

TAT upholds FIRS Establishment Act over the TAT (Procedure) Rules 2021 regarding security deposit for tax appeals

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KPMG Nigeria

On Tuesday 8 March 2022, the Tax Appeal Tribunal (TAT or “the Tribunal”) sitting in Lagos, ruled in *Investment Holdings Limited (IHL or “the Company” or “the Appellant”) and Federal Inland Revenue Service (FIRS or “the Respondent”)* that the provision of Section 15(7) of the Fifth Schedule to the FIRS (Establishment) Act, 2007 (FIRSEA or “the Act”) supersedes the provision of Order 3 Rule 6 of the TAT (Procedure) Rules 2021 (“the Rules”).

The TAT further clarified that the burden of proof lies with the tax authority to convince the Tribunal of the existence of the conditions prescribed in the FIRSEA before it will mandate payment of security deposit before the prosecution of a tax appeal.

Facts of the case

On 25 January 2022, the FIRS filed a preliminary objection (PO) against the TAT’s jurisdiction to entertain an appeal filed by IHL because the Company failed to make a security deposit as provided in Order 3 Rule 6 of the Rules and Paragraph 15(7) of the Fifth Schedule to the FIRSEA.

The FIRS argued that by failing to pay the security deposit, the Appellant did not satisfy the conditions for initiating the appeal, thereby rendering the appeal incompetent. Consequently, the FIRS asserted that the TAT lacked jurisdiction to hear the appeal for failure of the Appellant to comply with Order 3 Rule 6 of the Rules and Paragraph 15(7) of the Fifth Schedule to the FIRSEA. It, therefore, urged the TAT to be guided by its decision in the case between *Multichoice Nigeria Limited vs FIRS* and dismiss the appeal accordingly.

On the other hand, IHL argued that Order 3 Rule 6 of the Rules was inconsistent with the provisions of Paragraph 15(7) of the Fifth Schedule to the FIRSEA and, therefore, null and void in line with Section 68(2) of the FIRSEA. IHL opined that the requirement for security deposit by Paragraph 15(7) of the Fifth Schedule to the FIRSEA was contingent on the satisfaction of the Tribunal that it was “expedient to require the Appellant to pay an amount as security” for the appeal to proceed. The Company noted that the FIRS’ PO failed to provide any evidence that the payment of the security deposit was expedient to the prosecution of the appeal, hence the objection should be dismissed.

Issues for determination

Based on the arguments submitted by both parties, the TAT formulated the major issue for determination as, “*whether in the circumstances of this case, the Tribunal should not order the deposit of 50% of the disputed assessment or any amount as security for the prosecution of the Appeal*”

TAT’s decision

After considering the arguments of both parties, the TAT held that:

- (i). The provision of Paragraph 15(7) of the Fifth Schedule to the FIRSEA supersedes the provision of Order 3 Rule 6 of the Rules.

The Tribunal explained that Order 3 Rule 6 of the Rules should derive from the provisions of Paragraph 15(7) of the Fifth Schedule to the FIRSEA. While Order 3 Rule 6 of the Rules creates a condition precedent before an appeal can be entertained by the Tribunal, Paragraph 15(7) provides conditions upon which the Tribunal may, at its discretion, order for the payment of security charge before an appeal can be heard. Therefore, the provision of the Rule differs from the statutory provisions of the Act and is not complementary to it.

Further, the provision of Order 3 Rule 6 of the Rules cannot override the provision of Paragraph 15(7) of the Fifth Schedule to the FIRSEA on the basis that *rules of procedure cannot override statutory provisions of the law*. The TAT noted that Section 68(1) of the

FIRSEA specifically provides that where the provisions of any other law, including the enactments in its First Schedule, are inconsistent with the provisions of the FIRSEA, the provisions of the FIRSEA shall prevail. Consequently, the TAT ruled that Paragraph 15(7) of the Fifth Schedule to the FIRSEA is the relevant provision for consideration in respect of security deposit by taxpayers.

- (ii). Paragraph 15(7) of the Fifth Schedule to the FIRSEA does not make the payment of security deposit a condition precedent for the prosecution of an appeal by the Tribunal and, therefore, cannot apply to all appeals filed at the Tribunal. Further, the TAT clarified that the application of the Paragraph is only conditional upon the existence of certain facts which must be proved by the FIRS to the satisfaction of the Tribunal.
- (iii). The FIRS failed to satisfy the requirements under Paragraph 15(7) of the Fifth Schedule to the FIRSEA to invoke the powers of the Tribunal to order the security deposit for the prosecution of an appeal.

Paragraph 15(7) of the Fifth Schedule to the FIRSEA stipulates three conditions which the FIRS must fulfil before the Tribunal, at its discretion, may order an aggrieved taxpayer to pay the security deposit. Therefore, the failure of the FIRS to prove the existence of any of the three circumstances in Paragraph 15(7) prevents the Tribunal from granting the order for a security deposit, as the TAT will not grant such order on a mere assertion without satisfactory evidence from the FIRS.

The Tribunal relied on the decision of the TAT (North East Zone) in the case between *First Bank of Nigeria vs Taraba State Internal Revenue Service* where it was held that “a holistic reading of the Fifth Schedule to the FIRS Act does not entitle the Tribunal to make an order for payment of security as a matter of course.” Therefore, the burden of proof rests on the FIRS to convince the TAT to order a security deposit.

Based on the above, the Tribunal dismissed the PO and held that IHL was not required to pay any amount as security.

Commentaries

The decisions of the Tribunal in IHL's case and *First Bank of Nigeria vs Taraba State Internal Revenue Service* have satisfactorily resolved the conflict between the provisions of Paragraph 15(7) of the Fifth Schedule to the FIRSEA and Order 3 Rule 6 of the Rules by affirming the superiority of Paragraph 15(7) of the Fifth Schedule to the FIRSEA as the only applicable provision for consideration in respect of security deposit for the prosecution of a tax appeal.

Based on Paragraph 15(7) of the Fifth Schedule to the FIRSEA, the TAT will only consider the order for a security deposit where the FIRS is able to prove to its satisfaction that:

- a. *the Appellant has for the year of assessment concerned, failed to prepare and deliver to the Service returns required to be furnished under the relevant provisions of the tax laws mentioned in Paragraph 11 of the Act; or*
- b. *the appeal is frivolous or vexatious or is an abuse of the appeal process; or*
- c. *it is expedient to require the appellant to pay an amount as security for prosecuting the appeal.*

The above conditions do not preclude an aggrieved taxpayer from filing an appeal with the Tribunal and, therefore, cannot be construed as a condition precedent for filing an appeal as alleged by the FIRS.

The TAT decisions in the two cases have effectively put to rest the confusion created by Order 3 Rule 6 of the Rules, which requires aggrieved taxpayers to pay 50% of the disputed amount as security deposit before the Tribunal can proceed with hearing and prosecution of appeals against the FIRS. Equally, the two decisions exposed the error of the earlier TAT decision in *Multichoice Nigeria Limited (MNL) and FIRS*, where the Tribunal ordered MNL to pay the security deposit provided in Paragraph 15(7) of the Fifth Schedule to the FIRSEA without considering whether the FIRS fulfilled the conditions prescribed therein.

The TAT decision upholding Paragraph 15(7) of the Fifth Schedule to the FIRSEA over Order 3 Rule 6 of the Rules is a welcome development in Nigeria's tax dispute resolution process. On this basis, aggrieved taxpayers who intend to appeal disputed tax assessments against them by the FIRS will not be deterred from doing so by being required to pay 50% of the alleged liability upfront without proof of the conditions precedents by the FIRS. It is hoped that the TAT will be guided by the decisions to revise its Rules to conform with the provisions of the FIRSEA.

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