BANWO & IGHODALO

Grey Matter Tax Digest

A specialised newsletter providing strategic alerts and comprehensive analyses on tax matters in Nigeria

SPECIAL ISSUE: JULY 2024

50% DEPOSIT FOR PROSECUTION OF TAX APPEALS IN NIGERIA AND COMPLIANCE ESSENTIALS FOR BUSINESSES

Appeals at the Tax Appeal Tribunal

The practice at the Tax Appeal Tribunal (**"TAT"** or **"Tribunal"**) requiring an aggrieved taxpayer to pay 50% of a disputed tax amount into a designated account, as security for the prosecution of a tax appeal, is traceable to the provisions of paragraph 15(7) of the Fifth Schedule to the Federal Inland Revenue Service (Establishment) Act, 2007 (as amended) (the **"FIRS Act"**). The provisions grant the TAT the power to adjourn the hearing of a tax appeal and direct the appellant to deposit a prescribed amount with the FIRS before the adjourned date, as security for the appeal. However, the TAT can only make an order for payment of security deposit under the stated provisions, if the FIRS is able to prove to the satisfaction of the Tribunal that:

i. the appellant has failed to prepare and file tax returns with the FIRS in the concerned year of assessment as required under relevant tax statutes; or
ii. the appeal is frivolous or vexatious or is an abuse of the appeal process; and or

iii. it is expedient to require the appellant to pay an amount as security for prosecuting the appeal.

Where the Tribunal makes such an order, the payment of the prescribed deposit becomes a condition precedent to hearing an appeal, and failure of the appellant to comply with the order renders the appeal incompetent and liable to be struck out.

In ***Multichoice Africa Holdings BV v FIRS ("Multichoice")***[1], a case decided on October 22, 2021, the appellant filed an appeal at the TAT challenging a tax assessment of about ₦1.8 trillion issued against it by the FIRS. At the hearing of the appeal, the

[1] (2022) 66 TLRN 1

FIRS contended that the appellant is bound to make security deposit for the appeal in line with the provisions of paragraph 15(7) of the Fifth Schedule to the FIRS Act, and that non-compliance with the provisions would rob the TAT of the jurisdiction to hear the appeal. The Tribunal agreed with the FIRS and ordered the appellant to make a 50% deposit of the disputed tax amount with the FIRS as security for prosecuting the appeal. The appeal was ultimately struck out for want of diligent prosecution because the appellant failed to comply with the order. The appellant was also ordered to pay the disputed tax amount, having become final and conclusive in line with the stated provisions of the FIRS Act. Shortly afterwards, the Tribunal codified its ruling in Multichoice, by issuing the ***TAT (Procedure) Rules, 2021***[2], which require taxpayers to pay 50% of a disputed tax amount into a designated account by the Tribunal before hearing, as security for prosecuting appeals against the FIRS or any tax authority in Nigeria.

In the latter case of ***Investment Holdings Limited v FIRS***[3] ("***IHS v FIRS***"), decided on March 8, 2022, the issue of whether the deposit of 50% of a disputed tax amount is a strict requirement for the prosecution of tax appeals in the TAT, came up again for prosecution. This time, unlike in *Multichoice*, 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 was considered, and the decision of the Tribunal can be summarized as follows:

- The provisions of Order III Rule 6(a) of the TAT Rules are at variance with the provisions of paragraph 15(7) of the Fifth Schedule to the FIRS Act and as such do not have the same effect;
- While Order III Rule 6(a) of the TAT Rules introduces payment of 50% deposit of a disputed tax assessment as a condition precedent to the hearing of tax appeals, 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 listed three (3) events or circumstances, which must be proved by the FIRS to the satisfaction of the Tribunal; and
- Provisions of Order III Rule 6(a) of the TAT Rules, being a subsidiary legislation, are invalid for being inconsistent with the provisions of paragraph 15(7) of the Fifth Schedule to the FIRS Act, the primary legislation and enabling statute.

[2] TAT Rules. See Order III Rule 6(a) thereof.

[3] (2002) 66 TLRN 52

Appeals to the Federal High Court

By the provisions of paragraph 17(1) of the Fifth Schedule to the FIRS Act, appeals (on point of law) lie to the FHC. Order V Rule 3 of the ***Federal High Court (Federal Inland Revenue Service) Practice Directions, 2021*** *(the* ***"FHC Practice Directions"****)* mandates a respondent who intends to challenge a tax assessment served on him, to pay half of the assessed amount into an interest-yielding account of the Federal High Court, pending the determination of the appeal. The 50% security deposit has also operated as a condition precedent to hearing appeals brought by aggrieved taxpayers against decisions of the TAT.

Similarly, Order V Rule 1(1)(a) of the ***Federal High Court (Tax Appeal) Rules, 2022*** *(the* ***"FHC Rules"****)* provides that where a tax debtor is appealing to the FHC against an unfavourable decision of the TAT, he shall deposit the sum contained in the decision into an interest-yielding account maintained by the Chief Registrar of the FHC. Indeed, Order V Rule 1(1)(b) of the FHC Rules provides that the tax appeal shall only be heard where there is evidence of deposit of the sum contained in the decision. Order V Rule 1(2) of the FHC Rules further provides that where there is no evidence of compliance with the provisions of Order V Rule 1(1)(a) of the FHC Rules, the tax appeal is liable to be struck out or dismissed by the FHC.

However, in a recent and celebrated decision of the FHC in ***Joseph B.***

Daudu SAN v FIRS[4]*,* delivered on November 9, 2023, the validity of provisions which require appellants to pay a security deposit as a condition for hearing of tax appeals before the TAT and the FHC were determined. For instance, the court considered that a tax debtor who is unable to afford to deposit the entire assessed tax, as required under Order III Rule (6)(a) of the TAT Rules, would automatically be deprived of his right of appeal in violation of sections 36(1) & (2), 6(6)(a) and 6(6)(b) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) regarding fair hearing and access to court. The FHC held that any law or subsidiary legislation that contravenes the provisions of the Constitution shall be declared void to the extent of its inconsistency. The court ultimately declared unconstitutional, null and void, and of no effect, the relevant provisions of the TAT Rules, FHC Practice Directions, FHC Rules, and paragraph 15(7) of the Fifth Schedule to the FIRS Act, which provide in one way or the other for the payment of 50% or a percentage or the total amount of a

[4] Unreported judgment delivered by Hon. Justice James Omotosho of the FHC, Abuja Division, on November 9, 2023, in Suit No. FHC/ABJ/CS/12/2022.

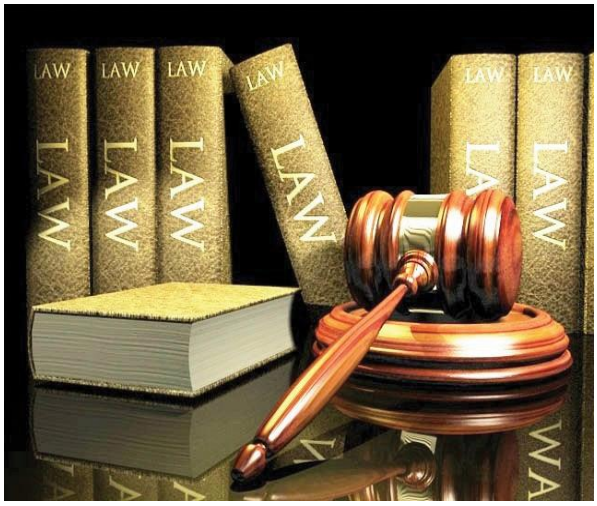
disputed tax assessment as a condition precedent to the hearing of tax appeals.

Commentary

It is settled law that failure to satisfy a condition precedent, where it is required, is fatal to a suit. Until the decision of the TAT in *IHS v FIRS*, the requirement for the payment of a deposit of 50% of a disputed tax amount had been established as a condition precedent to the hearing of tax appeals against the FIRS and other tax authorities in the Tribunal. By enshrining the deposit requirement in its procedure rules, the Tribunal practically made the satisfactory proof required of the FIRS in specified circumstances under paragraph 15(7) of the Fifth Schedule to the FIRS, a mute and redundant provision.

With the position in *IHS v FIRS*, it does appear that the payment of 50% deposit of a disputed tax amount will no longer constitute a condition precedent to hearing tax appeals at the TAT. In other words, except payment of an amount is ordered by the TAT as security deposit, subject to satisfactory proof by the FIRS of the existence of any of the three circumstances listed under paragraph 15(7) of the Fifth Schedule to the FIRS Act, an aggrieved taxpayer challenging a tax assessment is no longer obliged to pay 50% or any percentage of the disputed tax amount as security deposit as a condition precedent to access to justice at the Tribunal[5].

[5] The TAT, North-East Zone, had earlier on November 30, 2021, reached a similar decision in First Bank of Nigeria Limited v Taraba State Board of Internal Revenue (Appeal No: TAT/NEZ/002/2020).



On a better note, the FHC decision in *Joseph B. Daudu SAN v FIRS* has provided further and expanded comfort to aggrieved taxpayers intending to challenge an assessment by a tax authority in the TAT or appealing against a decision of the TAT at the FHC. It is the first case in which the provisions requiring payment of a security deposit for prosecution of tax appeals in subsidiary legislations (TAT Rules, FHC Practice Directions, and FHC Rules), as well as primary legislation (FIRS Act), were declared unconstitutional, null and void.

We agree with the TAT in *IHS v FIRS* that it is trite that a subsidiary legislation cannot amend, enlarge or in any way contravene the provisions of a primary legislation. Moreso, by section 68(1) of the FIRS Act, the provisions of the FIRS Act take precedence over all other federal tax laws applicable in Nigeria with regard to the administration, assessment, collection, accounting, and enforcement of federal taxes and levies. By the same token, we align with the decision of the FHC in *Joseph B. Daudu SAN v FIRS* that any provision in any legislation (primary or subsidiary) that contravenes

any provision of the Constitution is null and void and of no effect whatsoever.

Without prejudice to these latest pronouncements by the TAT and the FHC, we note that the dust may not have settled regarding the payment of security deposits in tax appeals in Nigeria, until a superior court of record like the Court of Appeal or the Supreme Court makes a pronouncement on this. In our view, it may be too hasty to reach a conclusion that the requirement to pay 50% deposit or any portion of the disputed tax amount as security for prosecution of tax appeals in Nigeria is no longer mandatory. However, until these decisions are set aside by a superior court, we note that taxpayers may rely on them to challenge the deposit requirement when appealing a tax assessment or decision at the TAT and FHC.

For commercial expediency, it is still safe for taxpayers intending to file a tax appeal in either the TAT or the FHC to make provision for the security deposit requirement. This will protect the taxpayer should the TAT or the FHC decline to follow their earlier decisions on the point. In critical situations, taxpayers should seek appropriate legal and other professional advice before taking commercial decisions relating to tax.

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