

A review of the Tax Appeal Tribunal's ruling In Multichoice Nigeria Limited vs the FIRS



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Introduction

The FIRS alleged that MultiChoice Nigeria (MCN or the Company) had under-remitted about N1.8 trillion in taxes, and directed banks with which the Company had accounts, to freeze such accounts, recover the said sum and pay over to the FIRS. MCN disputed the assessment and filed an appeal at the Tax Appeal Tribunal (the Tribunal or TAT).

The FIRS raised an oral preliminary objection challenging the jurisdiction of the Tribunal to entertain the appeal, on the ground that the suit did not meet the condition precedent to its institution. The FIRS therefore requested the Tribunal to make an order compelling MCN to make a statutory deposit of an amount under the provisions of the FIRS Establishment Act (FIRSEA).

The Tribunal's Ruling

The Tribunal cited many cases and held that the payment of the statutory deposit is a condition precedent to triggering its jurisdiction to hear the appeal. The Tribunal went ahead to order the Appellant to comply with the provision by making the required deposit before the adjourned date of hearing. We have analysed this ruling below.

Analysis

Paragraph 15(7) of the Fifth Schedule to the FIRSEA provides as follows;

"At the hearing of any appeal, if the representative of the Service proves to the satisfaction of the Tribunal hearing the appeal in the first instance 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;*
- 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 Tribunal may adjourn the hearing of the appeal to any subsequent day and order the appellant to deposit with the Service, before the day of the adjourned hearing, an amount, on account of the tax charged by the assessment under appeal, equal to the tax charged upon the appellant for the preceding year of assessment or one half of the tax charged by the assessment under appeal, which ever is the lesser plus a sum equal to ten percent of the said deposit, and if the appellant fails to comply with the order, the assessment against which he has appealed shall be confirmed and the appellant shall have no further right of appeal with respect to that assessment.

The provision above can be separated into two parts; the first part stating the conditions for the order, and the second part stating the order to be made by the Tribunal.

Conditions for the Order

The opening words of the paragraph state that *"...if the representative of the Service proves to the satisfaction of the Tribunal..."* This clearly shows that the burden is on the FIRS to put forward relevant materials and facts before the Tribunal in proof of at least one of the three conditions listed below:

1. The Appellant failed to file tax returns for the year of assessment concerned
2. The appeal is frivolous or constitutes an abuse of court process
3. It is expedient to require the appellant pay the statutory deposit

It is curious that the Tribunal did not refer to any of the three conditions in reaching its decision. As a result, the Tribunal did not mention which facts were placed in proof of such condition(s), or how it considered that the FIRS' facts were cogent enough to trigger the provision. The Tribunal ignored this critical part of the provision and focused on the order for statutory deposit.

Also, Paragraph 13 of the Fifth schedule to the FIRSEA provides for persons who are aggrieved by decisions of the FIRS to appeal such decisions to the Tribunal. The only conditions to do that are to file the appeal within 30 days in the prescribed form and to pay the necessary filing fees. Beyond this, it is important for the rights of taxpayers that the FIRS must prove the conditions first, before the Tribunal (at its discretion) can make an order for a statutory deposit.



The Order

Based on the provision of the law, it is perceived that it is not mandatory for the Tribunal to make the order for statutory deposit. It is arguable that even if the FIRS can prove at least one of the conditions listed in the provision, the Tribunal may still exercise a discretion on whether to order the Appellant to make a statutory deposit or not.

This is because the provision states that *"the Tribunal may adjourn the hearing of the appeal to any subsequent day and order the appellant to deposit with the Service..."*. Generally, the word 'may' in law connotes a discretionary rather than a mandatory requirement. There could be a counter argument that the word "may" as used in this context qualifies only the adjournment, and that once the Tribunal adjourns the hearing, the deposit should be paid. However, our experience is that the Tribunal can exercise its discretion in both adjourning and ordering for the deposit. This means the Tribunal can consider other factors such as the attitude of the appellant to the prosecution of the appeal in deciding whether to make such ruling. It may also make other orders such as accelerated hearing of the appeal.

Also, the Tribunal in its ruling simply ordered the Appellant to make *“the required deposit as provided under Schedule 5 para 15(7) ...”* This order is vague, especially considering that the provision requires the payment of the lower of:

- a) an amount equal to the tax charged upon the appellant for the preceding year of assessment; or
- b) half of the tax charged by the assessment under appeal.

Further to the Tribunal's ruling, the FIRS has allegedly claimed in press releases that the order was for MCN to pay half of the N1.8 trillion assessment (about N900bn), while MCN has also stated that the order requires the Company to deposit an amount equal to its prior year tax, which is significantly lower.

A simple confirmation of the amount paid by MCN in the preceding year of assessment, if any, would have enabled the Tribunal to make a definite order that would not be open to misinterpretation by both parties involved in the dispute. However, it is clear from the law that MCN is required to pay the lower of the two amounts under the referenced provision of the law.

Conclusion

As analysed above, the Tribunal's ruling in this case did not provide insights into how they reached the conclusion that a deposit was required based on the 3 conditions in the law. Therefore, there is room for taxpayers to challenge it if the FIRS attempts to cite this ruling as a precedent to argue that taxpayers must make a statutory deposit prior to filing an appeal.

It is advisable for the Tribunal to carefully consider the requisite conditions for ordering the statutory deposits, and duly exercise its discretion under the provision in good faith. Not doing this may result in indiscriminate assessments and a decline in taxpayer confidence in the appeal process.



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