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PwC Tax Alert

TAT holds that payment of security deposit is not a condition precedent for the hearing of a tax appeal

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Background

In June 2021, the Minister of Finance issued the Tax Appeal Tribunal (Procedure) Rules 2021 (the "Rules"). Order III Rule 6 of the Rules provides for payment of a security deposit of 50% of the disputed amount into an account designated by the Tribunal. This provision was affirmed by the Tribunal in the case of *Multichoice Africa Holdings B.V v FIRS*, where the Tribunal struck out Multichoice's appeal for failure to pay the required deposit before filing the appeal. Similarly, Paragraph 15(7) of the 5th schedule to the FIRS Establishment Act (Paragraph 15(7)) provides for payment of deposits by appellants upon proof of certain conditions by the FIRS.

Investment Holdings Limited (IHL) filed this appeal without paying any deposit. The FIRS, relying on the Multichoice case, filed a preliminary objection asking that the appeal be struck out for failure of IHL to comply with the provisions of Order III Rule 6 and Paragraph 15(7).

Parties Arguments

FIRS

- Payment of the security deposit in compliance with paragraph 15(7) and Order III Rule 6 of the Rules is a condition precedent for initiating a valid appeal before the Tribunal.
- Failure of IHL to pay the security deposit deprives the TAT of jurisdiction to hear the appeal.
- The Appeal is frivolous and it is expedient to require IHL to pay an amount as security for prosecuting the appeal.

IHL

- Order III Rule 6 of the Rules is inconsistent with paragraph 15(7). By virtue of Section 68(2) of the FIRS Establishment Act (the FIRS Act), the provisions of paragraph 15(7) will prevail over the Rules. Consequently, Order III Rule 6 should be declared null and void.
- The FIRS failed to prove the existence of any of the conditions in paragraph 15(7). As such, IHL is not required to pay a security deposit as a condition for prosecuting the appeal.

TAT's Decision

The Tribunal held that Paragraph 15(7) and Order III Rule 6 of the Rules are contradictory. Order III Rule 6 makes it mandatory for the Appellant to pay a security deposit of 50% of the disputed assessment before its appeal can be heard while Paragraph 15(7) vests the Tribunal with discretion to make an order for the payment of security deposit upon proof of certain conditions by the FIRS.

Procedural rules cannot override the statutory provisions of the law and subsidiary legislations must conform with the principal law.

Thus, Paragraph 15(7), being a part of the substantive Act, must prevail over Order III Rule 6, which is a subsidiary legislation.

The Tribunal further noted that the effect of paragraph 15(7) on Order III Rule 6 was not considered in the *Multichoice Africa BV Holdings* case and relied on the decision of the North-East zone of the Tribunal in the case of *First Bank of Nigeria Ltd v Taraba State Board of Internal Revenue* delivered on 30 November, 2021 to the effect that the payment of a security deposit is not a condition precedent to the hearing of a tax appeal and any tax authority requiring a payment of deposit under paragraph 15(7) must prove the existence of at least one of the conditions therein .

Finally, the Tribunal held that the FIRS failed to prove the existence of any of the conditions in paragraph 15(7) and consequently dismissed the preliminary objection.

Takeaway

The decision of the TAT is a welcome development in light of the controversy and uproar that trailed the enactment of the Rules. It means there is no longer any bar against taxpayers' right to access the Tribunal.

This case once again, along with other cases on the subject shows that the provisions of an Act cannot be modified by an enactment of the executive arm of government. The TAT Rules being an enactment of the Minister of Finance cannot modify the provisions of the enabling Act, be it directly, or through the backdoor of subsidiary legislation. This is the position in *The Registered Trustees of Hotel Owners and Managers Association of Lagos v A.G Fed & Anor*.

The decision of the Tribunal to depart from its ruling in the *MultiChoice Africa BV Holdings* case also confirms our opinion in our earlier tax alert (link) that the Tribunal did not properly consider the provision of paragraph 15(3) in that case and the ruling should be revisited. It bodes well for taxpayers to see that the Tribunal can depart from its previous decision where such a decision was given in error.

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