

## FHC nullifies the requirement to pay security deposits before appeal at the TAT and the courts

### Background

The Federal High Court (FHC) of Nigeria in the case of *Joseph Bodunrin Daudu SAN v. Minister of Finance Budget and National Planning & 2 Ors*<sup>1</sup> struck out certain provisions of the Tax Appeal Tribunal (Procedure) Rules (2021) ("TAT Rules"), the Federal High Court of Nigeria (Federal Inland Revenue Service) Practice Directions (2021) ("FHC Practice Direction") and the Federal High Court of Nigeria (Tax Appeals) Rules (2022) ("Tax Appeal Rules") which require a tax payer to pay 50% or 100% of a disputed tax assessment as deposit before filing appeals. These provisions were held to be an infringement on the taxpayers' constitutional right of fair hearing and therefore null and void.

The FIRS had assessed Joseph Bodunrin Daudu SAN (the "Applicant" or the "Taxpayer") to outstanding Personal Income Tax, Withholding Tax and Value Added Tax. Dissatisfied with the assessment, the Applicant appealed to the Tax Appeal Tribunal (TAT) in July 2018, who ruled in favour of the Federal Inland Revenue Service (FIRS). The Taxpayer then appealed the judgment before the FHC. While the matter was still pending in court, the Minister of Finance, Budget and National Planning (MoF) made the TAT Rules and the Honourable Chief Judge of the FHC (Chief Judge) issued the FHC Practice Direction and the Tax Appeal Rules. The Applicant then filed this suit

against the MoF, the Chief Judge and the Attorney General of the Federation ("Respondents") challenging the constitutionality of these Rules and Practice Direction.



### Parties arguments

#### The Taxpayer

- The MoF and Chief Judge acted beyond their powers in issuing the TAT Rules and FHC Practice Direction which are contrary to Section 36 of the Constitution of the Federal Republic of Nigeria (CFRN) and the Federal Inland Revenue Service (Establishment) Act.
- The TAT Rules and FHC Practice Direction breach a taxpayer's right to fair hearing and appeal and places an excessive burden on the taxpayer.

#### The Respondents

- The Chief Judge of the FHC is statutorily empowered with the overall control and supervision of the administration of the FHC and as such can either amend, modify, add or issue directives that are supplemental to the practice and procedure regulating civil processes filed in the FHC<sup>2</sup>.
- The Practice direction was issued to ensure the implementation of the FIRS' mandate is subject to judicial powers and scrutiny.
- The payment of half of the tax liability is to be paid into an interest yielding account of the court which can be refunded if it is decided that the tax assessment is excessive or wrongly made.

#### Decision of the Court

- The Court held that the right of a person to appeal a decision is a constitutional right which accords with the right to fair hearing. The requirement to pay deposits under both the Rules and Practice Directions place a huge barrier on the path of a taxpayer towards venting his grievance against an unjust or excessive tax assessment. The requirement to make a deposit is akin to taking away a taxpayer's constitutional right of appeal.
- This does not prejudice the MoF and Chief Judge's statutory power to make rules to govern the TAT or the procedure of the FHC respectively.
- The provisions of the Rules and Practice Directions were made to favour FIRS without balancing the interest of the tax debtor, as a tax debtor who is unable to pay the deposit is deprived his right to appeal.
- The offending provisions (Order III Rule 6 (1) (a) TAT Rules, Order V Rule 3 Practice Directions, Order V Rule 1 Tax Appeal Rules) are struck down as they substantially take away the tax debtors' constitutional right to appeal.

### Analysis and takeaway

The payment of deposits before appeals has been a controversial issue challenged on several accounts in previous cases at the TAT; although none of the arguments in the previous cases considered the taxpayer's constitutional right of fair hearing.

In *MultiChoice Africa Holdings B.V v FIRS*<sup>3</sup>, the TAT struck out MultiChoice's appeal because the company failed to pay the required deposit before filing the appeal in accordance with Order III Rule 6 of the TAT Rules. However, in 2022, the TAT departed from its earlier position and held in *Investment Holdings Limited v FIRS* that Order III Rule 6 of the TAT Rules contradicted Paragraph 15(7) of the 5th Schedule to the FIRS Establishment Act (FIRSEA), and therefore were invalid. In line with Paragraph 15(7) of the 5th Schedule to the FIRSEA, the FIRS is required to prove that certain conditions have been met, before the TAT exercises its discretionary powers to mandate the payment of a security deposit.

Also, based on the FIRSEA, the deposit should be the lower of the tax charged for the preceding year of assessment or 50% of the tax charged by the assessment under appeal, plus a sum equal to 10% of the deposit.

The right of a person to appeal flows from the constitutional right to fair hearing. However, the exercise of this right is hinged upon the fulfillment of prescribed conditions in the law or rules of court as Section 36 (2) (a) CFRN empowers an administering government or authority to prescribe the laws/rules for determining questions arising from its administration of a law.

### Conclusion

The FHC's conclusion on the unconstitutionality of the provisions is applauded. However, arguments on the payment of appeal deposit are likely to continue as Paragraph 15(7) of the 5th schedule to the FIRSEA remains effective and is open to varying interpretations. The constitutionality of rules of court and practice directions recognised under the provisions of Section 36 (2) (a) of the CFRN also remain contentious. For a start, it may be preferable if the pre-conditions in Paragraph 15(7) of the 5th schedule to the FIRSEA are standardised and clarified, to provide a clear basis for the imposition of the security deposit.

It is left to be seen if the concerns mentioned above will be considered on appeal, until then taxpayers can file their appeals without payment of any deposit of the disputed tax assessment. Previous cases that were struck out based on the offending provisions of these Rules and Practice Direction may also be appealed by the taxpayers.

<sup>1</sup>Suit no: FHC/ABJ/CS/12/2022

<sup>2</sup>Order 54 Rules 1-7 Federal High Court (Civil Procedure) Rules 2019

<sup>3</sup>Appeal No. TAT/LZ/CIT/062/2021

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