

TAX APPEAL TRIBUNAL RULES ON SECURITY DEPOSIT REQUIREMENT FOR PROSECUTION OF TAX APPEALS

BACKGROUND



Taxpayers in Nigeria have had to grapple with conflicting interpretations of applicable statutory provisions, on the correct position of the law regarding the requirement to pay a security deposit for prosecution of tax appeals to the Tax Appeal Tribunal (“TAT” or the “Tribunal”). It was unclear whether the requirement was a mandatory condition-precedent to the competence of tax appeals to the TAT or if it was a discretionary requirement in statutorily defined circumstances to be proved to the satisfaction of the Tribunal. Earlier decisions of the TAT did not provide clarity on the point. This quandary occasioned recurrent tax controversies between taxpayers and relevant tax authorities, especially the Federal

Inland Revenue Service (“FIRS”). Thankfully, recent decisions of the TAT seem to have cleared the ambiguity around the point.

In the celebrated cases of **Investment Holdings Limited v FIRS**¹ (“IHS v FIRS”) and **Emenite Limited v FIRS**² (“Emenite v FIRS”), the Tribunal provided clarity on the proper interpretation of the applicable provisions of paragraph 15(7) of the Fifth Schedule to the FIRS (Establishment) Act 2007 (as amended) (the “FIRS Act”) and Order III Rule 6(a) of the TAT (Procedure) Rules 2021 (the “TAT Rules”). The TAT held, in those pivotal cases, that the security deposit requirement for prosecution of tax appeals to the Tribunal is not mandatory under the FIRS Act and that the provisions of Order III Rule 6(a) of the TAT Rules are not enforceable against taxpayers.

This development has provided relief to taxpayers who had hitherto groaned under the TAT’s earlier interpretation of the security deposit requirement as

¹(2022) 66 TLRN 52

² Unreported judgment of the TAT delivered on May 13, 2022, in Appeal No. TAT/SEZ/012/2021.

being mandatory and a condition precedent to the competence of tax appeals to the Tribunal.

SYNOPSIS OF APPLICABLE CASE LAW

Paragraph 15(7) of the Fifth Schedule to the FIRS Act gives the TAT the discretion, to request for the payment of a determined part of a disputed tax amount by an appellant, as security for the prosecution of tax appeals to the Tribunal, upon an application by the FIRS establishing certain conditions. If the application by the FIRS succeeds, a failure to pay the security deposit so ordered by the TAT makes the disputed tax amount final and conclusive and precludes the taxpayer from further challenging the tax assessment in the Tribunal. On the other hand, Order III Rule 6(a) of the TAT Rules mandates aggrieved taxpayers to pay fifty percent (50%) of a disputed tax amount, as security for the prosecution of tax appeals to the Tribunal.



In an earlier decision delivered on October 22, 2021, in the case of **Multichoice Africa Holdings BV v FIRS**,³ the TAT construed the requirement to pay the 50% security deposit as being mandatory and a condition precedent to the competent prosecution of tax appeals to the

Tribunal. The Multichoice decision raised serious concerns among taxpayers, as it effectively curtailed their right of appeal against unfavourable tax assessments issued by the FIRS.



The appellant in the Multichoice case had filed an appeal to the TAT, challenging a tax assessment of about ₦1.8 trillion issued by the FIRS. By an oral application, the FIRS had sought orders of the Tribunal compelling the appellant to comply with the provisions of paragraph 15(7) of the Fifth Schedule to the FIRS Act, on the basis that non-compliance by the appellant would fetter the jurisdiction of the Tribunal to hear the appeal. After listening to arguments from both parties, the TAT agreed with the FIRS and held that a 50% deposit of the disputed tax assessment constitutes a condition precedent to the hearing of appeals to the Tribunal and consequently ordered the appellant to make a 50% deposit of the disputed tax amount to the FIRS as security for prosecuting the tax appeal. In striking out the tax appeal for want of diligent prosecution, upon the appellant's failure to pay the 50% deposit of the disputed tax amount as ordered, the TAT held that the failure to pay the deposit rendered the tax appeal incompetent and robbed the Tribunal of the

³(2022) 66 TLRN 1

jurisdiction to entertain same. The Tribunal then proceeded to order the appellant to pay the disputed tax assessment, same having become final and conclusive. It is important to note, however, that the Tribunal, in the **Multichoice v FIRS** appeal, did not consider the impact that the provisions of paragraph 15(7) of the Fifth Schedule to the FIRS Act would have on the provisions of Order III Rule 6(a) of the TAT Rules.

In the latter case of **IHS v FIRS**, which was decided on March 8, 2022, the key issue for determination before the TAT was whether the deposit of 50% of the disputed tax amount is a strict requirement for the prosecution of tax appeals to the TAT, considering the combined effect of the provisions of Order III Rule 6(a) of the TAT Rules and paragraph 15(7) of the Fifth Schedule to the FIRS Act. The TAT held that both provisions were at variance and did not have the same effect. According to the Tribunal, the provisions of Order III Rule 6(a) of the TAT Rules introduce a condition precedent to the prosecution of tax appeals to the TAT. It makes it mandatory for an appellant to deposit 50% of the disputed tax amount as a condition precedent to the hearing of the appellant's tax appeal to the Tribunal. Whereas, the provisions of paragraph 15(7) of the Fifth Schedule to the FIRS Act makes the payment of such deposit conditional upon the existence of one of the three (3) events or circumstances listed in the Schedule, which must be proven by the FIRS to the satisfaction of the TAT.

In other words, the TAT in **IHS v FIRS** held that while Order III Rule 6(a) of the

TAT Rules introduces the 50% deposit as a condition precedent to the hearing of an appeal filed by taxpayers against the FIRS to the TAT, paragraph 15(7) of the Fifth Schedule to the FIRS Act only vests the TAT with the discretion to order payment of the 50% deposit as security for the prosecution of tax appeals before it, upon satisfactory proof by the FIRS of the existence of certain specified conditions. In this regard, one of the following conditions must be proved by the FIRS, before the TAT can validly exercise its discretion to request for payment of a deposit as a condition for prosecuting a tax appeal to the Tribunal: **(i)** the taxpayer has failed to file required tax returns for the relevant assessment year with the FIRS; or **(ii)** the tax appeal is frivolous or vexatious or is an abuse of the appeal process; or **(iii)** it is expedient to require the appellant to pay an amount as security for prosecuting the appeal.



Failure to comply with an order of the TAT to pay a security deposit under the provisions of paragraph 15(7) of the Fifth Schedule to the FIRS Act is fatal to a tax appeal, in that the disputed tax amount becomes final and conclusive. The effect of this is that the taxpayer is precluded from further challenging the disputed tax assessment in the Tribunal. On the one hand, failure to comply with the provisions of Order III

Rule 6(a) of the TAT Rules renders an appeal incompetent and the TAT may strike out the appeal or even adjourn same to allow the appellant to comply with the condition precedent for the prosecution. In this instance, the appellant may subsequently bring an application to relist the appeal upon satisfying the said condition precedent.



In the latest case of **Emenite v FIRS**, decided on May 13, 2022, the appellant challenged an unfavourable tax assessment of the FIRS in the TAT. In response, the FIRS brought an application seeking (amongst other things) orders of the TAT mandating the appellant to comply with the provisions of Order III Rule 6(a) of the TAT Rules and paragraph 15(7) of the Fifth Schedule to the FIRS Act, by paying 50% of the disputed tax amount into a designated account of the Tribunal, as security for the appellant's prosecution of the tax appeal to the TAT.

In deciding the tax appeal, a key issue for determination by the TAT was whether the provisions of Order III Rule 6(a) of the TAT Rules 2021 were in conflict with those of paragraph 15(7) of the Fifth Schedule to the FIRS Act. In conformity with its earlier decision in **IHS v FIRS**, the Tribunal held that the

provisions of Order III Rule 6(a) of the TAT Rules should derive its validity from those of paragraph 15(7) of the Fifth Schedule to the FIRS Act. The TAT reiterated that while the provisions of Order III Rule 6(a) of the TAT Rules create a condition precedent to the prosecution of tax appeals in the Tribunal, the provisions of paragraph 15(7) of the Fifth Schedule to the FIRS Act stipulate conditions upon which the Tribunal may, at its discretion and upon an application by the FIRS, direct the payment of a specified amount as security deposit for the prosecution of tax appeals to the Tribunal. The TAT concluded that the relevant provisions of the TAT Rules conflict with those of the FIRS Act. Being a subsidiary legislation, the Tribunal held that the TAT Rules could not override the provisions of the FIRS Act. In support of its conclusion, the TAT referred to the provisions of section 68(1) of the FIRS Act, which guarantee the supremacy of the provisions of the FIRS Act above those of other applicable federal tax laws in Nigeria. The TAT further held that failure of the FIRS to prove any of the three (3) conditions specified in paragraph 15(7) of the FIRS Act, would not entitle the FIRS to benefit from the discretionary security deposit requirement for prosecution of tax appeals to the Tribunal by taxpayers.

COMMENTARY

As noted by the TAT in the decisions discussed above, the approach to the security deposit requirement for prosecution of tax appeals to the Tribunal, differs under the conflicting provisions of the TAT Rules and the FIRS Act.

While the requirement provided by the TAT Rules is mandatory and a condition precedent to the competence of tax appeals to the Tribunal, the requirement is discretionary under the FIRS Act. Pursuant to the FIRS Act, the TAT may direct the taxpayer to pay a specified amount as security deposit for the prosecution of a tax appeal before the Tribunal, upon an application duly brought by the FIRS with proof of the statutory conditions for the grant thereof.

The decision of the Tribunal regarding the possible conflict between the applicable provisions of the TAT Rules and those of the FIRS Act, in respect of the security deposit requirement for prosecution of tax appeals to the Tribunal, is based on a long-standing principle of the hierarchy of laws in Nigeria. The settled rule is that where there is conflict between the provisions of a subsidiary legislation and those of an enabling statute, the provisions of the enabling statute shall prevail, and the conflicting provisions of the subsidiary legislation shall to the extent of its inconsistency be void.

In this regard, the security deposit requirement for the prosecution of tax appeals to the TAT is discretionary. The Tribunal may only make an order for the deposit to be paid by an appellant, upon an application duly filed by the FIRS with proof of the requisite statutory conditions to the satisfaction of the Tribunal.

Beyond the foregoing, it is arguable that the provisions of both the TAT Rules and the FIRS Act regarding the security deposit requirement for prosecution of tax appeals to the TAT, may be

unconstitutional. This is due to the fact that both provisions appear to infringe on a taxpayer's constitutional right of free access to the court to seek judicial relief against unfavourable tax assessments issued by the FIRS.

The Grey Matter Concept is an initiative of the law firm, Banwo & Ighodalo.

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Click [here](#) to read our article on **FIRS' Public Notice on Submission of Certificate of Acceptance.**

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