the position of the revenue itself, is all important. Every ordinarily sophisticated taxpayer knows that the revenue is a tax-collecting agency, not a tax-imposing authority. The taxpayer's only legitimate expectation is, prima facie, that he will be taxed according to statute, not concession or a wrong view of the law: *Reg. v Attorney-General, Ex parte Imperial Chemical Industries plc* (1986) 60 T.C.1, 64G, *per* Lord Oliver of Aylmerton. Such taxpayers would appreciate, if they could not so pithily express, the truth of the aphorism of "One should be taxed by law, and not be untaxed by concession": *Vestey v Inland Revenue Commissioners* [1979] Ch. 177, 197 *per* Walton J. No doubt a statement formally published by the Inland Revenue to the world might safely be regarded as binding, subject to its terms, in any case falling clearly within them.[325]

[323] Watson *supra* note 13 at 634.
[324] *Supra* note 26.
[325] *Ibid* at 1569.

The above persuasive[326] statement sets a general tone on the parameters within which the court may protect a legitimate expectation in revenue matters. There have been various attempts, judicial and academic, to refine the province of legitimate expectation to better streamline the circumstances under which a court may ascertain the existence of a legitimate expectation (worthy of protection) and, perhaps more importantly, where a court may refuse to enforce a recognized expectation.[327] Watson, for instance, identifies a sub-divisible two-step test that differentiates between the expectation, on the one hand, and its legitimacy, on the other hand.[328] Fordham[329] asserts that legitimate expectation "usually" needs: (1) prior disclosure by the applicant; (2) a clear and unqualified representation; (3) communication to the applicant (or that "class"); and (4) detrimental reliance, but then cautions that:

> It is dangerous to think that all these ingredients are essential for all purposes… (1) There is often no mention of disclosure. (2) The absence of a clear and unambiguous representation was not fatal in *Unilever.* (3) The absence of communication to and knowledge by the applicant was not fatal in *R v Secretary of State for the Home Department ex p. Ahmed* [1999] Imm AR 22 at 40 (involving an "objective" legitimate expectation that the Home Secretary would not, without reason, act inconsistently with a ratified Convention). (4) It is recognised "that reliance and detriment as such are not necessarily required in every legitimate expectation case" *(Francisco Javier Jaramillo-Silva v Secretary of State for the Home Department* [19941 Imm AR 352 at 357).[330]

[326] The term "persuasive" is used in the context of the fact that a foreign authority is only of persuasive – as opposed to binding – effect in a Nigerian court. See *Dada v State* (1977) NCLR 135; *Eliochin Nigeria Limited v Mbadiwe* (1986) 1 NWLR (pt. 14) 47; *Oladeji (Nig) Ltd v Nigerian Breweries Plc* (2007) LPELR-160(SC). However, given that Nigerian jurisprudence, including that on legitimate expectation, has developed along English jurisprudential lines, I consider English authorities to be of "high persuasive value" in evaluating or developing Nigerian law on the point, especially so in the current dearth of Nigerian authorities on the subject.

[327] See, for instance, Dwight David, "Rethinking the Doctrine of Legitimate Expectations in Canadian Administrative Law" (1997) 35:1 Osgoode Hall LJ 139; Groves *supra* note 295; Ahmed & Perry *supra* note 85; M Murcott, "A Future for the Doctrine of Substantive Legitimate Expectation – The Implications of Kwazulu-Natal Joint Liaison Committee v MEC for Education, Kwazulu Natal" (2015) 18:1 Potchefstroom Electronic LJ 3132; Aileen McHarg, "Administrative Discretion, Administrative Rule-making, and Judicial Review" (2017) 70:1 Current Legal Problems 267; Varuhas, *supra* note 257.

[328] Watson *supra* note 13 at 634–635.

[329] Fordham *supra* note 10 at 188.

[330] *Ibid* at 189.

Judicial effort to streamline legitimate expectation has similarly followed a zigzag path. The Nigerian Supreme Court in the *Stitch* case did not lay down a constructive framework for any future consideration of legitimate expectations. I find it difficult to look at *Stitch* and say: 'these are the yardsticks for a future application of the doctrine of legitimate expectation'. Although there are a few inferable pointers, such as the existence of the Ministry of Interior's regular practice on the issuance of import permits, the appellant's reliance on that regular practice and the "wrongful" frustration of the appellant by the Ministry, it does appear that the case was simply decided on its own facts without significant effort towards laying the parameters for future application of the doctrine. It is, perhaps, not surprising that the subsequent Nigerian decisions have also avoided a broad conceptual analysis of legitimate expectation. It seems the attitude of the courts has been to pick a few elements, particularly those that would assist them in coming to a conclusion on whether an enforceable expectation has not been created in the particular case.[331] A consequence is that any scholar or court engaging legitimate expectation in-depth would, from a doctrinal standpoint, likely gravitate towards English authorities, and, perhaps, authorities from other foreign jurisdictions. It is on this cruise vessel that I find myself.

Tomlinson asserts that in England and Welsh public law, development of a tailored set of parameters of (substantive) legitimate expectations has, for the most part, been attributed to the UK Court of Appeal rather than the UK Supreme Court.[332] It was the Court of Appeal – consisting of Sedley, Woolf, and Mummery LJJ – that controversially pronounced the existence of the substantive dimension of the doctrine in *Coughlan*.[333] It was also the Court of Appeal – often

[331] For instance, in the *Halliburton* case the court hammered on the lack of full disclosure by the respondent, while in *Saipem* the court emphasized that the representation was not unequivocal and the that there was no proof that the appellants relied on the representation made by the tax authority.
[332] Tomlinson *supra* note 294.
[333] *Coughlan supra* note 26.

through the judgments of Laws LJ – that refined the contours of the doctrine in the subsequent decade and a half.[334] However, as highlighted by Varuhas, English courts have also struggled to streamline legitimate expectation and have continually articulated fresh approaches and taxonomies in the bid to do so.[335] Thus, we find in the jurisprudence,[336] a five-step test, a three-step approach,[337] a sliding scale approach,[338] a four-part categorization,[339] a three-point categorization,[340] a non-exhaustive two-point categorization[341] and a different two point categorization.[342] In a recent case, Rose LJ of the UK Court of Appeal made an instructive observation about how the tests of legitimate expectation have been formulated:

> There have been many different formulations of the test to be applied because claims of legitimate expectation are made in greatly differing circumstances, tax, immigration and asylum procedures, planning law and provision for the homeless. The different ways in which the test has been expressed reflect the particular circumstances in which the issue has arisen but they are all directed at the same, high level question because they all contain the same key ingredients: a representation made by the public authority followed by conduct on the part of that authority vis à vis the claimant which contradicts that statement and about which the claimant is aggrieved. The question for the court in each case is whether the failure of the public body in its conduct towards the claimant to abide by the representation it made is something which the courts should intervene to prevent.[343]

Her Lady Justice warned that the safest course in any particular case is not, therefore, to pick out passages from earlier authorities dealing with different circumstances and attempt to transplant them into a different situation, but to consider what factors should be relevant in answering the fundamental question, guided by earlier cases in which the facts were reasonably close to the facts

[334] He refers to the cases of *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363; *R (Niazi) v Secretary of State for the Home Department* [2008] EWCA Civ 755. See Tomlinson *supra* note 300.
[335] Varuhas *supra* note 257 at 18.
[336] *R v Jockey Club; ex parte RAM Racecourses Ltd* [1993] 2 All ER 225.
[337] *R (Bibi) v Newham LBC* [2002] 1 WLR 237.
[338] *R v SOS Education and Employment; R* v *Education Secretary ex parte Begbie* [2000] 1 W.L.R. 1115.
[339] *R v Devon CC; ex parte Baker* [1995] 1 All ER 73.
[340] *Coughlan supra* note 26.
[341] *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755.
[342] *CCSU v Minister for the Civil Service* [1985] 1 AC 374.
[343] *Aozora supra* note 27, para 35.

facing the court in the instant case.[344] This follows the path of an earlier observation made by Judge J in *Ex parte MFK Underwriting* that "the correct approach to 'legitimate expectation' in any particular field of public law depends on the relevant legislation."[345] An impression made by these opinions is that the approach of the court to the application of legitimate expectation in a tax matter may be at variance with how the court's approaches the doctrine in other matters. The effect is that a Nigerian court, for instance, may gravitate towards more liberal requirements for the enforcement of legitimate expectation in immigration matters than in claims involving the revenue of the state. It is the duty of the courts to protect the revenue base after all.[346]

Assessment of UK decisions suggests that two broad perspectives continue to exist on the ingredients of legitimate expectation. From one perspective, it is the duty of the claimant to establish certain basic elements: a clear and unambiguous representation and detrimental reliance, after which the onus shifts to the public authority to avail the court of an overriding public interest by reason of which the established expectation should not be enforced. This is reflected in the decision of the Privy Council of the House of Lords in the case of *United Policyholders Group and others v Attorney General of Trinidad and Tobago*.[347] In that case, the Privy Council laid down a harmonized two-stage test for determining when it is appropriate to enforce a legitimate expectation. The objective of stage 1 is to ascertain whether a legitimate expectation has been created. The objective of stage 2 is to ascertain whether there is an overriding reason for allowing the state to resile from the expectation. The conditions in the first stage must be satisfied first. In that specific case, even though the court found that the assurance given by the state created a

[344] *Ibid.*
[345] *Ex parte MFK Underwriting supra* note 27 at 1573.
[346] See *Phoenix Motors Ltd v NPFMB supra* note 27.
[347] [2016] UKPC 17; [2016] 1WLR 3383 [United Policy Holders].

legitimate expectation, the court, nevertheless, found overriding reasons to refuse to enforce the expectation against the state. In summarizing what the court deemed to be the "modern" position of the law on legitimate expectation, Lord Carnwath, JSC, stated that:

> In summary, the trend of modern authority, judicial and academic, favours a narrow interpretation of the Coughlan principle, which can be simply stated. Where a promise or representation, which is "clear, unambiguous and devoid of relevant qualification", has been given to an identifiable defined person or group by a public authority for its own purposes, either in return for action by the person or group, or on the basis of which the person or group has acted to its detriment, the court will require it to be honoured, unless the authority is able to show good reasons, judged by the court to be proportionate, to resile from it. In judging proportionality, the court will take into account any conflict with wider policy issues, particularly those of a "macro-economic" or "macro-political" kind.[348]

Like the first perspective, the second perspective on legitimate expectation posits that the claimant must establish the existence of facts giving rise to an expectation; ingredients such as a clear and unambiguous representation, reliance and resilement. The point of departure is that once those ingredients have been established, enforceability of the expectation would then depend on the claimant further establishing that, in the circumstances, there has been a high level of unfairness towards her, which demands the court to intervene.[349] In other words, unlike the first perspective, the evidential burden never shifts from the claimant to the defendant.

In *Aozora,* the UK Court of Appeal rejected a test that places any burden on the revenue to provide an overriding justification for why a legitimate expectation should not be enforced. The court took the view that in all cases, the onus rests squarely on the taxpayer to show why she is entitled to a legitimate expectation and that after establishing "objectively", as a first stage, that the statement made by the revenue is capable of giving rise to a "legally enforceable legitimate expectation", the court then turns on the question whether the statement has done so in the particular case of this

[348] *Ibid,* para 121.
[349] See *Aozora supra* note 27.

taxpayer. At this second stage, the taxpayer must establish "a high degree of unfairness" or "conspicuous unfairness" on the part of the revenue.[350]

It is my reckoning that there is no conflict between the two lines of authority (*United Policyholders* and *Aozora*) as regards the first stage. However, I have made a deliberate decision to critically treat the second stage from the two seemingly conflicting perspectives: overriding public interest and unfairness, before drawing inferences on what should be the appropriate test at that stage. In doing so, I also highlight that *United Policyholders*, unlike *Aozora,* is not a tax case, although it was a case with significant economic and financial implications for the state.

Following the above taxonomy, the stage 1 ingredients discussed here are: (1) the existence of a promise that is clear, unambiguous and devoid of relevant qualification; (2) given to an identifiable defined person or group by a public authority for its own purposes; (3) either in return for action by the person or group, or on the basis of which the person or group has acted to its detriment.[351] I also discuss the reoccurring issue of disclosure by the party seeking to enforce the promise.[352] The factors in stage 1 are considered cumulatively – meaning that the absence of any one of these ingredients defeats any inference that an expectation or *reasonable expectation* has been created[353] – while stage 2 – relating to questions of unfairness or, alternatively, "the absence of good reasons, judged by the court to be proportionate, to resile from the promise" – may be considered only if a case scales the herculean hurdles of stage 1.

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[350] *Ibid,* paras 35–37.
[351] As indicated, the question of unfairness or, in alternative, the absence of good reasons, judged by the court to be proportionate, to resile from the promise will be treated at the second stage.
[352] This is based on authorities where the courts have cited as a reason for their decision to dismiss a claim the failure of the claimant to make full disclosure to the relevant authority. See, for instance, *Halliburton supra* note 211. See also Watson *supra* note 13.
[353] See Watson *ibid* at 635.

Again, due to the paucity of Nigerian case law on the various points, I discuss these elements with substantial reference to case law from other jurisdictions, especially English law. I, however, focus mainly on tax cases bearing in mind the dictum of Rose LJ that:[354]

> There have been many different formulations of the test to be applied because claims of legitimate expectation are made in greatly differing circumstances, tax, immigration and asylum procedures, planning law and provision for the homeless. The different ways in which the test has been expressed reflect the particular circumstances in which the issue has arisen but they are all directed at the same, high level question because they all contain the same key ingredients: a representation made by the public authority followed by conduct on the part of that authority vis à vis the claimant which contradicts that statement and about which the claimant is aggrieved. The question for the court in each case is whether the failure of the public body in its conduct towards the claimant to abide by the representation it made is something which the courts should intervene to prevent.[355]

5.1.1 Nature of the Promise or Representation

It seems settled that the first factor that a court interrogates when faced with a legitimate expectation claim is the clarity of the promise, representation, assurance, policy, etc. that the claimant seeks to enforce. It has long been the principle that a legitimate expectation can arise only where there has been a 'clear and unambiguous representation' as to the decision maker's future conduct.[356] Thus, when a person purports to rely on a statement, the court will scrutinize the statement to see whether it was made unequivocally or without 'relevant qualifications.'[357]

Dyson LJ in *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* stated that:

> It will be only in an exceptional case that a claim that legitimate expectation has been defeated will succeed in the absence of a clear and unequivocal representation. That is

[354] See *Aozora supra* note 27.
[355] *Ibid*, para 35.
[356] *Attorney General for Hong Kong supra* note 178, *Bancoult supra* note 225. See also *R (Davies) v HMRC; R (Gaines Cooper) v HMRC supra* note 148, where the issue was whether taxpayers who had moved abroad could claim non-resident tax status on the basis of certain paragraphs in a published booklet. Lord Wilson confirmed that Bingham LJ's requirement that representations should be "clear, unambiguous and devoid of relevant qualification" also applied to representations made in guidance formally published by revenue to the world.
[357] See *Hanover Company Services Ltd v Revenue and Customs Commissioners* [2010] UKFTT 256 (TC). The court held that: "even if we had found that Hanover had, either directly or indirectly, relied on the Manual, given the "health warning" (see paragraph 11 above) we consider that the representation at paragraph 9.5.4 was not capable of giving rise to a legitimate expectation as the representation was not devoid of relevant qualification.

> because it will only be in a rare case where, absent such a representation, it can be said that decision maker will have acted with conspicuous unfairness such as to amount to an abuse of power.[358]

In *Saipem,* one of the reasons why the court dismissed the appellants' argument that they relied on representations by the FIRS was that the so-called representations were conditional, thus, did not meet the required standards of unambiguity. The court affirmed that:

> The above is not a blanket exemption of the Appellants from tax liability. It eloquently states that to the extent that the activities of the foreign companies are not carried out in Nigeria they are not taxable. Furthermore, that the profit of the foreign company will be taxable in Nigeria in circumstances where the stipulation of Section 13 (2) (a)-(d) of the Companies Income Tax Act are applicable. It therefore follows that where the 1st Respondent determines that the activities of the foreign company was carried out in Nigeria or that Section 13 (2) of the Companies Income Tax Act is applicable, it will be consistent with the advisory in Exhibit A2 if it imposes a tax liability. It will definitely not be going back on any assurance it had given.[359]

The test of clarity is an objective one and it is interpreted strictly.[360] As Lord Dyson JSC of the Privy Council puts it in *Paponette & others v Attorney General of Trinidad and Tobago,*[361] the relevant question is "how on a fair reading of the promise it would have been reasonably understood by those to whom it was made."[362] In the words of Lord Wilson in *Davies*:

> It is better to forsake any arid analytical exercise and to proceed on the basis that the representations in the booklet for which the appellants contend must have been clear; the judgment about their clarity must be made in the light of an appraisal of all relevant statements in the booklet when they are read as a whole; and that, in that the clarity of a representation depends in part on the identity of the person to whom it is made, the hypothetical representee is the "ordinarily sophisticated taxpayer" irrespective of whether he is in receipt of professional advice.[363]

[358] [2003] EWCA Civ 473, [2003] QB 1397, para 72.
[359] See Okoro *supra* note 126 at 10.
[360] See *Wheeler v Prime Minister* [2008] EWHC 1409 (Admin), [2008] AC 70; *Bancoult supra* note 225.
[361] [2010] UKPC 32; [2012] 1 AC 1, para 30.
[362] See also *Association of British Civilian Internees supra* note 364, para 56.
[363] See *Davies supra* note 148 at para 29

Realistically, however, it may be the case that the content of the expectation varies significantly depending on how broadly the representation is interpreted by the courts or respective judges. Watson opines,[364] correctly, that the fact that different interpretations can arise from the same court demonstrates that the test is insufficiently certain. He was commenting on the UK case of *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*[365] where the majority and minority decisions of the UK House of Lords had reached different conclusions on the import of the Foreign Secretary's statement to the claimants.

A tax case that comes to mind is *Regina (Drax Power Ltd & anor.) v HM Treasury and anor,*[366] a case decided by the UK Court of Appeal. Here, the claimants were generators of electricity from renewable sources and benefited from the exemption for renewable source electricity ("RSE"), conferred by the Finance Act 2000[367], from the climate change levy, an environmental tax levied on electricity, gas, solid fuels and liquefied petroleum gas supplied to business and the public sector but not on those supplied to domestic customers.[368] In his Budget statement on 8 July 2015 the Chancellor of the Exchequer announced that the exemption would be removed with effect from 1 August 2015. On 14 July 2015 the House of Commons passed a resolution giving effect to that decision and the necessary legislative change was made by the Finance (No 2) Act 2015.[369] The claimants sought judicial review on the grounds, *inter alia*, that the decision to withdraw the exemption without a lead time of at least two years violated the European Union law principles of (i) foreseeability, legal certainty and protection of legitimate expectations, and (ii) proportionality.

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[364] *Supra* note 13 at 639.
[365] *Supra* note 225.
[366] [2016] EWCA Civ 1030.
[367] para 19 of Schedule 6.
[368] Article 15 of European Union Council Directive 2003/96/EC permitted member states to apply exemptions or reductions in tax in respect of electricity of renewable origin, and article 3 of Parliament and Council Directive 2009/28/EC obliged them to ensure by 2020 that at least 15% of all energy came from renewable sources.
[369] United Kingdom Finance (No 2) Act 2015, section 49

The judge dismissed the claim, holding that although European Union law applied to the exemption and the legislation removing it, (1) the claimants had failed to establish an express or implied assurance given by the government that had prompted the legitimate expectation that it would not withdraw the RSE exemption without a two-year lead time, and a prudent and circumspect operator should not have inferred that the exemption would not be removed without such a lead time. This appeal by the second claimant was also dismissed. The Court of Appeal held that, in the context of a national tax code set by the legislature of a member state, a protected legitimate expectation would arise only where, by giving a precise, unconditional and unambiguous assurance, the public authority had promoted an expectation as to how it would behave in future; that such an assurance could be given by words or conduct, in the administrative sphere or in the legislative sphere; that no promise had been made by the authorities and no assurance given that the exemption would be maintained indefinitely, nor that it would be subject to the giving of a period of notice before being changed[370]

Although the court did not uphold the legitimate expectation argument, the case reflects some of the important considerations that a court must bear in mind when adjudicating a case of this nature. The cautious approach adopted by the court places a significant burden on the taxpayer to demonstrate that a representation meets the standards set by the courts, as, ironically, illustrated by not-so-clear words such as 'precise', 'clear', 'unambiguous', 'unconditional' etc.

In *Hanover Company Services v HMRC*, the UK First-Tier Tribunal (Tax Division) considered the implication of HMRC's Guidance Manuals (on the liability to VAT of certain services), which contained the following statement:

[370] See, generally, paras 45, 46, 53, 55, 57, 61, 67, 68, 71, 79.

> It should not be assumed that the guidance is comprehensive nor that it will provide a definitive answer in every case… The guidance in these manuals is based on the law as it stood at the date of publication.

The Tribunal accepted the revenue's contention that the statement constituted a "health warning" to the taxpayer that the Guidance was qualified. In a case such as this, it would be more prudent for a taxpayer to seek direct confirmation from the revenue, something that the taxpayer in this case failed to do. It is also important for a taxpayer making a legitimate expectation claim to scrutinize the assurance to ascertain what it truly means. Where what the tax authority has assured is different from what the taxpayer claims, then the assurance cannot qualify as "clear, unambiguous and devoid of relevant qualification."[371]

The phrase "relevant qualification" used in *United Policyholders* suggests that it is not every qualification that is relevant. In other words, if the tax authority, for instance, claims that a representation was made conditionally or qualifiedly, the court would scrutinize the wordings of the representation to ascertain whether those qualifications are relevant in the circumstances of the case. For instance, in *Aozora*[372] the UK Court of Appeal declared as irrelevant a warning inserted by the HMRC in a published manual which read that the manual could not be relied on for tax avoidance and that in a particularly difficult or complex case an experienced officer might arrive at a different answer. The court found that "there was no suggestion of tax avoidance and the interest of payment arrangements were not particularly difficult or complex compared with typical double taxation problems."[373]

[371] See *Oxfam v Revenue & Customs* [2009] EWHC 3078 (Ch)*; MFK Underwriting Agencies supra* note 26.
[372] *Supra* note 27.
[373] *Ibid,* para 29.

If it is so difficult for a taxpayer to show that a promise or representation falls within the parameters of clarity, it would seem even more difficult to do so in the case of practice. How does a taxpayer show, for instance, that the way the tax authority has acted in the past paints a precise, unconditional and unambiguous picture of how it would act in the future? On this point, the observation of Lord Wilson of the UK Supreme Court in *Davies v HMRC* suggests that "clear evidence" would be necessary to make good the proposition that the revenue undertook to act a certain way. This is partly because, as the court reasoned, unlike written assurances that are easily trackable, it is more difficult for a taxpayer to elevate a practice into an assurance to taxpayers from which it would be abusive for the Revenue to resile and to which under the doctrine it should therefore be held. "[T]he promise or practice… must constitute a specific undertaking, directed at a particular individual or group, by which the relevant policy's continuance is assured".[374] It seems here that the "clear evidence" is not just of how the revenue has acted but of how it intends to continue acting. The taxpayer requires evidence that the practice was "so unambiguous, so widespread, so well-established and so well recognised as to carry within it a commitment to a group of taxpayers including themselves of treatment in accordance with it."[375] There are, thus, very rare cases where a legitimate expectation predicated on regular practice has succeeded.[376]

It is evident that the extremely textual emphasis on what is clear and unambiguous significantly stacks the odds of proving legitimate expectation against a taxpayer. Perhaps, a more tenable formula may be drawn from Watson's perspective on the *legitimacy* of an expectation.[377] Watson's perspective advocates a separation of the "preliminary" question of whether an expectation is

[374] See *Gaines-Cooper v HMRC supra* note 148 at para 49. See also *R (Bhatt Murphy) supra* note 347, per Laws LJ at para 43.
[375] *Gaines-Cooper ibid,* para 49.
[376] See *MFK Underwriting Agents Ltd supra* note 26.
[377] See Watson, *supra* note 13 at 642.

legitimate from the question of whether it is *enforceable*. While lamenting the status quo, he opines, as regards *legitimacy,* the adoption of a new test that jettisons the requirement to prove the existence of a promise that is clear, unambiguous and without condition, and instead focuses on three questions: (1) is the representation *clear enough* for the court to make an order?; (2) objectively construed, what could the applicant expect in all the circumstances as a result of the decision maker's representation or conduct?; and (3) did the decision maker realise that they were making a promise or that the circumstances amounted to a promise, to an individual or group, as to a specific benefit or ought they reasonably have realised?[378] Watson's test presents a shift in focus from the strictly textual construction of a representation and looks instead at the entire circumstances to ascertain whether it is feasible to infer that a reasonable expectation has been created.[379] This test is not only clearer but also more amenable to circumstantial reality. The test also balances out by taking into cognizance the deducible intention of the authority in the circumstances of making the promise or representation. It ensures that the only time that the decision maker is bound is when they know that they have made a promise or clearly ought to have known that they were making a promise.[380]

5.1.2 The Number of Beneficiaries

The test highlighted by Lord Carnwath in *United Policyholders* suggests that it is only a representation or promise that is made to a specific person or small group of persons that deserves

[378] It is important to note that Watson advocates this three-tier test as all that is required to prove the existence of a legitimate expectation. His test falls within the taxonomy of the first stage of legitimate expectation. He does not dismiss that there could be other factors which despite the legitimacy of an expectation may defeat its protection. In his own words – at page 635 – "legitimacy is the term used in the cases. It is important to note, however, that this term refers merely to the question of fact of whether the expectation exists, rather than expressing a conclusion as to its ultimate protection."

[379] It should be noted that the court is not concerned with what the applicant expected. The actual expectation will be relevant as a matter of evidence as to what could reasonably be expected. It will equally be relevant to the standard of protection. See Watson *ibid* at 643.

[380] *Ibid* at 644.

to be accorded the protective shield of legitimate expectation.[381] The court refers in this regard to a promise or representation having 'the character of a contract.'[382] This is an adoption of the view in *Coughlan,* where Lord Woolf CJ said that one of the deciding factors in that case was that the promise was confined to a few people and was akin to a contract.[383] To that extent, it seems more likely that the court binds the government to a promise made to an individual or a small group as opposed to one made to a larger group.[384] It is arguable that the limitation improves the likelihood that the tax authority knows exactly what it is promising and the likely ramifications of that promise. In contrast, a statement made to the whole world may have the inherent character of being too general – lacking the attributes of specificity and unambiguity – and, accordingly, extraneous to the unique characteristics of each taxpayer's case. Watson explains that the key is that where a promise is made to a small group it is more likely that this will be a voluntary assumption of greater responsibility than general statements to a more disparate group and more likely that the decision maker will conceive of her statements as a promise, rather than an indication of her current mindset.[385] In that sense, it demonstrates that the decision maker knew that they were making a morally binding promise and taking responsibility for another person.[386] This is in contrast to very general statements made to the public regarding the assisted place scheme in *ex parte Begbie*.[387]

Watson's explanation dovetails with Reynolds's specific trust theory. Reynolds advocates that legitimate expectation should only protect individual cases where the representation or promise is

[381] See also *R (Structadene) v Hackney London Borough Council* [2001] 2 All ER 225, *Begbie, supra* note 338.
[382] See *United Policyholders supra* note 347 paras 91 and 92.
[383] See *Coughlan supra* note 26. See also *Niazi supra* note 334, para 46 where Laws LJ said that "the number of beneficiaries of a promise for the purpose of such an expectation, in reality it is likely to be small, if the court is to make the expectation good".
[384] See Weeks *supra* note 86 at 150.
[385] Watson *supra* note 13 at 646.
[386] *Ibid.*
[387] *supra* note 338.

made to a specific person or group. This is on the basis that a specific trust is created between the authority and the known individual or group, the breach of which warrants judicial intervention. Reynolds argues that such restriction is necessary to avoid the doctrine becoming uselessly overextended, but is also justifiable since, in cases of representation, issues of trust will be particularly acute: reneging from the representation is a particularly explicit affront to the preservation of trust.[388]

Further, if courts were to hold government bound to policy positions, this would ossify public administration and utterly undermine the pursuit of the public good. If the adoption of a policy in and of itself were held to ground enforceable expectations, this could discourage the setting of policies, given the adoption of a policy could potentially tie the administration's hands in the future so they would be prevented from changing tack given the changed demands of the public interest. This would be difficult to reconcile with the no fettering principle.[389] Moreover, it would seem generally more tenable to enforce a promise made to a few than one made to the whole world. Still, if the approach is to bind the revenue to policy, the court may be unduly fettering the revenue's discretion to change an unfavored policy. If the court allows the revenue to change that policy as regards the public but makes an exception for an individual, there is a risk of creating inequity between taxpayers. The chances of such a situation occurring reduces if the relief of legitimate expectation is limited to promises made *ab initio* to an identifiable taxpayer in respect of that taxpayer's peculiar circumstances.

[388] Reynolds *supra* note 12 at 343.
[389] Varuhas *supra* note 257 at 21.

Despite the rationality of the above views, focusing on the number of taxpayers is an uncertain yardstick and it is not always easy to see where the line should be drawn.[390] Thus, this useful distinction may not be helpful in every situation. In tax administration, for instance, the distinction may not be practically expedient for the tax authority or the taxpayer. For the taxpayer it means that she will in every case where she seeks guidance have to reach out to the revenue to request specific answers even where a representation publicly made by the revenue is clear and unambiguous and capable of fulfilling those answers. On the other side, it means that the tax authority would be inundated with enquiries from taxpayers even in respect of positions already made publicly clear. This scenario certainly does little to aid the onerous task of tax administration. As Rose LJ observed in *Aozora*:

> [i]t is true… that it is open to taxpayers to apply specifically to HMRC for a ruling on their circumstances, but an important function of publishing guidance is precisely to reduce the number of occasions on which a taxpayer or its advisers will need to seek an individual ruling from HMRC. [391]

Moreover, there is the risk that an individualist approach to guidance increases the risk of applying the law unequally and inequitably to similar situations. An average taxpayer should be able to ascertain the revenue's position without having to, barring peculiarities, reach out to the revenue for a private ruling.[392] Such a distinction does not enjoy manifest judicial support.[393] As Bingham LJ declared in *MFK Underwriting* that:

> No doubt a statement formally published by the Inland Revenue to the world might safely be regarded as binding, subject to its terms, in any case falling clearly within them.

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[390] Clayton *supra* note 193 at 100.
[391] *Supra* note 27 para 32.
[392] I consider, in this respect, that the distinction may be more suitable to cases where there is a further duty of disclosure on the part of the taxpayer. The existence of facts which require disclosure necessitates "face-to-face" dealing between tax authority and taxpayer, in which case the promise is inextricable tied and tailored to the disclosure made by the taxpayer.
[393] See *Aozora supra* note 27.

To exclude public guidance or assurances from the protective dome of legitimate expectation would also deny protection to taxpayers who rely on a significant body of useful tax guidance even when the detriment arising from resilement may not lend itself to such discrimination. Moreover, if it is taken that a promise given privately is in the character of a contract, is it also not logical that a promise given publicly is in the form of a unilateral offer, and once "accepted" and acted upon by a taxpayer, *ceteris paribus,* becomes binding likewise? It is submitted that contract principles, however enticing, should rather be avoided here.[394]

In *Association of British Civilian Internees*,[395] a promise to between 800 and 1500 people was held to give rise to a legitimate expectation by the Court of Appeal. Although, the decision was overturned on appeal to the House of Lords, the court did not reject the idea that legitimate expectations could arise amongst such a large group of people. The key, therefore, as Watson observes, is not merely that this is a small group, but that it is a group that has the same interest in the fulfilment of the promise or that the promise applies in the same way to each individual.[396] Such an approach is consistent with the policy consideration of allowing maximal flexibility for the decision maker.[397] It seems that a better way to approach the issue is to regard this ingredient not as a prerequisite but as solidifying the inference that the decision maker intended to make a

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[394] The court in *ex p. Unilever supra* note 128 emphasized that:

> Unfairness amounting to an abuse of power" as envisaged in Preston and the other Revenue cases is unlawful not because it involves conduct such as would offend some equivalent private law principle, not principally indeed because it breaches a legitimate expectation that some different substantive decision will be taken but rather because either it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power. As Lord Donaldson MR said in R. v ITC ex p. TSW: "The test in public law is fairness, not an adaptation of the law of contract or estoppel. Per Simon Brown L.J. at 695.

[395] *Supra* note 364 at 576.

[396] See also case of *Ng Siu Tong v Director of Immigration* [2002] HKCFA 6, [2002] HKLRD 561, the Hong Kong Court of Final Appeal decided that a legitimate expectation claim could be made by over 1,000 claimants who relied on pro forma replies from the Legal Aid Board to the effect that they need not bring an individual claim but could rely on a test case then being adjudicated.

[397] Watson *supra* note 13 at 636.

promise. Thus, it may be subsumed under the question of whether there is a clear and unambiguous statement or promise. A statement made to an individual is more likely to reveal unambiguous intent than, say, one made to the whole world, which may be nuanced.[398] It is quite possible, after all, for a statement or guidance issued to the whole world to be intended as a promise. A taxpayer should be able to benefit in so far as her case falls within the parameters intended by the tax authority.

5.1.3 Disclosure

A reoccurring theme in the jurisprudence of legitimate expectation, a sword upon which many claims have fallen is the requirement of disclosure. A taxpayer that does not disclose to the tax authority the full facts upon which she seeks guidance, assurance or compromise will not be allowed to enforce a legitimate expectation.[399] Thus, it has been held that a legitimate expectation will only arise if full disclosure of material information was made to the decision maker.[400] Watson explains the idea behind this principle from the practical point of view that "it is impossible for the decision maker to make a binding promise where she does not have all material facts in front of her.[401]

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[398] *Ibid.*

[399] See *R. v Inland Revenue Commissioners ex p. Matrix Securities* [1994] 1 W.L.R. 354. Here, the taxpayer had obtained what it thought to be clearance from the UK tax authority for a complex scheme, whose effectiveness depended on whether investors would qualify for capital allowances. The responsible Inspector initially gave a favourable assurance, but that was subsequently withdrawn by the tax authority after further consideration. The court held that the tax clearance was properly withdrawn because the taxpayer failed to make a full disclosure. The scheme was a massive anti-avoidance scheme which would have cost the state 38 million pounds, a fact that the taxpayer failed to disclose, and which the revenue would have considered further before giving any assurances.

[400] *MFK Underwriting Agents Ltd supra* note 26.

[401] See Watson *supra* note 13 at 644. Watson further explains that responses to general questions do not represent a promise. Such responses will often be general and *on-the-spot,* meaning that the decision maker has not fully considered the alternatives and could not be said to be making a serious promise in any meaningful sense – at 645.

In both *Transocean* and *Halliburton,* the failure of the taxpayers to fully disclose contributed greatly to the defeat of their claims. In the UK case of *Reg. v Inland Revenue Commissioners Ex parte Preston,*[402] the House of Lords considered the question whether the revenue was entitled to reopen an assessment which it had agreed on the basis of a presumed mutual benefit to the revenue and the taxpayer should not be reopened. The revenue reached the agreement about the taxpayer's liability with the belief that all the relevant facts were known. They were not known. It was held that the revenue was not acting unfairly in seeking to reopen the assessment.[403]

In the context of legitimate expectation, it is not every nondisclosure that counts against the taxpayer. Only the nondisclosure of a material fact; that is, one that would have had an impact on the assurance or representation, counts against the taxpayer.[404] In that context, I opine that there is room for skepticism about how the Nigerian Court of Appeal applied the disclosure element in *Halliburton*. In that case, the court found that Halliburton did not fully disclose the income from the transaction. Halliburton omitted to declare the income its subsidiary, HESNL, was to derive from the transaction for assessment, but limited the declaration to only the part that Halliburton received.[405] The court regarded this nondisclosure as a lack of "fair and open dealing" which, of its own, disentitled Halliburton to claim legitimate expectation. Without justifying the motives of Halliburton in not itself disclosing that part of the transaction income paid to its subsidiary, my

[402] *Supra* note 233.
[403] Under South African law, a binding private ruling only has this effect if the applicant has fully and accurately disclosed all material facts in connection with the proposed transaction and the transaction itself, and the manner in which it is carried out are fully consistent with those facts. In addition, the applicant must satisfy any conditions or assumptions that the Commissioner has stipulated in the ruling letter when carrying out the proposed transaction. A ruling can lose its binding effect if: the facts stated in the application regarding the proposed transaction are materially different from the transaction as actually carried out; the application involves fraud, misrepresentation or the nondisclosure of material fact; or a condition or assumption stipulated by the Commissioner in the ruling letter has not been satisfied or carried out. See Section 76K of the Income Tax Act; See Malukele *supra* note 291 at 22.
[404] See *R (on the application of Biffa Waste Services Ltd) v HMRC* [2016] EWHC 1444 (Admin).
[405] HESNL apparently declared that part of the income in its own tax returns and the income was taxed in its hand.

skepticism is based on the fact that the circular on which Halliburton's legitimate expectation claim rested was a public document, issued by the revenue without any sort of inducement by Halliburton. Put differently, this was not a case of Halliburton seeking to rely on a private ruling or an assurance that it had in any way induced the revenue to give. Halliburton merely relied on a representation that was made to the whole world by the revenue. As far as legitimate expectation is concerned, it is, at least, doubtful whether the disclosure test was relevant in those circumstances, since the relevant transaction took place after the fact of the representation. In fairness to the court, and as a general admonition, it is worth reiterating that legitimate expectation is an equitable remedy resting on the court's perceptions of fairness. As it is so often said, he who comes to equity must come with clean hands.[406] So, even if Halliburton's not-so-open conduct was not directly relevant to the specified elements of its legitimate expectation claim, the equitable foundation of the claim was, perhaps, liable to capitulate as a consequence of that suspicious conduct.[407]

5.1.4 Detrimental Reliance

Generally, for there to be an enforceable legitimate expectation the taxpayer must show that it relied on the revenue's representation or assurance to its detriment. It is the case that defeating an expectation created by a public authority in another party is not legally significant without more.[408] Thus, the courts accord significance to the presence or absence of "detrimental reliance" in legitimate expectation claims. Gibson LJ in *ex p Begbie* observed that:

> It would be wrong to understate the significance of reliance in this area of the law. It is very much the exception, rather than the rule, that detrimental reliance will not be present when the court finds unfairness in the defeating of a legitimate expectation.[409]

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[406] See *Alalade v National Bank of Nigeria Ltd. (No.2)* (1997) LPELR-5540(CA); *Aizeboje v EFCC* (2017) LPELR-42894(CA).
[407] See also *VF Worldwide Holdings v FIRS supra* note 229.
[408] Weeks *supra* note 86 at 161.
[409] *Supra* note 338 at 1124.

Detrimental reliance as a normative basis for protecting legitimate expectation seems to find rooting in utilitarianism, arguments that focus on the gains of protection vis-à-vis the ills of non-protection. According to Professor Barak-Erez:

> The utilitarian arguments supporting the protection of reliance are also relevant in administrative law because efficiency is one of the social interests that administrative law seeks to promote. First, protecting reliance promotes the goals of administrative intervention in the free market, requiring people to take official initiatives 'seriously.' When the administration gives financial backing to an economic activity, the citizens' willingness to rely upon it is crucial. Investors will not cooperate if promises of support prove undependable.[410]

The view generally taken by English courts seems to be that knowledge of the representation and detrimental reliance on it are powerful factors – not prerequisites – in deciding whether it would be unfair for the revenue to frustrate the expectation that their representation has created.[411] In *GSTS Pathology LLP v HMRC*[412] it was observed that although it has sometimes been said to be a requirement that the claimant has relied to its detriment on what the public authority has said, the law now seems to be clear that such detrimental reliance is not essential but is relevant to the question of whether it would be an unjust exercise of power for the authority to frustrate the claimant's expectation.[413] Clarifying this position, the UK Court of Appeal in *Aozora* reaffirmed that reliance remained, as a general rule, a requirement for the sustenance of a legitimate expectation claim. The court acknowledged, however, that there were circumstances in which reliance may be dispensed.[414] This is mainly in respect of cases involving public statements. The implication is that a successful legitimate expectation claim in the absence of detrimental reliance is the exception rather than the general rule. In *Oxfam v Revenue and Customs*,[415] the UK High

[410] Barak-Erez *supra* note 17 at 590.
[411] See *Aozora supra* note 27*; R (Hely-Hutchinson) v HMRC* [2017] EWCA Civ 1075, [2018] 1 WLR 1682 ('*Hely-Hutchinson*').
[412] [2013] EWHC 1801 (Admin), [2013] STC 2017.
[413] *Ibid*, para 72.
[414] See *Aozora supra* note 27 at para 44.
[415] *Supra* note 371.

Court rejected a legitimate expectation claim partly on the basis that the taxpayer did not show any detrimental reliance on its part to justify binding the authority. The Court observed that:

> In my view, in a case such as this, involving an assurance given to only one person and where there is no irrationality on the part of the public authority in adopting a different approach, the absence of detrimental reliance on the part of the person to whom the assurance is given is fatal to the argument that to modify the assurance would involve an abuse of power on the part of the public authority which gave the assurance.[416]

Although no Nigerian court has laid down a general rule on whether detrimental reliance is a sacrosanct factor, I am of the view that the detriment suffered by the appellant in *Stitch* played a significant role in swaying the Supreme Court to her case. Although this does not necessarily mean that the absence of detriment will in every case defeat a legitimate expectation claim, it can be inferred from the generally cautious disposition in subsequent court decisions that the courts would most likely insist on detrimental reliance.

Saipem shows that the timing or sequence of events can be crucial in helping the court to ascertain whether there has been a reliance at all. In that case, one of the factors that saw to the failure of the appellants' case was that there was not just a lack of proof that the appellants relied on the representation, but the existence of proof that they did not. As the Court of Appeal observed, the relevant contracts were entered into long before the taxpayers sought the opinion of the revenue. In those circumstances any pleas of reliance were liable to be unsuccessful. It speaks to logic that if a taxpayer became seized of a guidance only after having committed to the relevant transaction, that may well prove fatal to his claim of reliance.[417]

[416] *Ibid,* para 50.
[417] See *Aozora supra* note 27 and *Hely-Hutchinson supra* note 411.

A narrow construction of legitimate expectation that requires the existence of detrimental reliance stands to limit the number of cases where legitimate expectation can be enforced, limiting the likelihood of judicial interference in administrative discretion. As the Court observed in *Oxfam*:

> The general position in public law is that discretionary powers are conferred on a public authority in order to allow that authority to make judgments about how to treat specific cases. A public authority is free, within the limits of rationality, to decide on any policy as to how to exercise its discretion; it is entitled to change its policy from time to time for the future (e.g. as its perception of the public interest changes in the light of new circumstances); and a person whose case falls within the scope of the policy is only entitled to have whatever policy is lawfully in place at the relevant time applied to him.
> The position would be different in the case of an attempt to disapply a policy in circumstances where there had been detrimental reliance by the individual. In that situation, the requirements of fairness will be more demanding and the public authority may only be entitled to disapply the policy which was in place at the relevant time if the court is satisfied that there is some overriding public interest, as explained in Coughlan.[418]

As far as detriment is concerned, the English court draws a distinction between an assurance given to an individual and an assurance or policy directed to the public. Thus, where an individual is dealing with a general policy statement and there is no question of public authority changing that general policy, then ordinary rules of preventing a public authority from acting arbitrarily and capriciously will prevent the public authority from applying that policy in a discriminatory way against the individual, even if the individual was not aware of the policy at the time they acted.[419]

Finally, where detriment does exist, it must be traceable to actual reliance by the taxpayer on the revenue's representation. Thus, coincidental detriment may not be regarded by the court. In *R (Hely-Hutchinson) v HMRC,*[420] for instance, the taxpayer had entered into the relevant transactions before the guidance was issued. It was found that the detriment suffered by the taxpayer was not caused by the guidance. This supports the position of the court in previous cases showing that a

[418] *Supra* note 371, paras 51 and 53.
[419] See *ex p. Begbie supra* note 338*; ex p. MFK Underwriting supra* note 26; *Oxfam v Revenue & Customs ibid.*
[420] *Supra* note 411.

valid reliance is one that is based on a communication that does flow from the revenue to the taxpayer. In *Hanover Company Services Ltd v HMRC,* for instance, the UK Tax Tribunal found that the claimant, Hanover, made its business decisions reliant on the practice of a certain Jordans, the adjudged industry leader, as advised by its accountants. Hanover did not consult the revenue to confirm the correctness of the supposed practice of Jordans, albeit the practice reflected what was contained in HMRC's Manual V1–3.[421] It did not move the Tribunal that the revenue's assessment was inconsistent with paragraph 9.5.4 of its own Manual V1–3. The manual was an internal document of HMRC which was, perhaps, only intended to guide the staff of HMRC in making tax assessments.[422] In *Aozora,* however, the court clarified the position on reliance through an intermediary (such as a tax consultant or adviser) when it held that such reliance was not fatal to a legitimate expectation claim. The court also held that the question of reliance would not rest on whether the intermediary mentioned the guidance expressly in any advice or communication to the client. The extent and content of what the adviser tells the taxpayer will be influenced by other facts, such as the degree of knowledge and interest on the part of the recipient.[423] The court, however, held that "if a taxpayer engages a specialist adviser to advise on the correct tax position, that greatly diminishes – but does not rule out – the extent to which the taxpayer can then say that his view of the law was influenced by a representation of the kind given in this case (a public guidance).[424]

The conclusion drawn from the cases is that detrimental reliance is a requirement, except for the limited class cases where it is not. The threshold of reliance is set high. There is a huge onus on

[421] *Supra* note 357 at 48.
[422] These manuals are only published for the information of taxpayers and their advisors in accordance with the Code of Practice on Access to Government Information.
[423] *Aozora supra* note 27*,* para 54.
[424] *Ibid*, paras 55 and 56.

the taxpayer to prove that it did indeed rely on the communication of the revenue. Also, there is a suggestion that the relevant communication must have been directed to the taxpayer, and not to some other person, as was the case in Hanover. Alternatively, if the communication is through an intermediary, such as a tax adviser, the taxpayer must be alerted to the fact that the tax adviser forms its opinion from the revenue's representation and not of its own (the tax adviser's) interpretation or deduction.[425]

5.1.5 Stage 2: Unfairness Amounting to Abuse of Power or Overriding Public Interest?

Where a taxpayer has established facts giving rise to an expectation, then going by the principles enunciated in *Coughlan* and *United Policyholders,* the onus shifts to the tax authority to show, in spite, that an overriding public interest exists, by reason of which the legitimate expectation should nevertheless be frustrated. The view advanced by Professor Craig would deny that an expectation is legitimate where an overriding public interest exists. For Craig, "expectations ... are not merely a matter for factual analysis. They will depend on a normative view of the expectations which an individual can be said to derive from the original policy, combined with an interpretative judgment as to whether the legislative framework will be jeopardized by holding the administration to the original policy".[426]

In *R (Vacation Rentals (UK) Ltd (formerly known as the Hoseasons Group Ltd)) v HMRC*[427] the UK Upper Tribunal opined that the principle of 'conspicuous unfairness'[428] amounting to an abuse of power is pertinent where there is no express promise, assurance or representation on which the

[425] See *Aozora supra* note 27.
[426] Paul Craig, "Contracting Out, the Human Rights Act and the Scope of Judicial Review" (1992) 108 LQR 79 at 91, cited in Watson, *supra* note 13 at 634.
[427] [2018] UKUT 383 (TTC), [2019] STC 251 (*Vacation Rentals).*
[428] The principle is now regarded as an aspect of irrationality. See *R (on the application of Gallaher Group Ltd) v Competition and Markets Authority* [2018] UKSC 25, [2018] 4 All ER 183, paras 38-40, per Lord Carnwath JSC.

taxpayer can rely. It is not directly applicable where the taxpayer has established a legitimate expectation based on clear guidance by a public authority. In particular, it cannot be used to throw a greater burden onto a claimant than would otherwise exist.[429] The Tribunal concluded that it was only open to the revenue to override the legitimate expectation that it had encouraged in circumstances where there was a sufficient public interest to override it. The Tribunal added, as regards the burden of proof, that the onus shifts to the revenue to justify frustration of the legitimate expectation. Where the revenue fails to do so convincingly, then the court can draw the conclusion that the conduct is so unfair as to amount to an abuse of power.[430]

This position, as stated above is a controversial one, owing to decisions of the UK courts which favour a different path. For instance, the UK Court of Appeal in *Aozora*[431] completely rejected the idea that the revenue has, in any circumstances, a duty to establish an overriding public interest against a legitimate expectation claim. The court maintained that in all cases where a legitimate expectation has been shown to exist (stage 1) the onus remains on the taxpayer to show (stage 2) that manifest unfairness will befall it (the taxpayer) if the legitimate expectation is frustrated. Put differently, the onus is squarely on the taxpayer to convince the court that the conduct of the tax authority in the circumstance of the case is so unfair as to amount to abuse of power. In her judgment in *Aozora*, Rose LJ declared that:

> I do not accept that, once a representation capable of giving rise to a legitimate expectation has been identified, the burden shifts to HMRC to adduce evidence to the court showing some public interest in it being able to resile from the representation. Such an approach fails to recognise that these supposed separate elements or stages in establishing unfairness are all part and parcel of the taxpayer making good his claim that he has a legitimate expectation arising from the representation which the court should protect.[432]

[429] See *Vacation Rentals supra* note 427 at para 88.
[430] *Ibid*, paras 89–90.
[431] *Aozora supra* note 27.
[432] *Ibid*, para 46.

The court iterated that in any case the collection of tax is itself an important public interest imposed by the legislature.[433] The court relied, *inter alia,* on an earlier decision in *Hely-Hutchinson* where Arden LJ had made the following pronouncement:

> [I]t is well established that it is open to a public body to change a policy if it has acted under a mistake. The decision whether or not to do so is not reviewed for its compatibility in the public interest: the question is whether or not there has been sufficient unfairness to prevent correction of the mistake. It is clear from the authorities that the unfairness has to reach a very high level: see, in particular, the holding of Simon Brown LJ in Unilever where he held that it was not enough that the change of course by the public body was "mere unfairness" or conduct which was "a bit rich". It had to be outrageously or conspicuously unfair.[434]

The decisions in the cases cited above convey the inference of conflict in terms of how the so-called second stage of a legitimate expectation claim is to be adjudicated. One approach shifts the burden to the revenue to establish an overriding public interest while the other approach keeps the burden on the taxpayer to establish the unfairness of the decision.

5.1.5.1 What Constitutes Overriding Public Interest?

This question is relatively straightforward in the context of tax. It has been asserted that legitimate expectation cannot be invoked where to do so would interfere with the public authority's statutory duty.[435] It goes without saying that the primary (statutory) duty of the revenue, as a public authority, is to collect taxes which are properly payable in accordance with current legislation, albeit, the revenue is also responsible for managing the tax system.[436] As we have shown with the *Aozora* case, this primary duty of tax collection, by itself, also constitutes a public interest. The point of contention, therefore, is whether it can be taken, even as a general rule, that where the revenue's policy change or resilement is driven by its duty to collect tax (or more tax), as would

[433] *Ibid.*
[434] *Supra* note 411, para 72.
[435] See, for instance, *Halliburton supra* note 211. Whether or not this is an absolute position falls for consideration.
[436] *Gaines-Cooper v HMRC supra* note 148, para 26.

ordinarily be the case, legitimate expectation cannot be invoked. In *Reg. v Attorney-General, Ex parte Imperial Chemical Industries Plc.,*[437] it was stated that the legitimate expectation of the taxpayer was the payment of the taxes actually due. Thus, no legitimate expectation could arise from an *ultra vires* relaxation of the relevant statute by the body responsible for enforcing it. There are also authorities that the revenue may not "dispense" with applicable statutory provisions.[438] If this strict position is adopted, that is, to the effect that the duty to collect tax automatically defeats legitimate expectation, then it may well be accepted that legitimate expectation is useless in tax matters. This does not seem to be the case, however, as the courts have in various cases recognized the place of judicial intervention with the tax authority's statutory duty, where need be. It is arguable that the fact that the Nigerian Court of Appeal in both *Halliburton* and *Saipem* made the effort to comb through the relevant elements of legitimate expectation before dismissing those claims supports this argument. Several UK court decisions also support this point. The UK Court of Appeal in *Samarkand Film Partnership No 3 & ors v HMRC* described this issue as follows:

> There is a strong public interest in the imposition of taxation in accordance with the law, and so that no individual taxpayer, or group of taxpayers, is unfairly advantaged at the expense of other taxpayers. There is also a real public interest in the revenue making known the general approach which it will adopt, and the practice which it will normally follow, in specific areas… [T]here are likely to be <u>few cases</u> where a taxpayer can plausibly claim that a representation made in general material of this nature is so clear and unqualified that the taxpayer is entitled to rely on it and to be taxed otherwise than in accordance with the law.[439]

The dictum of Judge J in *MFK Underwriting Agents* on this point is also very instructive:

> I accept without hesitation that (a) the revenue has no dispensing power and (b) no question of abuse of power can arise merely because the revenue is performing its duty to collect taxes when they are properly due. <u>However, neither principle is called into question by recognising that the duty of the revenue to collect taxes cannot be isolated from the functions of administration and management of the taxation system for which it is responsible</u>… <u>If the argument for the Inland Revenue were correct any application for judicial review on the ground of unfair abuse of power would be bound to fail if the revenue were able to show that</u>

[437] 60 T.C. 1
[438] See *Vestey v Inland Revenue Commissioners* [1980] A.C. 1148; See *Saipem v FIRS supra* note 102.
[439] [2017] EWCA Civ 77, [2017] STC 926, Per Henderson LJ, para 115.

> its actions were dictated by its statutory obligation to collect taxes. However it was clearly recognised in *Ex parte Preston [1985] A.C. 835* that in an appropriate case the court could direct the Inland Revenue: "to abstain from performing their statutory duties or from exercising their statutory powers if the court is satisfied that 'the unfairness' of which the applicant complains renders the insistence by the commissioners on performing their duties or exercising their powers an abuse of power…' per Lord Templeman, at p. 864.[440]

In applying the doctrine of legitimate expectation to tax, the court performs a delicate balancing between some important conflicting interests. On one side there is the taxpayer whose tax liability is at stake and who risks being taxed in an "unfair" manner. On the other side there is the revenue, which shoulders that public responsibility to collect taxes for the actualization of government business, as well as other taxpayers who are not disposed to that one taxpayer receiving a treatment that may create inequity between taxpayers. In *R (Dixons Retail plc) v HMRC*,[441] the Court stated that:

> On the other hand, and to be weighed on the other side of the balance, is the obvious and strong public interest in the defendant collecting tax that is due in accordance with statute and correcting an incorrect decision if there is a good reason to do so. Fairness in relation to the general body of taxpayers who do pay their VAT so that no individual or group of taxpayers is unfairly advantaged at the expense of other taxpayers weighs strongly on this side of the balance.[442]

I subscribe firmly to the reasoning expressed above. I reiterate that while it is of great importance to preserve the statutory mandate of the tax authority to do all that is legally permissible to collect tax, simply allowing the tax authority to recite the statutory mandate mantra when called upon to keep its word may not necessarily serve the interests of that mandate. Legal recognition of that autonomy must, therefore, be exerted within proper context. An unrefined assertion of statutory mandate will render the useful concept of legitimate expectation completely useless in the sphere of taxation which may be detrimental to the tax system. It must be borne in mind, after all, that the

[440] *MFK Underwriting supra* note 26 at 1574.
[441] [2018] EWHC 2556.
[442] Per Simler J (as she then was), para 66.

reason why the tax authority issues guidance is to enable the collection of tax. Thus, as the court put it in *Aozora*, "it is inherent in the nature of guidance that it only fulfils the function of assisting in the management of the collection of taxes if taxpayers can rely on it."[443] It is, therefore, pertinent to find the right balance. One that preserves the statutory mandate of the tax authority, allows the tax authority to make necessary decisions and yet protects the taxpayer when the tax authority acts wrongfully. There are, thus, cases where the revenue has had to show the existence of an overriding interest in order to defeat a legitimate expectation. In *Drax Power Ltd*,[444] for instance, the court accepted that the government had advanced a reasonably compelling case that the exemption's removal was justified in the public interest, notwithstanding its evident harm to the claimants' private interests and to its property rights in the form of concluded contracts to supply companies, so that the decision came within the appropriate margin of discretion and was therefore not disproportionate.

I would iterate that the revenue, despite its important function of tax collection, is nevertheless a public authority whose actions are ordinarily subject to judicial review.[445] Moreover, its actions are in many cases capable of jeopardizing the rights and genuine interests of ordinary citizens as well as the broader macroeconomic space. If the revenue's attempts to collect tax in the circumstances of a given case would unfairly prejudice a taxpayer, then the court is entitled to intervene, the public interest or duty notwithstanding.

5.1.5.2 What Constitutes Unfairness?

I have argued in support of the approach of the UK Court of Appeal in *Aozora* that the revenue need not prove that it has an overriding reason for resiling from an assurance given to a taxpayer.

[443] *Aozora supra* note 27, para 32.
[444] *Supra* note 372.
[445] See *Ex p. MFK Underwriting Agents* s*upra note* 26.

I agree with the court, among other reasons, that there is an underlying public interest in tax matters which negates, ordinarily, the need for the tax authority to provide an overriding interest. This position is, however, not fatal to the cause of a taxpayer seeking to enforce a legitimate expectation. A taxpayer can always approach the court where it is able to establish that there has been, as described in *Hely-Hutchinson,* "sufficient unfairness to prevent correction of the mistake" made by the authority.[446] In those circumstances, the principal public interest, being the collection of tax, may be sidestepped.[447] The question that follows is what degree of unfairness must the taxpayer establish to succeed?

One of the dominant features of Arden LJ dictum in *Hely-Hutchinson*, quoting *Unilever,* is the reference to terms such as "sufficient unfairness", "very high level" of unfairness, "outrageously or conspicuously unfair".[448] The use of these terms by the court signifies the fact that, generally, the courts see the revenue as acting within its mandate when reversing itself on an incorrect decision. It is also an attitudinal reflection of the courts' cautious thread when called upon to intervene in the administrative functions of the revenue. Moreover, given as the court asserted in *MFK Underwriting* that a taxpayer's only legitimate expectation is that it would be taxed according to law, the court is unsurprisingly reluctant to enforce a legitimate expectation that is based on a wrong application of the law. Thus, it is apparent that it is only in those rare cases where the conduct of the tax authority can be deemed to be manifestly unfair, to add to the muddle of semantics, that the court may be moved to intervene. This cautious arm's length judicial approach has been the consistent pattern. Lord Templeman of the UK House of Lords in *Preston* said that the court can only intervene if "the unfairness" of which the applicant complains renders the

[446] *Hely-Hutchinson supra* note 411, para 72.
[447] It is at this juncture that defeat likely awaits the taxpayer.
[448] See Hely-Hutchinson *supra* note 411, para 72.

insistence by the revenue to perform its duty or exercise its powers an abuse of power.[449] In *Unilever,* Brown LJ stated that "unfairness amounting to an abuse of power" as envisaged by *Preston* was unlawful because it is either illegal or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power.[450] In *R (Dixons Retail plc) v HMRC*, Simler J stated that:

> It is well-established that it is open to a public body to change a decision if it has acted under a mistake or adopted a mistaken view. However, it will not be permitted to do so where there is sufficient unfairness to justify preventing it from doing so. The authorities, as I have said, make clear that the unfairness must reach a high level.[451]

Rose LJ in *Aozora* justified the need for a high degree of unfairness as arising from the fact that the primary duty of the revenue is to collect, not to forgive tax. A duty which "is not linked with the existence or absence of a representation…"[452] Her Lordship added that "wherever an express representation is established it is still essential for the court to consider all the factors relevant to whether it would be unfair to allow HMRC to frustrate an expectation arising from that promise, assurance or representation and further that a high level of unfairness is necessary to override the public interest in the collection of taxes to which I have referred."[453]

It is apparent from the available English cases that the presence of unfairness can be gleaned from either of two main factors: the revenue's motive for resilement and the taxpayer's detriment. Rose LJ in *Aozora* stated that "in each case… it is up to the taxpayer to point if he can, to some detriment that he has suffered as a result of relying on the representation. That will need to be weighed in the balance by the court in deciding whether it is fair to allow HMRC to resile from their

[449] The UK House of Lords in this case viewed "unfairness amounting to abuse of power" in the context of conduct which, if in the realm of private law, would have been "equivalent to a breach of contract or breach of representations" on the part of the revenue.
[450] *Unilever supra* note 128 at 695a.
[451] *Supra* note 449, para 62.
[452] *Aozora supra* note 27, para 49.
[453] *Ibid,* para 49.

representation. The absence of any detriment… would, of course, create a significant hurdle for the taxpayer to overcome."[454] In that specific case, the court held that the taxpayer did not show that it suffered a "serious detriment" as a result of any reliance on the representation.

In *Unilever,* the court held that on the exceptional facts of the case, the revenue acted unfairly in not exercising its discretion to extend time for the taxpayers, especially in the light of the history between the parties and the fact that granting the extension would not have done any damage to the legitimate interests of the public. Lord Bingham MR held that the revenue's conduct towards Unilever had been so unfair as to amount to an abuse of power and so unreasonable as to be irrational.

The term "conspicuous unfairness",[455] used in *Unilever,* it should be noted, is not a principle of law, by itself. In the subsequent case of *R v Gallaher Group Ltd & ors v Competition and Markets Authority,*[456] Lord Carnwath JSC clarified that the term was simply an expression used to emphasise the extreme nature of the revenue's conduct in that specific case. Thus, a taxpayer's claim must be judged according to the ordinary principles of judicial review, notably irrationality and legitimate expectation, and the terms unfairness, conspicuous unfairness or abuse of power are not distinct legal criteria.

The decision of the UK Court of Appeal in *Aozora* is to the effect that it is the unfairness that is supposed to override the inherent public interest and not the other way around. The court held:

> It is therefore necessary in my judgment, that before Aozora UK can hold HMRC to a view of the law that HMRC has expressed but which they now believe to be wrong, it is necessary for Aozora UK to show a high degree of unfairness arising in its particular circumstances in

[454] *Ibid,* para 58.
[455] *Unilever supra* note 128 at 233, para E–F.
[456] *Supra* note 436.

> order to override the public interest in HMRC collecting taxes in accordance with a correct interpretation of the law.[457]

It is plausible that even though the revenue is not required to establish the existence of an overriding interest or reason, the existence of such can help negate the idea of unfairness or abuse of power. In *Regina (Dickinson and others) v Revenue and Customs Commissioners*[458] it was held on appeal that the judge had been entitled to conclude that "the unfairness which he had found had been outweighed by other factors with the result that there had been no abuse of power."

I would add that since (Nigerian) tax jurisprudence generally recognizes tax planning/avoidance as a legitimate taxpayer design,[459] where a taxpayer has relied on the tax authority's assurance or guidance to organize its affairs to reduce its tax liabilities, the mere fact that the state may lose some tax revenue, may not, by itself, provide sufficient justification to defeat a legitimate expectation claim. Again, as Judge J. observed in *Ex p. MFK Underwriting Agents Ltd*:

> The suggestion that a huge amount of tax would be lost to general funds as a consequence of an order for judicial review is an argument without force. The remedy of judicial review for improper abuse of power – if established – should be available equally to all taxpayers irrespective whether their potential liability is huge or small. If persuaded that judicial review would otherwise have been appropriate I should have exercised my discretion in favour of granting it.[460]

If, on the other hand, the tax avoidance or other benefit to be derived by the taxpayer is materially different from what was contemplated by the tax authority at the time of giving the assurance or was likely to cause significant inequalities between taxpayers or disruptions in the tax system, then the tax authority may not be deemed to have acted unfairly.[461] It is not out of place, after all, for

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[457] *Aozora supra* note 27, para 52.
[458] [2018] EWCA Civ 2798.
[459] See *Ahmadu v Gov of Kogi State* [2000] 3 NWLR (pt. 755) 502.
[460] *Ex p. MFK Underwriting Agents Ltd supra* note 26 at 1574. Contrast *Matrix Securities supra* note 399.
[461] See, for instance, the case of *R (Bamber) v HMRC* [2006] STC 1035; [2005] EWHC 3221 (Admin), where it was found that there was no abuse of power in relation to HMRC changing a tax agreement which had operated with

the tax authority to seek to collect taxes in a way that achieves reasonable fairness as between taxpayers, avoiding where possible unmerited windfalls for particular taxpayers.[462] It may also be of importance in defusing any notions of unfairness or abuse of power if the revenue acts promptly in correcting a mistaken assurance by withdrawing same before the taxpayer has acted on it. In *R. v Inland Revenue Commissioners ex p. Matrix Securities*, for instance, the UK Court of Appeal stated, albeit *obiter*, that it would not have been unfair to allow the revenue resile its approval of a taxpayer's tax avoidance scheme having done so timeously and in those circumstances it would be wholly wrong to hold the Revenue to the mistaken clearance and allow the scheme to go ahead at a cost of some £38m of lost revenue to the national exchequer.[463] Perhaps, the court would have reasoned differently if the scheme in this case was a genuine or good faith tax avoidance scheme and if the revenue had sought to withdraw belatedly.

Having carefully considered the two approaches, I am of the view that the *Aozora* approach is the right one as far as tax-based legitimate expectation is concerned. First, the overarching purpose of legitimate expectation, has, generally, been the eradication of unfairness and abuse of power in public administration. Thus, as observed by the court in *Aozora* the establishment of unfairness, as the case may be, forms an integral part of the requirements that the taxpayer needs to meet. Taking out the need to prove this ingredient and, in its place, shifting to the tax authority the onus of proving that there is an overriding interest effectively means that that crucial foundation on which legitimate expectation is built stands uprooted. Second, as also observed by the court in *Aozora*, the collection of tax itself constitutes an inherent public interest that is present in tax-based

unexpected consequences, even though an individual may have incurred a degree of personal expenditure in reliance on the agreement: see [45]-[59] and [71]-[73]

[462] See *Oxfam supra* note 371. See also *R v IRC, ex p. National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617.

[463] *Supra* note 399 at 640, para E–F.

legitimate expectation disputes. Given the indelible presence of this factor, the need to establish an overriding interest becomes superfluous, although it may favour the revenue's case to do so.

It seems to me that the two perspectives are more reconcilable than not and that the seeming disparity between them only relates to the question of who has the onus of proof. The state of Nigerian law on legitimate expectation in this regard is not obvious. This is because the cases that have followed *Stitch* have not made it past the first stage of proof. If an inference is to be drawn from the thin thread of *Stitch*, then it would seem that the standard is closer to what was said in *Aozora* than *United Policyholders.* In other words, it seems that the unfairness approach rather than the overriding interest approach, so to speak, better aligns with the state of the law in Nigeria. The standard is "unfairness amounting to abuse of power" or, as *Hely-Hutchinson* reflects, "conspicuous unfairness", the onus of which is on the claimant to prove. What flows from this is that there is limited scope for the application of legitimate expectation in administrative law, generally, and in tax specifically. Further support for this inference can be drawn from the opinion, albeit persuasive, expressed by Judge J in *Ex p. MFK Underwriting Agents,* one of the earliest cases where legitimate expectation was applied in tax jurisprudence:

> If contrary to my conclusion it had been established that the revenue had abused its powers the case for granting judicial review as a matter of discretion would have been clear. In expressing that view I have recognised that it is only in an exceptional case of this kind that the process of judicial review is permitted and the court should be extremely wary of deciding to be unfair actions which the commissioners themselves have determined are fair.[464]

Perhaps, Lord Templeman's dictum in *Ex parte Preston* best captures judicial leanings:

> The court cannot in the absence of exceptional circumstances decide to be unfair that which the commissioners by taking action against the taxpayer have determined to be fair.[465]

[464] *Ex p. MFK Underwriting Agents Ltd supra* note 26 at 1574.
[465] *Supra* note 233 at 864.

The endorsement of a "narrow interpretation" to substantive legitimate expectation in *United Policyholders* has been welcomed as valuable and providing welcome clarity by those who reckon that courts have, effectively, been operating on the basis of a narrow interpretation of that judgment since it was handed down.[466] The court's characterization of the 'narrow interpretation' of *Coughlan* as 'the trend of modern authority, judicial and academic' is also fair insofar as it is very much the middle ground between sceptics and proponents.[467] This narrow approach is also reflected in the fact that the court is more willing to bind the government to a promise or policy that is applicable to an individual or small group as opposed to one with a broad application.[468] Moreover, the narrow, conservative, approach better reflects the state of affairs in Nigeria where three decades after its introduction, the deployment of legitimate expectation has been remarkably frugal; and although, legitimate expectation claims in Nigeria – few as they are – have featured mainly in the tax sphere, those cases only underline the abysmal chances of success.

5.2 What Principle(s) Underlie or Justify Judicial Protection of Legitimate Expectation?

A persistent aspect of the theoretical debate on substantive legitimate expectation centers on the normative content of the doctrine. The debate seeks to provide answers as to why the court should protect legitimate expectation. In other words, what specific, ultimate, fundamental principle(s) would be actualized by exerting judicial power to protect legitimate expectations? Is it the rule of law, fairness, natural justice, good administration, consistency, certainty, trust, non-abuse of power

[466] Tomlinson *supra* note 294at 83.
[467] *Ibid* at 84. Tomlinson further observes that: a 'trend' is not, however, consensus. One's view of whether a 'narrow interpretation' approach to substantive expectations is good or not (and even the prior question of whether it is 'narrow' or not) will inevitably hinge upon how one conceives as the appropriate relationship between the courts and executive… In terms of how various contested theories of administrative law may offer practical guidance as to the correct approach to substantive legitimate expectations, the profundity of that Sisyphean task is matched only by its uselessness in offering immediate, helpful answers. For now, then, a useful and defensible approach to substantive legitimate expectations must be the aim. With this goal in mind, Lord Carnwath's judgment reveals an approach that is — in view of present discussion, experience, and knowledge — both pragmatic and justified. *Ibid.*
[468] See Weeks *supra* note 86 at 150.

or something else?[469] This is not a particularly smooth venture because, as observed by Daly, legitimate expectation, as is the case with the common law, "has not followed inexorably from an agreed set of first principles."[470] Thus, the exact role and scope of the doctrine is less than clear[471] because there has, generally, been "a lack of conceptual exploration of the doctrine: it has been assimilated into administrative law without any real attempt to explain its purpose and to sufficiently identify principles which underpin this purpose."[472] The apparent lack of a clear justification is adjudged by some scholars to be problematic from both the normative and practical points of view. Watson, for instance, opines that although the courts have articulated a number of factors that may be relevant to determine when a legitimate expectation may arise[473] without a clear underlying principle, there is no guidance as to what weight should be given to these various factors or how they interact with one another.[474] Groves adds that the doctrine's want of a clear normative purpose renders it "little more than a smokescreen for an erratic and subjective assortment of judicial ideas."[475] For Varuhas, this inability to pin down the doctrine or doctrines of legitimate expectations helps to explain continuing uncertainty over the field's theoretical foundations.[476] This has, however, not deterred courts or commentators from proposing a myriad of explanatory theories, including good administration, trust in public administration, legal

[469] There are similarities between some of these terms. The reason for naming them is to capture the diverse terminology used by scholars and courts to describe closely related phenomena.
[470] Daly *supra* note 14 at 102.
[471] Reynolds *supra* note 12 at 331.
[472] *Ibid* at 332.
[473] Discussed in the preceding section of this paper: a promise, reliance, detriment, etc.
[474] Watson *supra* note 13. To this end, the doctrine would be assisted by identifying some sort of overarching "meta value" – see Reynolds *supra* note 12 at 330.
[475] Groves *supra* note 295 at 487.
[476] Varuhas *supra* note 257 at 19.

certainty, the rule of law, consistency, and individual dignity.[477] Some specific underlying theory is, thus, needed to assist in answering the difficult doctrinal questions that will inevitably arise.[478]

There is judicial support for the inference that legitimate expectation is predicated on the rule of law.[479] Judicial concern for the dignity and autonomy of individuals in their dealings with administrative decision-makers evokes the rule of law, as "a principle of institutional morality."[480] In legitimate expectation cases where the rule of law is invoked, courts are typically concerned by the effect on individuals of promises being broken or settled expectations disrupted.[481] However, it is hardly evident that protecting substantive legitimate expectations forms an essential ingredient of promoting the rule of law.[482] It seems evident from available English case law that the two most prominent explanations for why legitimate expectations are protected are the importance of ensuring 'fairness' and to prevent decision makers from 'abusing their power'.[483] Thus, there are various cases where the courts' approach to legitimate expectation were concerned with the 'duty to act fairly' or where fairness has either expressly or implicitly been considered to be central to the doctrine.[484] On this view, legitimate expectations are protected because to do otherwise would be 'unfair'.[485] Likewise, there are cases where the courts have grounded their appreciation of legitimate expectation on the need to prevent abuse of power by the public authority. In these cases, what the courts seem to be saying is that 'we will intervene to protect an expectation in order

[477] *Ibid.*
[478] Daly *supra* note 14 at 102.
[479] See *Rainbow Insurance Company Ltd v Financial Services Commission (Mauritius)* [2015] UKPC 15 at 51.
[480] See J Jowell, "The Rule of Law" in J Jowell, D Oliver & C O'Cinneide, eds, *The Changing Constitution,* 8th ed (Oxford, UK: Oxford University Press, 2015) 13 at 27, cited in Daly *supra* note 14 at 107.
[481] Daly *ibid.*
[482] Groves *supra* note 295 at 506–511, cited in Chandrachud *supra* note 25 at 262.
[483] Reynolds *supra* note 12 at 331.
[484] See: *Stitch supra* note 40*; R* v *Minister for the Civil Service ex parte CCSU* [1985] AC 374 at 415; *Attorney-General of Hong Kong v NG Yuen Shiu supra* note 178; *MFK Underwriting supra* note 26 at 1570.
[485] Reynolds *supra* note 12 at 331.

to preclude public authorities from abusing their powers when dealing with members of the public.'[486] In *R (Bancoult)* v *Secretary of State for Foreign and Commonwealth Affairs*, the House of Lords, per Lord Carswell, made the point that "the basis of the jurisdiction [of legitimate expectation] is abuse of power and unfairness to the citizen on the part of the public authority".[487] However, the problem with applying these principles is the apparent lack of coherence that exists between cases. For instance, despite collective judicial recognition of what Bingham, LJ. described as the "Revenue's unqualified acceptance of a duty to act fairly and in accordance with the highest public standards,"[488] identifying the quantum of unfairness that would justify the protection of legitimate expectation remains a challenge.

In Nigeria, the few decided cases, *Stitch,* for instance, evidence the Nigerian Supreme Court's endorsement of the principles of fairness and non-abuse of power, as well as good administration, as the sort of moral compass of legitimate expectation. The Court also remarked that:

> The rationale which I gather from these decided cases is that a Government in which the citizen is entitled to repose confidence and trust, is not expected to act in breach of the faith which it owes to the citizen, and if it does so act, the courts will intervene. The right of the appellant in this case to be issued an import licence, on terms prescribed by the Minister on compliance with those terms, had vested. It was the right of the citizen which could not be ignored.[489]

Thus, it may be taken that there is a plurality of rationale for the protection of legitimate expectation in Nigeria that touches on not less than five principles. [490]

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[486] See *ex parte Preston supra* note 233; *ex parte Begbie supra* note 338.
[487] *Supra* note 225 at 135.
[488] *Ex p. Unilever Plc supra* note 128.
[489] *Stitch supra* note 40 at 1029, paras A–B.
[490] In *Halliburton,* the FIRS partly argued that the taxpayer did not disclose any "abuse of power" on the part of the tax authority and that in accordance with *Stitch* a case for legitimate expectation could not be made. Unfortunately, the Court of Appeal, which had the chance to contribute to the jurisprudence choose to ignore this argument completely but decided the case on other grounds.

Among scholars, there seems to be a lack of consensus on what should be *the* underlying basis for the protection of legitimate expectation; or, indeed, whether there is a need to outline such a basis.[491] Reynolds, for instance, considers the principles of fairness and abuse of power to be inadequate – not irrelevant – to explain and guide the application of the doctrine. He opines that while these principles encapsulate the moral impetus of legitimate expectations, they sit at such a high level of abstraction that reliance upon them alone results in two serious shortcomings.[492] First, they fail to clearly delimit the doctrine's scope – they do not tell us what it is that distinguishes a legitimate expectations case from other cases of unfairness or abuse of power by a public authority where application of the doctrine is unsuitable. Second, they fail to offer practical guidance when dealing with a legitimate expectations case – they give little indication of the facts and considerations that will be pertinent in deciding the doctrine's effect in a particular case. He argues vigorously that the result of explaining the doctrine only in terms of fairness and abuse of power means that the doctrine may be applied wherever there is a fairness issue. Given that fairness is the touchstone of all public law, the doctrine of legitimate expectation becomes an empty shell, a mere label;[493] that "there is therefore a clear need to identify an 'illuminating principle' which sits comfortably with fairness and abuse of power but is more specific and so is capable of identifying when the doctrine is relevant."[494] That adequate principle, for various reasons, is also not "good administration" because good administration, although entirely compatible with the moral impetus of legitimate expectation, is nevertheless too abstract, vague and overarching to provide any concrete delimitation or guidance.[495] He advocates instead for "public trust" – a general trust – as

[491] See Tomlinson (discussed below).
[492] Reynolds *supra* note 12 at 336.
[493] *Ibid.*
[494] *Ibid* at 333.
[495] *Ibid* at 337.

the principle that both fits well with the doctrine of legitimate expectations and can provide guidance. He concludes that the reason why it is unfair to breach a legitimate expectation is because this would breach the claimant's trust in the public authority, and so would be an abuse of power and contrary to good administration.[496]

Similarly, Watson views legitimate expectation from a sociolegal standpoint. He reckons that promises exist not just as statements but also as social conventions that carry with them a number of socially programmed assumptions. The foremost element of this social convention is an invitation to an individual to place their confidence in the maker. Thus, the promise exists as a recognized social convention of trust that is vital to avoid a society dominated by self-interest and duplicity. To break a promise is to directly interfere with the liberty of the person or persons who have relied on that promise. For Watson, the enforcement of a legitimate expectation is the judicial protection of a moral obligation that the public authority has freely solicited.[497]

The views of Reynolds and Watson align with Professor Forsyth's view that "good government depends upon trust between the governed and the governor. Unless that trust is sustained and protected, officials will not be believed, and government becomes a choice between chaos and coercion."[498] These views also find judicial support in Nigeria, in *Stitch,* where the Supreme Court remarked that "the citizen is entitled to repose confidence and trust" in government.

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[496] Reynolds *supra* note 12 at 341.
[497] See Watson *supra* note 13 at 641. Watson's priority is similar to that of Reynolds in that it seeks the protection of a moral code. For Reynolds that code is a general trust, while for Watson it is morally binding promise. For both, damage is done to both the society and the public institution if public authorities do not keep their promises.
[498] William Wade & Christopher Forsyth, *Administrative Law,* 10th ed (Oxford, UK: Oxford University Press, 2009), cited in Watson *supra* note 13 641.

Reynolds's theoretical postulations of a general public trust as the basis of legitimate expectations, [499] which, as noted, aligns with the views of Watson and Forsyth, is not without merit. It tries to deal with the problem of uncertainty as to the degree of unfairness that warrants the protection of legitimate expectation – although it does this, not by trying to determine that degree, but by diverting to another principle – and might even be adjudged the principle that makes the most sense about legitimate expectation from a tax perspective. It appears to be a low hanging fruit as far as the interest of the taxpayer is concerned, especially when compared with more demanding concepts like a "high degree of unfairness" or "unfairness amounting to an abuse of power." This is especially so if abuse of power is to be measured in the context of the egregious conduct of the respondents in the *Stitch* case. Suffice it to state that a taxpayer's claim is likely to be more feasible if the court views it from the angle that the revenue's repudiation of a promise amounts to a betrayal of trust reposed in the authority than to state that it amounts to an abuse of power. Moreover, while the Nigerian court has not directly defined 'abuse of power', a close term 'abuse of office' has been severally defined as the "use of power to achieve ends other than those for which power was granted, for example: gain, to show undue favour to another or to wreak vengeance on an opponent."[500] If abuse of power, for the purposes of legitimate expectation, were to be construed in the context of abuse of office then there would be an onerous burden on a taxpayer to prove a subjective and abusive motive on the part of the revenue authority; a burden that that may be far less pronounced in the case of trust.

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[499] He elaborates that "an example of trust informing the standard of review might be that where a promise is made to a large group of people whilst the court will appreciate that this promise is less intimate and contract-like than had the group been very small, it will go on to note that the overall connection between general public trust and good administration must not be forgotten (see Part IV) and that failing to protect the relevant expectation could cause serious injury to general public trust given the number of people involved, such that something beyond a light-touch review is called for." See Reynolds *supra* note 12 at 348.

[500] See *Dukoke v IGP Nigeria Police Force & Ors.* (2011) LPELR-4287(CA); *Federal University of Technology, Minna Ors v Okoli* (2011) LPELR-9053(CA); *Sule v Orisajinmi* (2006) ALL FWLR (343) 1686; *Ofoboche v Ogoja Local Government* (2001) FWLR (PT.68) 1051.

Second, the postulations of Reynolds and Watson appear to be in tune with the tax policy objective of certainty.[501] By anchoring legitimate expectation on trust, the court is invariably helping to entrench a more certain tax system. Be that as it may, there are reasons for discontent with these postulations.

My discontent, first, stems from a perception that the trust theory also suffers from the same presumptive shortcomings that Reynolds attributes to principles such as fairness, abuse of power and good administration. His contention that the reason why it is unfair to breach a legitimate expectation is because this would breach the claimant's trust in the public authority, and so would be an abuse of power and contrary to good administration is not infallible. The fact that a trust is breached may not always amount to abuse of power; nor would it always be unfair. That conclusion would depend on the circumstances in which the trust was breached and not just the fact that trust was breached.

Second, it is doubtful that the court is the appropriate forum to legislate public trust for administrative bodies. It is, perhaps, counterintuitive to suppose that trust in the revenue, as a distinct entity, can somehow be fostered by the court through its cohesive powers rather than by the revenue itself acting in a manner that would elicit or maintain trust. To illustrate, can Ms. A (the taxpayer) maintain trust in Ms. B (the tax authority) because of the actions of Ms. C (the court), especially at a point where Ms. B has broken her promise to Ms. A? I think it is logically coherent that it is only the actions of Ms. B that can reinstate or maintain the trust of Ms. A. The court binding the tax authority to a broken promise made to a taxpayer will not make the taxpayer

[501] This will be elaborated on in Chapter 6.

trust the tax authority. It might make the taxpayer trust in the court as a viable forum for redress, but that trust is reposed in the court, not the tax authority.

Third, predicating legitimate expectation centrally on trust rather than fairness (or abuse of power)[502] seems to detract from the core roots of legitimate expectation. Legitimate expectation is not a mushroom sprouting on deadwood. It is an offspring borne by the womb of judicial review. This implies that its theoretical underpinning is tied to judicial review like an inseverable umbilical cord. Current jurisprudence on judicial review restricts the concept to the determination of the legality of a governmental measure but not the merits or wisdom of such an action or inaction.[503] In other words, in the context of judicial review, what the court is principally concerned with is not whether the administrative act is right, but whether the public body acted fairly. Still, judicial review seeks to ensure that public bodies are fair, not that they are trustworthy, even if trust might be a by-product of consistent fairness. "In the exercise of its power of judicial review, the court has no jurisdiction to substitute its own opinion for that of the public body whose decision is being reviewed… it is not part of the purpose of judicial review to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question."[504] The Nigerian Supreme Court, per Nnaemeka-Agu, JSC, in *Bakare v Lagos State Civil Service Commission & anor* captured this point as follows:

> The courts in exercise of their power of judicial review are constantly called upon to scrutinize the validity of instruments, laws, acts, decisions, and transactions. In the exercise of the jurisdiction, the courts can declare them invalid or ultra vires and void… because they offend against the rules of natural justice of audi alteram partem, or nemo judex in causa, or offends against the rules of fairness, or otherwise offends the rule of natural justice… The court can by its power of judicial review set them aside[505]

[502] It seems a moot point that to abuse power is to act unfairly.
[503] CA Ogbuabor, "Expanding the Frontiers of Judicial Review in Nigeria: The Gathering Storm" (2011-12) 10 Nigerian Juridical Rev 1 at 2.
[504] *Military Governor of Imo State & anor v Nwauwa* (1997) LPELR-1876(SC), per Ogundare JSC at 24, paras B–C.
[505] (1992) LPELR-711(SC) at 91, paras C-G.

To sidestep the fulcrum of fairness – whether procedural or substantive – and delve into trust as the central concern would seem like the court imposing its own opinion on the body as regards not just what is fair but what is right; worse still, not just as regards the individual applicant but as regards what is best for the (tax) system, an evaluation that would seem to transcend the predominantly arm's-length borders of judicial review. For that to be done, one may have to go to the root of legitimate expectation to reconstruct the objectives of judicial review itself.

Again, the elevation of one value, as proposed by Reynolds, may unduly downplay the importance of another which may be equally significant in a given circumstance. So, rather than adopt a priority rule or value, a pluralist approach that views legitimate expectation normatively through a lens of different colours, as has been the dominant judicial pattern, may be more attractive.[506] In the context of tax, for instance, it seems plausible to anchor the doctrine on a variety of first principles, one of which, contrary to the opinion of Reynolds, would be legal certainty. As Fordham explains, "what is in play [in the context of legal certainty] is the idea that people deserve to know where, in law, they stand."[507] Practically speaking, given the uncertainty that often characterizes tax legislation, legitimate expectation would enable taxpayers attain a useful level of certainty about how tax rules would apply to them.[508] This is especially so in cases involving the interpretation of vague or ambiguous statutory provisions. Reynolds interprets this context to mean that legitimate expectation will be protected *only* insofar as this will ensure clarity and predictability of the law.[509] That need not be the case. While it is agreeable that legal certainty *only*

[506] See Daly *supra* note 14 at 110–112.
[507] Fordham *supra* note 3 at 263.
[508] Ansari & Sossin *supra* note 10 at 316.
[509] Reynolds *supra* note 12 at 338.

cannot adequately lace all the holes of legitimate expectation,[510] in some respects, such as mentioned above, its usefulness cannot be casually downplayed.[511]

On the other hand, the enforcement of an expectation arising from a promise or compromise may not necessarily be rooted in legal certainty since the import of the law may not be of principal importance to the taxpayer at this time. In those cases, the emphasis may be on good administration, which Daly[512] advocates, or on Reynolds' preferred public trust. It may as well simply devolve on the "meta principles" of fairness and non-abuse of power, depending on the facts. Any one of these principles applied within the framework of the identified ingredients of legitimate expectation and the peculiar facts of the extant case may justify the enforcement of an expectation. In that sense, it is, perhaps, better to toe the more cautious approach of Tomlinson who suggests that attempting to pin down legitimate expectation to a single principle may only inspire a sort of resistant shifting cultivation, in the sense that the adoption of a specific principle may not put an end to the debate but instead further ignite the craving for another specific meta value that will "better streamline" the application of the doctrine. Tomlinson argues that while it is perfectly valid to reflect upon whether a particular legal principle, new or old, possesses virtue, to pursue the identification of some sort of overarching 'meta-value' that would "provide invaluable guidance to difficult questions concerning the scope and effect of the doctrine" seems

[510] The suitability of legal certainty as an underlying principle of legitimate expectation is vehemently disputed by Reynolds, who opines that any principle which seeks to guide the doctrine must fit well with the "higher, more abstract principles of fairness and abuse of power." He reckons that legal certainty is not convincing as a principle distilled from fairness and abuse of power even though in some instances what is certain may also be conceived as fair. Moreover, according to him, in some cases, protection from abuse of power requires far more than the mechanical application of rules: it may well require that overall certainty be upset, and an exception allowed. See Reynolds *supra* note 12 at 339.

[511] Some scholars have highlighted that the principle of legitimate expectation has its own autonomy and shall not be identified with legal certainty because of its different function or objective. However, in various cases, both principles are used interchangeably. See Romano *supra* note 15 at 331.

[512] See Daly *supra* note 14.

to be misguided for various reasons.[513] It is, as Daly has observed, only normal that the "doctrine may not map clearly onto the various justifications offered for it from time to time."[514] Identifying some sort of meta-value that the doctrine ought to serve also risks foreclosing nuanced judicial consideration of the issues presented in a particular case.[515] He argues further that such a theoretical exercise may be representative of a worrying "rationalistic propensity among public lawyers to prioritize the universal over the local, the uniform over the particular and, ultimately, principle over practice."[516] As such, the solution offered from such an exercise may provide the attractive impression of structure, clarity, certainty, and comprehensiveness within the doctrine, but the courts would inevitably move away from such an abstract stricture when 'seeking to develop a knack and feel' for how the newly rationalised version of the doctrine would actually work in practice.[517] In this respect, he advocates that "Lord Carnwath's caution that it may be 'unnecessary to search for deep constitutional underpinning for a principle …which …simply reflects a basic rule of law and human conduct' ought to be heeded."[518] In concurrence, I reckon that it does not seem altogether necessary for the court to embark on a pilgrimage to discover the soul or underlying value of legitimate expectation. Such expeditions have become proliferated and contributory to a rhythm of confusion.[519] In any case, if judicial review is the mother of legitimate

[513] Tomlinson *supra* note 294 at 82.
[514] See Daly *supra* note 14 at 101.
[515] Tomlinson *supra* note 294 at 82.
[516] *Ibid.*
[517] *Ibid.*
[518] *Ibid.*
[519] I reiterate that the Nigerian Supreme Court in *Stitch* referenced fairness, abuse of power, good administration, trust and consistency, although the court seemed to focus more on the first two during the analysis. It does not get more pluralistic than that. Since the Nigerian court has not dedicated significant effort to shaping the jurisprudence of legitimate expectation, it is impossible to project whether the court will in the future make some attempt at seeking a meta value. My thinking is that even if legitimate expectation cases continue to prop up, this aspect of the subject will receive very passive attention. I do not think that the UK courts have done a much better job of this, either. That is not to conclude that there is need to. However, it seems from the cases that "unfairness" has been the predominant theme of discussion, albeit the degree of unfairness – or the right term for it – has been a sticking point, as highlighted in the preceding section. The use of terminology has been so fluid that one might think that some of the jurists simply quote whatever term comes to mind at a given time, even if describing an idea that could more consistently be described

expectation, then the doctrine is firmly rooted in fairness. Reynolds' assertion that the result of explaining the doctrine only in terms of fairness and abuse of power means that the doctrine may be applied wherever there is a fairness issue does not match the reality on ground because if that were the case there would not be so few successful cases of legitimate expectation. The courts themselves, as elaborated in the preceding section, have thought in the lines of a "high degree of unfairness" or similar terms. If there is need for any effort on this point, it should be exerted to attain (semantic) specificity on the appropriate degree of unfairness, to help ensure that the doctrine does not become – as Reynolds rightly fears – an "unruly horse"[520] for setting aright all things deemed unfair. That is another matter altogether.[521]

otherwise. In a sense, this might also reflect that the judges do not really care about the terminology in so far as it effectively reflects a significant enough degree of unfairness.

[520] A term used by Professor Hoexter to describe legitimate expectation. See Cora Hoexter, "The Unruly Horse and the Gordian Knot: Legitimate Expectations in South Africa" in M Groves & G Weeks, eds, *Legitimate Expectations in the Common Law World* (Oxford: Hart Publishing, 2017) 165.

[521] Please refer to the preceding section for an exploration of this issue.

Chapter 6: Legitimate Expectation and Tax: Policy Perspectives

6.1 Tax Policy: Concept and Framework

Discussions of legitimate expectation have traditionally focused on judicial approaches. This is unsurprising since legitimate expectation is a legal doctrine advanced by the court. It is this approach that has defined my discussion in the previous chapters of this thesis. Those chapters have examined the legal possibility and parameters of enforcing tax-based legitimate expectation in Nigeria. However, it is important to recognize that every case of legitimate expectation is premised on a conflict arising from a withdrawal by the tax authority of a benefit that the taxpayer expected to enjoy. Cognizant of this background, this chapter focuses on how the tax authority approaches or should approach issues of legitimate expectation. In other words, I discuss the importance of the Nigerian tax authority honouring its commitments to taxpayers. The central question in this chapter is: are there policy basis why the tax authority should respect legitimate expectation? I consider this discussion necessary because, while the court has an important role to play in ensuring that the revenue's commitments to taxpayers are honoured, the revenue itself may have a managerial responsibility to the tax system to try to honour those commitments.[522] The revenue adopting a more accommodating approach to legitimate expectation limits the chances of judicial intervention in matters that may impact broader tax policy. Some commentators express concern that the current situation where the FIRS has severally expressed a view on a tax issue and subsequently reversed itself might see the tax authority find itself in a position where its views on tax matters are considered irrelevant.[523] I address these concerns in the context of the overall tax

[522] Although the National Tax Policy recognizes that the judiciary has a role to play in "the development of tax jurisprudence in Nigeria, thereby creating a stable tax system in which all stakeholders have confidence," – see para 2.8 – I construe this role to be narrow as far as the active management of the tax system is concerned. It does not go beyond the issuance of judicial decisions which entrench the values discussed in the preceding chapter. This informs my decision to focus on the administrative perspective in this chapter.
[523] Onyenkpa & Ayoola *supra* note 5.

policy framework of Nigeria.[524] I examine the concept of tax policy and some evaluative criteria of tax policy such as fairness, neutrality, certainty and administrability. With reference to relevant aspects of Nigeria's tax policy framework, I discuss how an accommodating administrative approach to legitimate expectation dovetails with Nigeria's tax policy and how such approach may better benefit Nigeria than a dismissive or repudiatory approach.

6.1.1 Policy and Tax Policy

A policy is a "set of ideas or a plan of what to do in particular situations that has been agreed officially by a group of people, a business organization, a government or a political party."[525] It is "[t]he general principles by which a government is guided in its management of public affairs."[526] A policy speaks to what a public authority plans to do at a given time.[527] Drawing from these, tax policy may be viewed as the general principles which guide the management of the tax system in a given state, towards the attainment of that state's tax objectives.

Taxation constitutes a major source of revenue to both developed and developing countries. Tax generated revenues are used to finance public utilities, perform social responsibilities, and grease the administrative wheel of the government.[528] Ultimately, different groups will have different

[524] It is important to note that tax policy is not only made through legislation. Tax policy is driven by different vehicles including tax treaties, tax regulations, court opinions in litigated cases, revenue internal guidance, private and public guidance or rulings, as discussed here. See Eric Solomon, "The Process for Making Tax Policy in the United States: A System Full of Friction" (2013) 61:4 Canadian Tax J 1075 at 1076. Also, it has been observed that "the tax administration… does play an important part in the development and amendment of tax policies, by requiring its Legal Department to closely monitor, analyze, and report on the positive or negative impact of tax policy and legislation on the operations of the tax administration, as well as to recommend changes." See Arturo Jacobs, "Detailed Guidelines for Improved Tax Administration in Latin America and the Caribbean" (USAID Leadership in Public Financial Management) 31 August 2013, online: https://www.usaid.gov/sites/default/files/LAC_TaxBook_Ch%202%20-%20ENGLISH.pdf at 7.

[525] See Cambridge Advanced Learned Dictionary, 1st ed, *sub verbo* "policy."

[526] See Black's Law Dictionary, 8th ed, *sub verbo* "policy." See also *Ogundipe v The Minister of FCT & ors* (2014) LPELR-22771(CA), per Tur, J.C.A. at 53 paras B-D.

[527] Weeks *supra* note 86 at 149.

[528] GA Nwokoye & RA Rolle, "Tax Reforms and Investment in Nigeria: An Empirical Examination" (2015) 10 Intl J Development and Management Rev 39.

ideas regarding the additional purposes of taxation. These will include redistribution and changing behaviour. It is up to governments to decide on the appropriate balance between these competing priorities, but, in all cases, the objectives should be achieved as efficiently as possible. From an aggregate welfare perspective, the ideal tax system would be "neutral", i.e. would not distort decisions in areas such as business investment and recruitment. But policy priorities inevitably result in a non-neutral system.[529] A "good tax policy" does not change during times of large budget deficits or healthy surpluses. Good tax systems can fall woefully short of creating adequate revenue during recessions, and poor tax systems can raise plenty of money (but they often are unsustainable).[530] Also, a country's tax regime is a key policy instrument that may negatively or positively influence investment.[531]

6.2 Evaluative Criteria of Tax Policy

There have been various theoretical discussions on what constitutes a good tax system or what constitute the yardsticks for evaluating a good tax system, starting from Adam Smith.[532] In modern time, some of the often discussed models include the traditional tax policy criteria: equity, neutrality and administrability,[533] as well as other offshoots: simplicity, certainty, convenience of

[529] UK Parliament, "The principles of tax policy," 31 January 2011, online: https://publications.parliament.uk/pa/cm201011/cmselect/cmtreasy/memo/taxpolicy/m38.htm

[530] "Taxing Decisions Matter: A Guide to Good Tax Policy", *Minnesota Center for Fiscal Excellence*, online: https://www.fiscalexcellence.org/our-studies/tax-policy-primer.pdf

[531] OECD, Policy Framework for Investment User's Toolkit (2013), online: http://www.oecd.org/investment/toolkit/policyareas/41890309.pdf

[532] See Adam Smith, *The Canons of Taxation,* 1776. The four canons of taxation identified by Adam Smith are the: Canon of Equality; Canon of Certainty; Canon of Convenience; and Canon of Economy. Both the term "canon" and some of the specific canons have been redesigned by other scholars as the years have gone by. See, for instance, Clinton Alley & Duncan Bentley, "A Remodelling of Adam Smith's Tax Design Principles" (2005) 20 Australian Tax Forum 582 cited in Najeeb Memon, "Prioritizing Principles of a Good Tax System for Small Business in Informal Economies" (2010) 25:1 Australian Tax Forum 57 at 67.

[533] See, for instance, Kim Brooks, "Delimiting the Concept of Income: The Taxation of In-Kind Benefits" (2004) 49:2 McGill LJ 255 at 259; See Christians *supra* note 30. See also Anthony Stokes & Sarah Wright, "Does Australia Have A Good Income Tax System?" (2013) 12:5 Intl Business & Economics Research J 533 pointing to a consensus among scholars that, as a basic criterion, a good tax system should be fair, efficient and simple.

payment, information security, economic growth and efficiency, transparency and visibility, minimum tax gap, accountability to taxpayers and appropriate government revenues.[534] For some, equity (or fairness), economic efficiency and administrative capacity are identified as the three key principles that most tax scholars adjudge as the right normative criteria to guide society in achieving the desired distribution of costs and benefits through taxation.[535]

Like other countries, Nigeria operates a tax system that is guided by a set of identifiable evaluative policy criteria. These evaluative criteria can be found in a consolidated document, the National Tax Policy (NTP or the Policy).[536] The NTP sets the agenda for the formulation and administration of tax laws in Nigeria. Underlying the objectives of the NTP are the Fundamental Objectives and Directive Principles of State Policy contained in the Constitution of Nigeria.[537] Accordingly, the NTP directs that tax policies, laws and administration shall promote the attainment of, *inter alia,* the ability of all taxable persons to declare their income honestly to appropriate and lawful agencies and pay their tax promptly; ensuring that the rights of all taxable persons are recognized and protected; and eradicating corrupt practices and abuse of authority in the tax system.[538] Also, the NTP identifies as the Guiding Principles of Nigeria's Tax System, the factors: equity and fairness;[539] simplicity, certainty and clarity;[540] convenience;[541] low compliance cost;[542] low cost of

[534] See, generally, "Guiding Principles of Good Tax Policy: A Framework for Evaluating Tax Proposals," (2017) *Association of International Certified Professional Accountants,* online: https://www.aicpa.org/advocacy/tax/downloadabledocuments/tax-policy-concept-statement-no-1-global.pdf;
[535] Professor Christians contends that a main challenge of the above framework is that it ignores institutions and decision-making processes as if they are irrelevant to the normative quality of the tax policies themselves. See Christians *supra* note 30 at 11.
[536] See Nigeria, Federal Ministry of Finance, *National Tax Policy*, (Abuja, Nigeria: FMF, 1 February 2017).
[537] See, generally, Chapter 2 of the Constitution.
[538] See sub-paragraphs 1.3 (a), (d) and (e) of the NTP.
[539] "Nigeria tax system should be fair and equitable devoid of discrimination. Taxpayers should be required to pay according to their ability." *Ibid* para 2.1.
[540] "Tax laws and administrative processes should be simple, clear and easy to understand." *Ibid.*
[541] "The time and manner for the fulfilment of tax obligations shall take into account the convenience of taxpayers and avoid undue difficulties." *Ibid.*
[542] "The financial and economic cost of compliance to the taxpayer should be kept to the barest minimum." *Ibid.*

administration;[543] flexibility;[544] and sustainability.[545] Accordingly, all existing and future taxes are expected to align with these "fundamental features".[546]

The policy criteria contained in the NTP are consistent with both the traditional and modern categorizations of tax policy criteria. I do not consider a discussion of all categories necessary for the purpose of this thesis. Thus, I elect to discuss a few of the criteria identified above – focusing mainly on the traditional criteria – and to, as much as possible, streamline the discussion to the themes of this thesis. For a clear guidance on the trajectory of this section, the tax policy criteria that I discuss are equity, neutrality, certainty (with simplicity) and administrability. Some of these evaluative criteria are similar or intertwined.[547] Thus, there may be like themes in some of the discussions.

6.2.1 Equity (Fairness)

In the briefest of terms, equity suggests that people should be treated fairly.[548] There are two main strands of the tax equity theory. The first is the benefits theory, which holds that people ought to

[543] "Tax Administration in Nigeria should be efficient and cost-effective in line with international best practices." *Ibid.*
[544] "Taxation should be flexible and dynamic to respond to changing circumstances in the economy in a manner that does not retard economic activities." *Ibid.*
The tax system should promote sustainable revenue, economic growth and development." *Ibid.*
[545] "There should be a synergy between tax policies and other economic policies of government." *Ibid*.
[546] "The preceding National Tax Policy specified as its underlying agenda that: "taxpayers should understand and trust the tax system, and this can only be achieved if Nigerian tax policy keeps all taxes simple, creates certainty through considerable restrictions on the need for discretionary judgments, and produces clarity by educating the public on the application of relevant tax laws. It is therefore imperative that the Nigerian Tax system should be simple (easy to understand by all), certain (its laws and administration must be consistent and clear (stakeholders must understand the basis of its imposition)." See para 1.8.1 National Tax Policy 2012.
[547] For instance, Christians submits that administrative capacity may also serve equity goals. For example, a common capacity argument is that governments should not undertake administratively difficult taxes if they are under-resourced, because they will not be able to administer the tax equally across society. Lack of resources means lack of ability to monitor and enforce compliance, and this increases the risk that persons with equal means are taxed equally, or persons of different means are taxed appropriately differently. See Christians *supra* note 30 at 23.
[548] Christians *ibid* at 11.

pay taxes in relation to the benefits they receive from society.[549] The second is the ability to pay theory, which, as its terminology implies, holds that people ought to pay taxes in relation to their relative abilities to do so.[550] The ability to pay theory may be divided into two: horizontal and vertical equity. The principle of horizontal equity, the narrow focus of this section, demands that similarly situated individuals face similar tax burdens,[551] while vertical equity demands that taxpayers who are better-off should bear a larger proportion of the tax burden than those who are worse off.[552] There is a third strand of equity called is inter-nation equity. Inter-nation equity deals with the question of whether a tax system promotes a fair sharing of the international tax base, especially among developing countries.[553] Inter-nation equity is not predicated on the allocation of the tax revenue, but rather on the allocation of national gain, which is affected by the source country's decision to tax (or not) the gain.[554]

The challenge for the modem legal system is how to protect equality while preserving the ability of administrators to use discretionary power in the pursuit of social goals.[555] This protection is

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[549] *Ibid.*
[550] *Ibid* at 12.
[551] See Brian Galle, "Tax Fairness" (2008) 65:4 Wash & Lee L Rev 1323; David Elkin, "Horizontal Equity as a Principle of Tax Theory" (2006) 24:1 Yale L & Policy Rev 43; Tim Edgar & Daniel Sandler, eds, *Materials on Canadian Income Tax* (Toronto: Thomson Canada Ltd, 2005) at 66; RA Musgrave, "In Defense of an Income Concept," (1967) 81 Harv L Rev 44 at 45. See also National Tax Policy, para 1.7.6. There is a debate on whether horizontal equity has any normative value. One school of thought led by Musgrave argues that horizontal equity has a firmly grounded normative basis, while another school of thought, led by Kaplow, argues any application or measurement of horizontal equity would be meaningless or even harmful for policymakers if horizontal equity were indeed a bad normative principle: 'Horizontal equity should not be measured and new measures of social welfare should not be deployed until we know what we are trying to measure and why. See RA Musgrave, *The Theory of Public Finance* (New York: McGraw-Hill, 1959); Louis Kaplow, "Horizontal Equity: New Measures, Unclear Principles," (2000) NBER Working Papers 7649. For a deeper analysis of this debate, see Roberto Galbiati & Pietro Vertova, "Horizontal Equity", (2008) 75:298 Economica 384. For more celebratory evaluations of horizontal equity, see Ira K Lindsay, "Tax Fairness by Convention: A Defense of Horizontal Equity" (2016) 19:2 Fla Tax Rev 79; and Galle *ibid*.
[552] Edgar & Sandler *Ibid.*
[553] Edgar & Sandler *Ibid.*
[554] See, generally, Kim Brooks, "Inter-Nation Equity: The Development of an Important but Underappreciated International Tax Value", in Richard Krever & John G Head, eds, *Tax Reform in the 21st Century: A Volume in Memory of Richard Musgrave* (Alphen aan den Rijn: Kluwer Law International, 2009) 471.
[555] Dotan *supra* note 104 at 28.

pertinent because taxpayers who perceive the tax system as inequitable are likely to report less income to restore equity.[556] Administrative discretion is a coin of two sides as far as the demands of horizontal equity are concerned. On the one side, the use of discretionary power or, indeed, sticking to a given assurance may, intendedly or not, result in some taxpayers gaining undue advantage over others. Such outcomes may be unpalatable because the requirement of equal treatment for equal cases is a fundamental principle in public law.[557] According to Dotan, this concern for equality was sufficient for some commentators to denounce the use of discretionary powers by administrators as an arbitrary form of governmental action.[558] A way to deal with this concern is to administer discretion through informal flexible rules or policies.[559] The existence of a general policy is a powerful vehicle to ensure that administrators do not misuse their discretionary powers to unjustly discriminate between similar cases. The authority should however be bound to its policies in any case which falls within their scope, and unless it showed reasonable and sufficient grounds to depart.[560] This will help preserve fairness among taxpayers.

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[556] Frank Allen Cowell, "Tax Evasion and Inequity," (1992) 13:4 J Economic Psychology 521, cited in Massimo Finocchiaro Castro & Ilde Riz, "Tax Compliance under Horizontal and Vertical Equity Conditions: An Experimental Approach", (2014) 21 Intl Tax Public Finance 560 at 561.

[557] Dotan *supra* note 104 at 28.

[558] *Ibid.* Dotan refers to DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1986) at 145, discussing the works of Dicey and Hayek; and AV Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 10th ed, 1960) at 188.

[559] Dotan *supra* note 104 at 28. This may not resolve all problems, however. Although, some advocate that "the individuals treated equally by a policy should be those who are deemed normatively equals" – in practice, there remains a fundamental challenge in determining taxpayers are normatively equal and what factors are to be deemed relevant in doing so. In the context of income tax, for instance, measuring by income levels alone, may not be sufficient since there might be other variables such as expenses. See, generally, Galbiati & Vertova *supra* note 551. For some, it means that households with "equal economic positions" should bear equal tax burdens – see Harriet Stranahan & Mary O'Malley Bord, "Horizontal Equity Implications of the Lottery Tax," (1998) 51 National Tax J 1. For some, in the field of economic law… comparability between firms exists when their competitive positions in the relevant market are comparable. See Constantine Stephanou, "Good Governance and Administrative Discretion", (2010), online: http://www.unece.org/fileadmin/DAM/trade/workshop/OSCE_0304/presentations/Stephanou.doc

[560] Dotan *supra* note 104 at 28. This reflects the context in which the Nigerian Supreme Court considered the *Stitch* case. The court found that the terms for the grant of an import license were published and the appellant had met those terms. In those circumstances, the refusal of the Minister to grant the license was regarded as an abuse of power.

6.2.2 Neutrality (Economic Efficiency)

Tax neutrality essentially means that the tax system should not distort choices and behaviour, i.e. that taxpayers in similar situations and carrying out similar transactions should be subject to similar levels of taxation.[561] "According to the neutrality criterion, it should be assumed that people make choices that are in their own best interest and therefore, to the extent possible, their choices should remain after tax what they would be in a world without taxes."[562] The baseline to decide whether a taxation system is neutral is to compare it with the situation as if there is no-tax levied.[563] A non-neutral system creates incentives to reduce tax payments by changing behaviour – the behavioural response. This may be either a deliberate policy choice, such as in the case of taxing polluting industries more heavily, or incidental to the revenue collection objective.[564] Economists agree that tax policy should raise revenues without major distortions to the decisions of firms.[565] They also typically conclude that other funding means (for example printing money or borrowing) would be more distortive than taxation and therefore the efficiency goal that taxation is meant to meet is one of minimum disruption rather than absolute non-distortion. Accordingly, pursuing economic efficiency with taxation usually means trying to predict or measure the relative economic impact of various types of taxes, and favouring those which are believed to produce the least distortion, as economists define it.[566] It is arguable that the behavioural patterns of taxpayers stand to be altered by the uncertainty that derives from a policy of non-adherence to discretion. Such unpredictability can push or discourage taxpayers – especially businesses – to make or refrain from

[561] UK Parliament *supra* note 529.
[562] See Brooks *supra* note 554 at 266.
[563] Shu-Chien Jennifer Chen, "Neutrality as Tax Justice: The Case of Common Consolidated Corporate Tax Base under the EU law" (2018) 5 European Studies 33 at 36.
[564] UK Parliament *supra* note 529.
[565] Eric M Zolt, "Tax Incentives and Tax Base Protection Issues" (2013) United Nations Draft Paper 3, online: https://www.un.org/esa/ffd/wp-content/uploads/2014/10/20140604_Paper3_Zolt.pdf; Bird & Wilkie *supra* note 46.
[566] Christians, *supra* note 30 at 17.

making important decisions, which may have economic implications. These concerns will be buttressed further under the heading of "certainty."

6.2.3 Simplicity, Certainty and Clarity

The NTP outlines the triplet of simplicity, certainty and clarity as part of the guiding principles of the Nigerian Tax System.[567] The Policy mandates that tax laws and administrative processes should be simple, clear and easy to understand.[568] Legislative clarity is important as it enables companies to comply more easily, as tax liabilities are better understood, which should reduce costly and time-consuming disagreements with the tax authorities. Tax compliance should not require an excessive amount of company resource, which would divert energy from more productive and profitable business activities.[569] Simplifying the tax system will thus lead to a reduction in taxpayers' costs of complying with their tax obligations.[570]

The lack of clarity in tax legislation leaves holes that sometimes only administrative guidance for taxpayers can fill. This is at the heart of the tax guidance functions performed by the FIRS. In other words, providing tax guidance is a part of the revenue's policy responsibility, especially as the NTP mandates the FIRS to undertake tax awareness and taxpayers' education.[571]

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[567] Paragraph 3.4 of the 2012 Policy was more elaborate and in that it explicitly recognized that part of the burden that falls on taxpayers is the administrative cost necessary to comply with tax laws, especially as complicated tax laws increase the cost of compliance. The 2012 Policy went further to mandate, *inter alia,* that all tax/revenue authorities in Nigeria should adopt widespread taxpayer education strategies to understand tax compliance procedure required to meet their tax obligations. See para 1.8.2 of the National Tax Policy 2012. This provision helps to explain why tax authorities in Nigeria provide guidance to the public on the operation of the tax system, and that even though the 2017 Policy is not so elaborate that responsibility remains. This can be traced to para 3.3v of the 2017 Policy which mandates any agencies responsible for the collection and administration of revenue to "undertake tax awareness and taxpayers' education."

[568] Para 2.1 of the NTP.

[569] UK Parliament *supra* note 529.

[570] Silvani & Baer *supra* note 151 at 11.

[571] It is, thus, arguable that resiling from guidance already provided to a taxpayer may in some cases amount to a dereliction of the revenue's responsibility under the NTP.

Uncertain tax consequences deter some taxpayers from carrying out contemplated transactions, while others who do carry out the transactions risk potential loss.[572] Binding tax guidance will, thus, ensure certainty and consistency, and encourage investors to invest in such a country since investors are concerned with the certainty of the tax consequences of their proposed transactions and trades.[573] Where the tax authority can withdraw or modify rulings or dishonor them to the detriment of the taxpayer, the air of certainty disappears (with its rewards) barring judicial intervention.[574]

Tax certainty has been defined as the creation and maintenance of stable and regulatory policy frameworks for tax administration, taxpayers and tax compliance.[575] Certainty is one of the hallmarks of a good tax system as it helps to stabilize the expectations of both taxpayers and governments.[576] Indeed, the property and business interests involved in taxation lead some to suggest that certainty in tax law is of the utmost importance – perhaps even more so than in other areas of law.[577] Research shows the many causes of tax uncertainty to include unpredictable or inconsistent treatment by a tax authority, retroactive changes to legislation, frequent changes in the statutory tax system, complexity in the tax code, poor understanding of the tax code by the tax authority, unpredictable or inconsistent treatment by the courts, inability to achieve clarity proactively through rulings, poor general relationship with tax authority and corruption.[578] Uncertainty is also traceable to biased and inconsistent adjudication of tax cases by the court in

[572] Yehonatan Givati "Resolving Legal Uncertainty: The Unfulfilled Promise of Advance Tax Rulings" (2009) 29:1 Va Tax Rev 137 at 139.
[573] Malukele *supra* at 25.
[574] *Ibid.*
[575] Nara Monkam et al, "Tax Certainty" (2017) online: www.G20-insights.org
[576] *Ibid.*
[577] Freeman & Vella *supra* note 66 at 79.
[578] See Devereux *supra* note 32. See also Zangari, Caiumi & Hemmelgarn, *supra* note 32.

favour of the revenue[579] and in some cases by deliberate legislative intendment.[580] Uncertainty arising from unpredictable or inconsistent treatment by tax authority notoriously ranks as the second most important factor in determining uncertainty when encountered.[581]

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[579] See Mats Tjernberg, "Legal Certainty in Taxation at Authorities and Courts of Law: a Nordic View of Specialization and Unbiasedness" (2016) 1 Nordic Tax J. 17.

[580] This may be referred to as "uncertainty by design" or "structured uncertainty". Not all tax uncertainty is necessarily adverse, especially on the side of the state. Sometimes the legislature designs tax law to be uncertain either simply to allow for wider administrative discretion or to combat tax avoidance. This flows from the notion that when tax laws are certain they may open unintended opportunities for unwarranted tax planning and tax avoidance. See generally GT Pagone, "Tax Uncertainty", (2009) 33:3 Melbourne UL Rev 886. Moreover, it is arguable that rewards and penalties linked to unpredictable outcomes are an important part of ordinary economic behaviour in ordinary life. Accordingly, in some cases, keeping taxes uncertain may diminish the sense of control that a taxpayer may have in terms of contriving a tax avoidance scheme. See, generally, Philip D Straffin, "The Prisoner's Dilemma" in E Rasmusen, ed, *Readings in Games and Information* (New Jersey: Wiley-Blackwell, 2001) 5; John von Neumann and Oskar Morgenstern, *Theory of Games and Economic Behaviour*, 60th Anniversary ed (New Jersey: Princeton University Press, 2004) both cited in Pagone *ibid* at 899.
To buttress these salient points, a study by Dyreng, Hanlon & Maydew reveals that:

> First, tax avoiders appear to bear significantly more tax uncertainty, on average, than non-avoiders. For example, univariate comparisons show that the mean addition to the UTB [uncertain tax benefits] for a tax avoider over a typical five-year period is over 50 percent larger than the mean addition to the UTB for a tax non-avoider. The difference between the groups is statistically and economically significant. To put these differences into perspective, the mean tax avoider paid about $650 million of cash taxes, while the mean tax non-avoider paid $1,261 million of cash taxes over a typical five-year period.
> However, the mean tax avoider also faced more tax uncertainty, increasing its UTB account by $139 million, compared to an increase of only $68 million for the mean non-avoider over the five-year period…
> Second, firms with frequent patent filings face significantly higher tax uncertainty than do other firms, and the relation between tax avoidance and tax uncertainty is stronger among firms with frequent patent filings. These results are consistent with intangibles exposing firms to increased tax uncertainty, particularly among firms we classify as tax avoiders. Third, we find that tax haven usage and intangible intensity appear to have a joint effect on the relation between tax avoidance and tax uncertainty. This suggests that while intangible-related tax avoidance involving transfer pricing provides tax savings, it also forces firms to bear tax uncertainty. Fourth, we find limited evidence that tax avoidance using tax shelters leads to more tax uncertainty than does tax avoidance outside of tax shelters. The tax shelter results should be interpreted cautiously, however, because of the difficulty of distinguishing between likely tax shelter users and likely non-users in samples of large firms.
> Finally, we conduct a path analysis that confirms the presence of both direct and indirect effects of tax avoidance, patents, and havens on tax uncertainty. The results of this study also have implications for two puzzling empirical regularities. First, there is mounting evidence that multinational firms incur effective tax rates at least as large as domestic firms (Dyreng, Hanlon, Maydew, and Thornock 2017). This is a somewhat puzzling empirical regularity given that multinational firms have access to (arguably vast) opportunities for tax avoidance (i.e., shifting income to low-tax countries) that are simply not available to purely domestic firms. Our findings, however, show that income shifting involving tax havens and intangibles comes at a price, in the form of increased tax uncertainty.

See Scott D Dyreng, Michelle Hanlon & Edward L Maydew, "When Does Tax Avoidance Result in Tax Uncertainty?" (2019) 94:2 The Accounting Rev 179 at 180. This is an insightful contribution to the literature. It is difficult, however, to state emphatically how this perspective fares alongside the seemingly predominant pro-certainty views. A tie breaker may be that the focus of this perspective rests only on the objective of tax avoidance, which may be deemed narrow when compared to the pro-certainty school that focuses on broader micro and macroeconomic considerations.

Empirical evidence of the effects of tax uncertainty at the firm level is still limited due to the difficulties in measuring tax uncertainty.[582] However, the existing studies consistently support the view that tax uncertainty has a negative impact on investment.[583] Devereux's empirical research reveals that uncertainty about the effective tax rate on profit ranks as one of the top four considerations for investment and location decisions.[584] A poorly designed tax system, where the rules and their application are non-transparent, overly complex or unpredictable, may discourage investment adding to project costs and uncertainty.[585] Companies make long term investment decisions over substantial time periods and need to do so in a tax system that is stable, in order to receive the expected return on investment (which may then encourage further investment).[586] Prior to taking an investment decision, investors must forecast the prospective tax burden associated with the investment as it can be a significant cost factor.[587] Thus, to integrate taxes accurately into the decision calculus, the taxpayer has to estimate the prospective tax burdens of available investment options in advance.[588] Stability in the tax system gives companies certainty about their

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Also, it is worth iterating that the preponderance of work in this area seems to lean towards certainty in the tax system rather than the opposite. While a trend may not speak conclusively to what is best, it does suggest that certainty is a greater goal to pursue than uncertainty, especially since the aim of the tax system is not only to collect tax. In terms of peculiar needs, can a capital importing country (like Nigeria) afford to prioritize uncertainty over certainty?

[581] Devereux *supra* note 32 at 8.

[582] Zangari, Caiumi & Hemmelgarn, *supra* note 32 at 5.

[583] See, for instance, See Givati *supra* note 572; Devereux *supra* note 32.

[584] Devereux *ibid* at 8. See also the IMF-OECD's concurring report *supra* note 32.

[585] OECD *supra* note 531. Diller & Vollerty observe that in order to reduce uncertainties due to complexity and interpretation, several countries allow for the possibility of an advance tax ruling. This enables investors to gain certainty on the tax consequences of a planned investment. In other words, an investor can then enjoy legal certainty when factoring the tax consequences of a possible investment into his calculus. See Markus Diller & Pia Vollerty, "Economic Analysis of Advance Tax Rulings" (2011) Arbeitskreis Quantitative Steuerlehre Diskussionsbeitrag Nr. 122 at 2.

[586] See Anna Reva, "Toward a More Business Friendly Tax Regime Key Challenges in South Asia", (2015) World Bank Group Policy Research Working Paper No. 7513 at 26.

[587] Diller & Vollerty, *supra* note 585.

[588] *Ibid.*

ongoing tax liabilities and when they fall due. A more predictable tax policy and administration will increase investment attractiveness.[589]

Tax uncertainty is a nuisance in Nigeria. This is because Nigerian tax laws are fraught with intricate provisions, complexities and ambiguities that impede tax compliance to a great extent,[590] as well as poor policies of successive governments and inconsistent legal framework.[591] It is therefore the common experience of taxpayers often willing to discharge their responsibilities that they are stuck with uncertainties on what the law actually requires of them.[592] It is partly for these reasons that sound and consistent use of discretion is important to businesses/taxpayers. A policy of abrupt resilement from tax policies and guidance, sometimes with retroactive effect, does nothing to aid Nigeria's quest for an improved tax system and investment attraction, especially in the light of other socio-political and infrastructural challenges facing the country.[593]

The uncertainty arising from the inconsistent use of discretion in tax administration is a disincentive to investors. Nigeria has for years used tax incentives to attract investors while generally ignoring the impact of tax disincentives on how investors think.[594] Ironically, the more heralded tax incentives are only likely to hurt Nigeria by either negatively influencing taxpayer

[589] See Reva, *supra* note 600 at 26.
[590] See Okoro *supra* note 126 at 1. See also Edori Daniel Simeon, Edori Iniviei Simeon & Idatoru Alapuberesika Roberts, "Issues and Challenges Inherent in the Nigerian Tax System (2017) 2:4 American Journal of Management Science and Engineering 52 at 54; PricewaterhouseCoopers "Nigeria @ 50: Top 50 Tax Issues." (October 2010) online: http://www.orandcconsultants.com/downloads/nigeria-top-50-tax-issues.pdf; Taiwo Oyedele "How Nigeria's Tax System Discourages Investments" (23 February 2015) online: https://guardian.ng/features/tax-discourse/how-nigeria-s-tax-system-discourages-investments/amp/.
[591] Sunday O Effiok & Peter A Oti "Re-Invigorating the Nigeria Tax System as a Redemption from the Vagaries of the World Oil Market" (2017) 5:1 Intl J Advanced Studies in Economics and Public Sector Management 131.
[592] Okoro *supra* note 126 at 1.
[593] Paragraph 3.0 of the 2012 NTP provided that with the current challenges in the country's investment environment regarding her infrastructure, government should ensure that the tax system is favourable enough to attract investment. This is a sort of omnibus provision to guide the government's tax policy. This provision thus explicitly recognized Nigeria's peculiar infrastructural challenges which ordinarily make the country a less attractive investment destination compared to countries with better infrastructure.
[594] See, Oyedele, "How Nigeria's tax system discourages investments," *supra* note 604.

behaviour or transferring much-needed tax revenue from Nigeria to high income resident countries.[595] Rather than focus on granting tax incentives to taxpayers, tax policy should focus on eradicating disincentives such as inconsistent use of discretion.[596] Through this rebalancing, fears of lost foreign investment due to the non-conferment of tax incentives may be offset by the strategic elimination of tax disincentives.

6.2.4 Administrability

Administrability suggests that societies should be able to enforce the tax systems they create.[597] The principle also suggests that societies should impose tax obligations that taxpayers can comply with.[598] This policy objective sometimes proves evasive because there is so often a disconnect between what lawmakers say they want the law to do and what it actually does.[599] Moreover, regardless of how well tax laws are drafted, the role of institutional players bears significantly on how they are implemented in reality. In the view of some, "tax administration *is* tax policy".[600] Ultimately, tax administrators would want to ensure that the primary objective of taxation – revenue generation – is met as smoothly as possible. Theoretically, there are at least two ways that adherence to promises and representations can facilitate administrability. First, adherence can engender trust and public confidence in the tax system, which in turns facilitates self-assessment. Second, adherence can minimize the risks of dispute between the revenue and taxpayers, which in turn saves valuable time and resources that the revenue can use to pursue tax defaulters.

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[595] See Easson & Zolt *supra* note 565; Bird & Wilkie *supra* note 45; Kim Brooks, "Tax Sparing: A Needed Incentive for Foreign Investment in Low Income Countries or an Unnecessary Revenue Sacrifice" (2009) 34:2 Queen's LJ 505.
[596] It is arguable that while infrastructurally more secure countries like the UK and Canada, for instance, can afford to be more whimsical in their tax administration, a country like Nigeria which faces deep infrastructural challenges has far less room to play in this way.
[597] Christians *supra* note 30 at 23.
[598] See Ruth Mason, "Citizenship Taxation" (2016) 89:2 S Cal L Rev 169.
[599] *Ibid.*
[600] Milka Casanegra de Jantscher, "Administering a VAT", in M Gillis, CS Shoup & GP Sicat, eds., *Value Added Taxation in Developing Countries* (World Bank, 1990) 179, cited in Christians *supra* note 30 at 23.

6.2.4.1 Public Confidence and Voluntary Compliance

Public confidence in the administration and enforcement of taxes is a cornerstone of self-assessing tax systems.[601] Although the primary responsibility of a tax administration is to collect the proper amount of tax due to the government, it is essential that a tax administration carries out its responsibilities in a manner that warrants the highest degree of public confidence in the organization's efficiency, integrity and fairness.[602] The revenue must understand its role as that of a service provider and must be ready to treat the taxpayer as a customer.[603] Another way to approach the tax policy matter is to look at the role of tax administrators in a tax system. Commenting on the defunct 2012 National Tax Policy, Nigeria's Tax Appeal Tribunal in *Shell Nig. Ltd & 3 Ors. v FIRS* articulated the role of tax authorities in this regard as follows:

> In articulating the roles of tax authorities, paragraph 2.9 of the NTP states that the authorities should create a conducive tax atmosphere and environment which will engender taxpayer confidence at all levels of tax administration. [604]

The most cost-effective means of collecting taxes is through voluntary compliance of the public with the tax laws. The more enforcement activities are necessary, the more expensive the administration of the tax system.[605] Voluntary compliance goes hand in hand with a system of self-assessment.[606] Good taxpayer services and well-designed and well-targeted publicity campaigns are crucial elements in encouraging taxpayers to comply with the tax legislation.[607] Given clear information, proper education, simple procedures and sufficient encouragement, there is a greater

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[601] Saul Templeton, "A Defence of the Principled Approach to Tax Settlements" (2015) 38 Dal LJ 29 at 30.
[602] See Matthijs Alink & Victor van Kommer, *Handbook on Tax Administration*, 2nd ed. (Amsterdam: IBFD, 2016), online: https://www.ibfd.org/sites/ibfd.org/files/content/pdf/15_090_Handbook_on_Tax_Administration_%28Second%20Revised%20Edition%29_final_web_0.pdf at 167.
[603] Paragraph 3.3(i) of the NTP expressly admonishes tax administration and collection agencies to treat the taxpayer as a customer.
[604] 24 TLRN 51 at 60.
[605] Alink & Kommer *supra* note 602.
[606] Silvani & Baer *supra* note 151.
[607] *Ibid* at 27.

possibility that taxpayers will calculate and pay their tax liabilities on their own. In this way tax administration can concentrate its resources on identifying and dealing effectively with those taxpayers who fail to comply properly with their tax obligations. Extensive reliance on a self-assessment system combined with targeted enforcement would allow the tax administration to effectively administer the tax system. Among the key elements which must be in place for a self-assessment system to operate are: (1) good taxpayer services programs to facilitate understanding of their obligations and entitlements; (2) simple procedures; (3) a strong but fair penalty system; and (4) effective verification and enforcement programs. The two broad principles, voluntary compliance and self-assessment, are the foundation of modern tax administration.[608] Among the core functions performed by tax administration is the provision of information, forms, publications, and tax education to taxpayers to help them comply with their tax obligations, to demonstrate that they are considered valued customers of the tax administration, and to reduce the need for extensive enforcement, given limited resources.[609] This can be done through various means of taxpayer assistance. It is, however, essential for the tax administration to establish procedures and processes for providing guidance to taxpayers.[610] Having obtained guidance, taxpayers need to be able to apply it to their affairs without worrying that the FIRS might come after them in future and seek to apply a different interpretation to the periods they had relied on the guidance or advance ruling. An FIRS that cannot be trusted will lose its credibility. That will be a sad day for the country.[611]

[608] *Ibid* at 12.
[609] Jacobs *supra* note 524 at 7.
[610] Alink & van Kommer, *supra* note 602 at 167.
[611] Onyenkpa & Ayoola *supra* note 5.

Critical to the concept of voluntary compliance is the belief on the part of the tax-paying public that the Tax Administration respects the rights of taxpayers and operates on the principles of integrity and honesty.[612] Too much emphasis on raising revenue and not enough on customer service and taxpayers' rights can lead to a lack of confidence on the part of the public in a tax administration's ability to manage its responsibilities properly. Lack of confidence in the tax administration can also lead to reduced levels of voluntary compliance with it.[613] When a taxpayer acts on a representation made by the tax authority, there is an inferable presumption on the part of the taxpayer that the tax authority has both the competence and the knowhow to make that representation. Thus, where the tax authority turns around to reverse the representation on the basis that it does not disclose the correct position, the confidence is broken. This may breed an atmosphere of distrust in the tax system, which may affect compliance especially in a self-assessment system.[614] Thus, as a matter of policy, refusal to honour promises should be the exception, not the general to disposition, and the need for judicial review should only arise as a last resort.

6.2.4.2 Conflict Management

There is a consensus that revenue guidance delivered through the ruling system can reduce potential disputes between the taxpayer and tax authorities and the necessity of recourse to the courts.[615] A well-managed guidance system should help promote administrative efficiency by reducing conflict between taxpayers and tax authorities. Since taxpayers know what the law is –

[612] Alink & van Kommer, *supra* note 602 at 167
[613] *Ibid* at 168.
[614] Public confidence can only be further dampened where taxpayers are told by the court that there is no way to hold the tax authority to account; that the expectation of the taxpayer was only a mirage; that the judiciary is not the last hope after all.
[615] Malukele *supra* note 97 at 39.

or, at least, what the tax authority deems the law to be – in respect of the taxpayers' activities, there is, presumably, a lower chance of conflict.[616] This then limits the need for the tax authority to dissipate resources battling taxpayers on the applicability of tax statutes. Not observing those positions, invariably, takes both taxpayer and the tax authority back to the root of conflict, which just affects the capacity of the tax authority to deal with the actual collection of taxes.[617]

Finally, an official, well-tailored policy of adhering to discretionary positions serves the interests of Nigeria and complies with the NTP. Of course, this is not to imply that the NTP should take preeminence over tax statutes. It is, nevertheless, important for a state to apply its tax laws in line with defined policy, since policy gives life to the law. As charged by some, the NTP should not become a redundant policy document or reference tool only for academics. The NTP should be the "bible" that guides the thinking, formulation and execution of strategies relevant to taking tax administration at all levels (assessment, collection etc.) and the tax system at large to optimum heights.[618]

It is evident from these discussions that judicial enforcement and administrative observance of legitimate expectations have important roles to play in the tax system. While judicial enforcement should be a last resort for the taxpayer, administrative compliance enables the revenue to smoothly administer the tax system. The latter reduces incidents of conflict and strengthens the confidence of the taxpaying public in the tax system. Observance of legitimate expectations aligns not only

[616] The reduced risks of conflict contemplated here regards the meaning of statute but not necessarily with regard to whether or how the interpretation given by the tax authority should apply to a given transaction or situation.
[617] There is a symbiotic nexus between tax certainty and dispute management in tax administration. For instance, an IMF/OECD report posits that a shifting focus from dispute resolution to dispute prevention: ensuring that disagreements between tax administrations can be resolved quickly to avoid double taxation will always be a core element of tax certainty. This again highlights the interconnect between the policy dimensions discussed in this section of the paper. See IMF/OECD report *supra* note 32.
[618] See "Nigeria's National Tax Policy: Any agenda for the new FIRS' Chair?" *Deloitte*, (2015), online: https://www2.deloitte.com/content/dam/Deloitte/ng/Documents/tax/inside-tax/ng-nigerias-national-tax-policy-any-agenda-for-the-new-firs-chair.pdf

with traditional principles of tax policy but, in the case of Nigeria, with the specified tax policy objectives of the state.

Chapter 7: Conclusion

In the preceding six chapters of this thesis, I have discussed the subject of legitimate expectation in tax administration and the legal and policy approaches to addressing this complex subject. This final chapter has one principal objective; to discuss some possible policy directions that Nigeria may adopt to try to address the subsisting issues around tax-based legitimate expectation. Before the principal discussion, however, I summarize the thesis thus far, in order to provide a synoptic reference to the issues already discussed.

7.1 Summary

Tax complexity is at the heart of the issues discussed in this thesis. Considering the usual complexity of tax statutes and the administration of the tax system, generally, administrative guidance, provided by the revenue, is a useful tool for enhancing the objectives of clarity, simplicity and certainty, as well as the attainment of incidental micro and macroeconomic results. Administrative guidance and other forms of discretion exercised by tax authorities generally elicit expectations and trust from taxpayers that the tax authority would apply the law in the manner represented. If the tax authority subsequently decides to apply the law differently, to the apparent detriment of the taxpayer, it behoves on the court to determine whether the revenue should be made to stand by the promises or representations made in the circumstances; in other words, whether to uphold the *legitimate* expectation of the taxpayer. The question of whether the court should intervene – as well as the basis for doing so – is a complex one that has elicited attention from legal scholars, courts and practitioners for years across various jurisdictions, including Nigeria. On the one hand, there are concerns that a pro-legitimate expectation disposition may, *inter alia,* fetter administrative discretion, over-leverage judicial power over other branches of government, circumvent legislative intent and truncate the public interest of tax collection. On the

other hand, upholding expectations may promote fairness and certainty in the tax system. If extreme conclusions are to be drawn from the few existing tax decisions, the approach of the Nigerian courts, so far, is dismissive of legitimate expectation. That is to say, such expectations cannot be upheld at all, as the courts prefer to dwell on the supremacy of statute perspective. This thesis observes that, given deeper reflection, the Nigerian courts have not done much in terms of developing the general jurisprudence. Rather, it has been a case of picking flaws in the case presented by the taxpayer and deciding, based on those flaws, that a legitimate expectation has not been established. I argue that there are sound legal bases both under Nigerian and foreign – predominantly UK – jurisprudence for the Nigerian court to take a more receptive approach to tax-based legitimate expectation; that the court must in every case look beyond the shortcut of adjudging a case on the basis of statutory limitation; that statutory limitation is not always absolute, even in tax matters. I rely firmly on Nigerian judicial precedent where the courts have held public authorities, including tax authorities to representations or commitments made to private actors. Acknowledging the need for a 'principled' and 'coherent' (rather than whimsical) application of legitimate expectation, I argue that the Nigerian courts should consider the approach adopted by the UK courts in streamlining the application of the doctrine, especially in revenue cases. I make this argument bearing on a painstaking analysis of the UK approach in this thesis and bearing in mind the jurisprudential 'consanguinity' between Nigeria and the UK.

I contend that the revenue has an equally significant role to play in upholding taxpayers' legitimate expectations. The revenue has a management responsibility to the tax system to respect the legitimate expectations that it creates in the minds of taxpayers; there are important policy considerations for the tax system. If the revenue is more forthcoming on its obligations, there will

almost certainly be lesser chances of disagreement or conflict, which will ease the administrative burden.

7.2 Further Recommendations

7.2.1 Clear Modalities for the Withdrawal or Modification of Discretionary Benefits

It is pertinent that the FIRS as much as possible avoids repudiations of promises or policies that may have retroactive effect. If repudiations are to take place at all, I consider it best that they do so through a process that is transparent, predictable and fair. Policy changes should as much as possible give policy consumers opportunities to adjust. I also advocate for specific provisions, preferably by statute,[619] to specify the circumstances where the FIRS can withdraw or modify guidance or assurance given to a taxpayer. South African law, for instance, specifically provides that the Commissioner may withdraw or modify a binding private ruling that has been issued to the applicant. Before doing so, however, the Commissioner must first notify the applicant of the proposed withdrawal or modification and provide the applicant with a reasonable opportunity to state any proposition of law or fact relevant to the decision to withdraw or modify the ruling.[620] Whether the provisions under South African Law are broad enough to offer sufficient protection is another matter.[621] They do, however, indicate, *prima facie,* that tax rulings are binding and can only be withdrawn under certain procedural safeguards.

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[619] This approach maintains parliamentary preeminence to determine this aspect of tax administration.

[620] See section 76M of the Income Tax Act 58 of 1962. Section 76N provides for the withdrawal or modification to be retrospective. There are very limited circumstances where it is permissible for the Commissioner to withdraw a binding ruling. Some of these are where: the applicant has not yet commenced the proposed transaction; there is someone other than the applicant who will suffer a significant tax disadvantage if the ruling is not withdrawn or modified retrospectively, while the applicant will suffer comparatively less if it is; or the effect of the specific ruling will materially erode the South African tax base and it is in the public interest to withdraw or modify that specific ruling retrospectively. See section 76N(3) of the Income Tax Act 1962. See M J Malukele *supra* note 291 at 22–23.

[621] Malukele rightly points out that in certain instances, procedural protection may not be sufficient for some taxpayers to whom the notice to withdraw will not address the looming loss or financial hardship due to the withdrawal of the ruling. See Malukele *Ibid.*

7.2.2 A Policy-based Application of Discretion

The benefits of discretion find a counterweight in strong demands from taxpayers for certainty, legitimacy, consistency and equality.[622] Thus, if tax authorities do not exercise discretion in a coordinated and consistent manner the benefits of discretion may be lost especially as excessive administrative discretion can result in unintended consequences such as abuse of power and official corruption.[623] Tax systems that leave excessive administrative discretion in the hands of tax officials tend to invite corruption and undermine good governance objectives fundamental to securing an attractive investment environment.[624] These are potential side effects of a poorly regulated system of discretion, which must be considered with full sensitivity especially where revenue matters are concerned. It would be inappropriate for revenue discretion to be used to corruptly to circumvent the statutory mandate of the tax authority. As a way of addressing these concerns, I advocate a system of discretion that based on clearly laid out policy and is less susceptible to individual manipulation. In other words, a rules or policy-based system of discretion.[625] Policies being the rules which are developed by authorities in areas where discretionary powers are exercised,[626] the creation and application of general policies add important benefits to the decision-making process in a discretionary framework (in comparison to an ad-hoc decision-making process). These benefits serve as a reason to encourage authorities to develop general policies, and at the same time are the rationales for the requirement that authorities

[622] Freeman & Vella *supra* note 66 at 79.
[623] See OECD *supra* note 531; Adedokun opines that the issue of exercise of discretionary powers is not a simple matter of tax law particularly in Nigeria where public service is highly politicized and politics and governance are not considered as independent variables. See Adedokun *supra* note 50 at 2.
[624] OECD *ibid*.
[625] See, for instance, Davis, "Confining and Structuring Discretion-Discretionary Justice, *supra* note 147; Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Illinois: University of Illinois Press, 1971); Mark Elliott & Jason NE Varuhas, *Administrative Law: Text and Materials* (Oxford, UK: Oxford University Press, 5th ed, 2016); McHarg *supra* note 333; Dotan *supra* note 104 at 27.
[626] Dotan *ibid.*

will follow their policies while disposing of particular cases.[627] Soft laws (and legitimate expectation) provide a framework for ensuring greater consistency and coherence in the exercise of discretion – and where it can be justified, also ensure transparency if and when administrative decision makers depart from guidelines and other policy instruments.[628] In that sense, a soft law or policy-based system of discretion serves the end of 'quality control' in the use of discretion. Instead of individual tax officers only dealing with cases on an ad-hoc basis, there should be greater emphasis on synthesized revenue-wide policies that deal with like cases. Advance rulings should be issued by authorized and task-specific departments, while guidance resources such as circulars should be developed by specialists, where possible in consultation with relevant stakeholders.[629] This can lessen the risks of induced compromises, enhance quality control and limit the chances of inequality between taxpayers with similar cases. The publication of advance tax rulings, in particular, is a fundamental aspect of a sound administrative practice, and consistent with basic, democratic, legal principles.[630] Thus, publishing redacted versions of private rulings is encouraged. This should, of course, be undertaken through a system that balances between equality and transparency on the one hand, and confidentiality of taxpayer information, on the other.[631]

7.2.3 Systematic and Strategic Reform of Tax Law

Until more recently, tax law reform was a considerably slow process in Nigeria. Consequently, obsolete, moribund and vague statutory provisions remained operable for long periods of time, leaving problems of uncertainty and complexity for both the revenue and taxpayers to deal with. For instance, certain provisions that impose penalties in these tax laws, aimed at discouraging non-

[627] *Ibid.*
[628] Ansari & Sossin *supra* note 10 at 316.
[629] Stakeholders may include other government agencies and private tax consultants, scholars and experts.
[630] Romano *supra* note 15 at 478.
[631] *Ibid.*

compliance, do not reflect current economic realities.[632] It follows logically that a proactive way to avert some of these issues and, thus, limit the need for revenue discretion – with its attendant problems – is to regularly update the country's tax statutes. Thankfully, the Nigerian government seems to be awaking to this responsibility – most likely out of a pressing need to address the country's troubling tax-to-GDP problem.[633] The country recently enacted the Finance Act 2019.[634] This legislation has introduced sweeping changes to the Nigerian tax system, including the amendment and deletion of some obsolete or clogging provisions in various tax statutes.[635] I subscribe to the more proactive approach, the only caveat being that reform should take into account potential disruptions to the existing tax order.[636] I would add, however, that regardless of the amount of reform, it simply is not possible to eliminate substantive tax law uncertainty for every conceivable business transaction. No matter how long and detailed the tax laws become, there will always be gaps; there will always be transactions or activities whose proper tax treatment is uncertain,[637] thus necessitating administrative discretion.

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[632] Deloitte (2015) *supra* note 632.

[633] Nigeria's tax-to-GDP ratio has hovered around 6% for years – one of the poorest in the world – as successive governments focused their energy on oil revenue and failed to harness the tax prospects of the country. According to the OECD the average across the 2010-2019 decade was 5.7%, well below the African continental average of 17.2. See OECD, "Revenue Statistics in Africa 2019 ─ Nigeria," online: http://www.oecd.org/tax/tax-policy/revenue-statistics-africa-nigeria.pdf.
This is down to a number of factors, including Nigeria's low VAT rate of 5% which is also way below the African average and has now been increased to 7.5 percent by the Finance Act 2020. For more on Nigeria's troubling tax-to-GDP profile see: Reality Check Team, "Nigeria: Why is it struggling to meet its tax targets?" BBC, 8 September 2019, online: https://www.bbc.com/news/world-africa-49566927; Temitope Kolade & Patience Ajogbor, "Nigeria's Unchanging Tax To GDP Ratio: An Instructive Appraisal" Andersen Tax, 25 September 2019, online: https://drive.google.com/file/d/1cN4i8iFG60M8QA1cWknP2b-RTBUII-cj/view.

[634] The Bill for this enactment was proposed to the National Assembly together with the 2020 Appropriation Bill and was passed since 2019. See "Senate Passes Finance Bill, 2019" *Policy and Legal Analysis Center, Nigeria* (21 November 2019), online: https://placng.org/wp/2019/11/senate-passes-finance-bill-2019/.

[635] See, for instance, "President Muhammadu Buhari has signed the 2019 Finance Bill into Law," *PWC*, (13 January 2020), online: https://pwcnigeria.typepad.com/tax_matters_nigeria/2020/01/president-muhammadu-buhari-has-signed-the-2019-finance-bill-into-law.html; Chinedu Ezomike & Michael Ango, "Finance Bill, 2019 to Introduce Significant Changes to the Provisions of the Tax Laws", *Andersen Tax*, (12 November 2019), online: https://drive.google.com/file/d/1KtTtXekoZeOt8hO6gzoRb_Uqca8yQQbP/view.

[636] It is important to iterate that "tinkering yearly with the tax code – often to change tax expenditures – clearly generates tax uncertainty." See Zangari, Caiumi & Hemmelgarn, *supra* note 32 at 2.

[637] Logue *supra* note 255 at 343

7.3 Conclusion

It is often said that the only things certain in life are death and taxes. To an extent that seems to be true, although one might be "humble" to acknowledge that factors like legal complexity, globalization, digitalization of business, etc. make tax far less certain than Daniel Defoe may have contemplated centuries ago. If truly taxes were as certain as death, everyone would know theirs; everyone would, maybe, pay theirs. In Nigeria, like in most countries, taxation is a matter of legislation. Legislation prescribes the tax obligation on income and transactions and stipulates the mode of their collection. Ideally, tax laws should be clear and easy to apply for both the tax authority and the taxpayer. Regrettably, this is barely the case. This is the muddled field where both administrative discretion and legitimate expectation play. The end game of honouring or enforcing tax-based legitimate expectations should be the entrenchment of a tax system that is built on both fairness and trust, across board. Applying these principles is a tough reality, as I have tried to demonstrate. These are realities that taxpayers, judges and tax administrators must grapple with. To say that legitimate expectation does not apply to Nigerian taxation is to lie, but finding a fitting case is where the challenge truly lies.

From a non-adjudicatory standpoint, I subscribe to the view that Nigeria needs to do more to shore up tax leakages and increase tax collection. This must be done through a more robust and aggressive tax system. Recent tax reforms suggest that the Nigerian government is serious about these responsibilities. Nigeria must aim to derive the maximum benefit possible from the tax base through sound legislation and administration, but not through broken promises.

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