

## IT IS UNCONSTITUTIONAL TO FINALIZE A TAX ASSESSMENT WHERE THE TAXPAYER IS DENIED THE STATUTORY RIGHT TO OBJECT: TAX APPEAL TRIBUNAL HOLDS



On Friday, September 27, 2019, the Tax Appeal Tribunal, Lagos Zone (“TAT” or the “Tribunal”) held, inter alia, that where the action of a tax authority purports to make an assessment final and conclusive, by irregularly foreclosing the statutory right of a taxpayer to object, the action is unconstitutional and the assessment is unenforceable. This decision, which was reached in *Ponticelli Upstream v Federal Inland Revenue Service* (unreported judgement in Appeal No: TAT/LZ/CIT/029/2017) (“*Ponticelli*”), reinforces the fundamental right to fair hearing<sup>1</sup> entrenched in the Constitution of

<sup>1</sup> Section 36 of the Constitution provides that a person shall be entitled to fair hearing within a reasonable time in the determination of his civil rights and obligations, including any question or determination by or against any government or authority. By the general purport of section

the Federal Republic of Nigeria, 1999 (as amended) (the “**Constitution**”).

### **Brief Facts of Ponticelli**

The Appellant, a foreign entity, was awarded a contract jointly with a Nigerian company (“**Nigerian entity**”) to execute a project in Nigeria. The Federal Inland Revenue Service (“**FIRS**”) discovered the contract in the course of reviewing Transfer Pricing (“**TP**”) returns of the Nigerian entity. Against this backdrop, the FIRS assessed the Appellant to additional companies’ income tax with interest and penalty for 2011 to 2015 accounting years (2012 to 2016 years of assessment); via TP Notices of Additional Assessment and Demand Notices.

The Notice of Assessment, besides stating the amount of the additional tax raised on the TP returns, contained a statement communicating the FIRS’ refusal of the Appellant’s purported

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36(2)(a) thereof, where the statute under which the rights and obligations of a person are to be determined provides for an opportunity for such person to make representations to the administering authority, the opportunity is to be given before the authority makes its decision affecting the person.

objection to the additional assessment and notified the Appellant of its right to appeal against the assessment under the Companies Income Tax Act (“CITA”)<sup>2</sup>.

Given the fact that the Notice of Assessment was the first assessment to be issued by FIRS and that the Appellant had not exercised its option to object to the assessment as prescribed by law<sup>3</sup>, the Notice of Assessment was construed by the Appellant – based on its contents – to have doubled as both a Notice of Additional Assessment and a Notice of Refusal to Amend (“NORA”)<sup>4</sup>.



Consequently, the Appellant considered the Notice of Assessment to be a final and conclusive decision reached by the FIRS, issued in breach of the Appellant’s right to object under the CITA and its right to fair hearing under the Constitution. The Appellant filed the appeal, urging the TAT to declare the actions of FIRS as

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<sup>2</sup> Cap. C21 Laws of the Federation of Nigeria (“LFN”) 2004 (as amended in 2007).

<sup>3</sup> Section 69(1) & (2) of the CITA provide a 30-day window from the day an assessment is served, within which an aggrieved taxpayer may object to the assessment in writing, to the FIRS.

<sup>4</sup> Under Section 69(5) of the CITA, where the FIRS disagrees with a taxpayer’s written notice to object, it shall issue a NORA to that effect. The NORA gives an aggrieved taxpayer a cause of action before the Body of Appeal Commissioners. Thus, within 30 days after the service of a NORA, an aggrieved taxpayer may lodge an appeal before the Body of Appeal Commissioners pursuant to section 72 of the CITA.

unconstitutional and the Notices of Assessment and Demand Notices, including the penalty and interest, arising therefrom as unlawful. The Appellant also sought an order of Perpetual Injunction to restrain the FIRS and its agents, officers or privies from further assessing, demanding, and enforcing TP Notices of Assessment or Demand Notices for companies’ income tax for the affected period.

### Arguments of Parties

In support of its case, the Appellant further contended the following:

- The additional TP assessment raised by FIRS contravened the Double Taxation Agreement (“DTA”) between Nigeria and France, because it covered activities carried on wholly in France by the Appellant, which was not attributable to a permanent establishment in Nigeria and therefore not taxable (out-of-country income on which appropriate taxes had been paid in France)<sup>5</sup>;
- FIRS did not conduct any transfer pricing audit exercise with the Appellant and could not have validly raised additional TP assessment with interest and penalty, because the Nigerian entity did not act as agent of the foreign entity in the course of executing the contract. Therefore, audit meetings purportedly had with the Nigerian entity by FIRS

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<sup>5</sup> Under section 30(1)(b)(i) of the CITA, only foreign entities with a fixed base of business in Nigeria or a reasonable percentage of their turnover in an assessment year attributable to a fixed based in Nigeria, are taxable. Also, under section 45(1) thereof, companies from any country with which Nigeria has an existing Double Taxation Agreement enjoy exemption from tax in Nigeria.

could not amount to meetings with the Appellant<sup>6</sup>; and

- The Income Tax (Transfer Pricing) Regulations, 2012 under which FIRS assessed the Appellant was applied retroactively to a prior year of assessment and was therefore inapplicable.

In opposition, FIRS urged the Tribunal to dismiss the appeal, contending that:

- The Nigerian entity acted as an agent of the Appellant and that the various meetings held with the Nigerian entity qualified as transfer pricing audit exercise which was binding on the Appellant; and
- The *Notice of Additional/Amended Assessment* issued to the Appellant is not the standard form of NORA issued by FIRS. Thus, irrespective of its wording, the notice could not qualify simultaneously as both Notice of Assessment and NORA and that the Appellant was therefore not precluded from exercising its statutory right to object in exercise of its constitutional right to fair hearing.

### Decisions of the Tribunal

The three (3) issues which the Tribunal considered for determination in the case can be summarized as follows:

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<sup>6</sup> By the purport of section 26 of the FIRS (Establishment) Act, 2017, the audit process through which the FIRS is empowered to obtain information from a taxpayer requires either oral or written accounts elicited from such taxpayer by calling for returns or production of books and documents for examination. For fuller or further returns, FIRS is required under section 27 thereof to give notice in writing to the taxpayer, within reasonable time, requesting for such returns/information.

1. Whether FIRS was not in breach of the Appellant's right to fair hearing;
2. Whether the tax audit purportedly carried out on the Appellant by FIRS was a Transfer Pricing Audit; and
3. Whether FIRS properly assessed the Appellant to tax in Nigeria in view of the Double Taxation Agreement between Nigeria and France.



In the final analysis, the Tribunal decided only "Issue 1" and held that FIRS was in breach of the Appellant's right to fair hearing and consequently made an order setting aside the Notices of Additional Assessment and Demand Notices issued to the Appellant. In the reasoning of the Tribunal, the operative words of a clear document ought to be given their simple and ordinary grammatical meaning<sup>7</sup> and this is so, irrespective of the title given to the document. Where a document speaks for itself, oral testimony is inadmissible to vary, add, or take away from its content<sup>8</sup> as the Tribunal is concerned with the substance rather than the form of a document.

The Tribunal declared that the *Notice of Additional/Amended Assessment* issued by the FIRS unambiguously doubled as both a notice of additional assessment and a NORA, as it precluded the Appellant from exploring the robust procedures for review laid down in section 69 of the CITA. The Tribunal also held that the action of the FIRS in this regard

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<sup>7</sup> See *Union Bank of Nigeria Ltd v Prof. A. O. Ozigi* (1994) 3 NWLR (Pt. 333) 385 Ratio 4

<sup>8</sup> See *NDIB v Olalomi Industries Limited* (2002) 5 NWLR (Pt. 761) 532 Ratio 7

deprived the Appellant of his statutory right to object to the assessment and thus decided the rights and obligations of the Appellant without affording it the opportunity to make any representation in violation of its fundamental right to fair hearing guaranteed by section 36 of the Constitution<sup>9</sup>.

Having resolved “Issue 1” in favour of the Appellant, the other two issues were discountenanced because the Tribunal reasoned that their determination would amount to a mere academic exercise. However, the TAT refused to make the order of perpetual injunction to restrain the FIRS sought by the Appellant because, the Tribunal was of the view that the FIRS, being a statutory body, cannot be restrained from performing its statutory duties.

### Commentary

The decision in **Ponticelli** has further reinforced the settled principle of law that where a statute prescribes procedures for carrying out a function, that procedure and no other means ought to be adopted and that failure to so follow such statutorily stipulated procedures renders the outcome incompetent<sup>10</sup>. It is expected that tax authorities and taxpayers alike will be guided by the Tribunal’s pronouncements in observing

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<sup>9</sup> In particular, the Tribunal relied on the decision of the Akwa Ibom High Court in *Ukpong & Anor. v Commissioner for Finance & Economic Development & Anor.* 4 ALL NTC 349 at 360, where the court pronounced that: “*the constitution ... guarantees a right to fair hearing in the determination of one’s rights and liabilities. The determination of tax payable by any taxpayer is subject to this protection too. That is why there are provisions in the law for objections, appeal and revisions ... the breach of a right to fair hearing renders any proceeding null and void, no matter how competently or brilliantly handled*”.

<sup>10</sup> See the Supreme Court in *Okereke v Yar’adua* (2008) ALL F.W.L.R. Part 430 at 626 particularly at 654 paragraph D; and *Agip (Nigeria) Ltd v Agip Petroli International* (2010) 5 NWLR (Pt. 1187) 348 at 498.

their statutory duties and obligations in future, in order to ensure orderliness and certainty in tax administration.



However, we note that the declared unconstitutionality of the actions leading to the issuance of the disputed Notices of Additional Assessment and Demand Notices, which finally rendered the various notices null and void, has also denied stakeholders in the tax industry a good opportunity to have judicial pronouncements made on the other germane issues which arose in the appeal.

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

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## EDITORIAL TEAM

Ken Etim  
(Managing Partner)  
[ketim@banwo-ighodalo.com](mailto:ketim@banwo-ighodalo.com)

Abimbola Akeredolu, SAN, FCI Arb.  
(Partner)  
[aakeredolu@banwo-ighodalo.com](mailto:aakeredolu@banwo-ighodalo.com)

Azeezah Muse-Sadiq  
(Partner)  
[asadiq@banwo-ighodalo.com](mailto:asadiq@banwo-ighodalo.com)

Kemi Ajayi  
(Chief Operating Officer)  
[kajayi@banwo-ighodalo.com](mailto:kajayi@banwo-ighodalo.com)

Oluwatoba Oguntuase  
(Practice Support Lawyer)  
[ooguntuase@banwo-ighodalo.com](mailto:ooguntuase@banwo-ighodalo.com)

Emmanuel Onyeabor  
(Associate)  
[EOnyeabor@banwo-ighodalo.com](mailto:EOnyeabor@banwo-ighodalo.com)

## OUR OFFICES

48, AWOLOWO ROAD, SOUTH WEST IKOYI  
LAGOS, NIGERIA

AFRI-INVESTMENT HOUSE  
50, AGUIYI-IRONSI STREET, MAITAMA  
ABUJA, NIGERIA

234 9060003561-2;  
8050875883; 8092714452; 9020524921  
(ABUJA - 09 2912127)  
[BANWIGHO@BANWO-IGHODALO.COM](mailto:BANWIGHO@BANWO-IGHODALO.COM)  
[WWW.BANWO-IGHODALO.COM](http://WWW.BANWO-IGHODALO.COM)