EXAMINING SECURITY PAYMENT FOR PROSECUTION OF A TAX APPEAL

INTRODUCTION

We discuss security payment for prosecution of a tax appeal in Nigeria in the narrow sense of the tax payer's access to the Nigerian courts and not to a political order. The tax payer contributes significantly to the social and economic developments of society. Tax administration must therefore guarantee the tax payer's freedom which includes the right to challenge a relevant tax authority's assessment and the right to be heard. Without access to courts for justice it is impossible under the current polity for the realization of these tax payer's rights.

TAX PAYER'S RIGHT TO APPEAL

A tax payer's right to Appeal an assessment of the Federal Inland Revenue Service (FIRS) or other relevant tax authority is constitutionally guaranteed by section 36 of the Constitution of the Federal Republic of Nigeria 1999 (Constitution). **Section 36 (1) of the Constitution** provides as follows:

In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.

The above provision is also echoed in Paragraph 13 of the 5th Schedule to the Federal Inland Revenue Service (Establishment) Act 2007 (as amended) [FIRSEA].

ORDER III RULE 6 OF THE TAX APPEAL TRIBUNAL (PROCEDURE) RULES 2021:

Like most courts, the Tax Appeal Tribunal (TAT) is guided by rules prescribing the procedure to be followed in the conduct of appeals before it. According to **Paragraph**

21 of the 5th Schedule to the FIRSEA, the Minister of Finance is saddled with the responsibility for making the Rules of Procedure for the TAT. In the exercise of such powers, the Minister of Finance recently made the Tax Appeal Tribunal (Procedure) Rules 2021 (Rules) which took effect from the 10th day of June 2021.

Order III Rule 6 (a) of the Rules (Rule) provide that:

For an appeal against the service and other relevant tax authority under Rules 1 and 2 of this Order the aggrieved person shall –

a. ***Pay 50% of the disputed amount into the designated account by the Tribunal before hearing as security for prosecuting the Appeal.***

Firstly, it is worthy of note that the only party required to meet this onerous requirement is the tax payer. Secondly, it applies to all disputes in taxation no matter the nature of the tax involved. Thus, indirect and direct tax disputes require the payment of security into designated accounts of the TAT before filing an appeal.

The above provision as contained in the Rules constitutes a procedural obstacle to an aggrieved tax payer in participating in the established tax justice system in Nigeria. The above rule particularly unfairly constrains the right of the tax payer to challenge a tax assessment and to be heard before the appropriate judicial authority. This is against the Rule of Law which provides that all persons should be treated equally before the law and no man should be punished or suffer penalty for any offence unless the due process of the law has been followed.

By stipulating a procedural provision containing a pre-condition purposed on determining whether an aggrieved tax payer will be heard and requiring such tax payer to pay 50% of the disputed amount into a designated account of the TAT before hearing is permitted, the Rule has therefore given legal backing to a contested assessment without according the tax payer an opportunity to be heard or without following due process of the law. Asides the foregoing, the Rule as it stands abridges the tax payer's right of fair hearing and enhances the unjustified deprivation of the tax payer's property in a bid to access justice before the TAT. This in turn tilts the scales of justice in favour of the Federal Inland Revenue Service (Service) or other relevant tax authority and thereby raises the issue of bias in the eye of the reasonable man.

For the Positivists, the opinion by Viscount Simonds in **PYX GRANITE CO. V. MINISTRY OF HOUSING (1959) 3 All E.R. 1 at 6** is apt for our purpose when he held that "***It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words***". He held further that it is a fundamental rule from which a Judge should not sanction a departure. In the applicability of the above mentioned case to our discuss in hand, where a statute seeking to restrict recourse to a court provides an alternative or exclusive remedy to the determination of a tax payer's grievance, instead of recourse to the court, the tax payer must pursue such remedy but where no remedy lies for the tax payer to be heard on his grievance, the tax payer must be given recourse to the courts for the determination of

such tax payer's grievance. The Supreme Court of Nigeria per Ayoola JSC in **OKEAHIALAM & ANOR V. NWAMARA (IZINZE ONICHA) & ORS (2003) LPELR -2429 (SC)** approved the opinion of Viscount Simonds when it held that "***In this Country any person's recourse to the courts is a constitutional right guaranteed by Section 36 of the 1999 Constitution***". The Supreme Court went further to hold that an intent to legislate in contravention of the constitution should not be imputed to the law-maker. Therefore, it cannot be the intention of the Legislature that the right of recourse to the TAT should be mitigated or prevented by payment of an amount predicated on the assessment of an opposing party. If it is in fact found to be the intent of the law makers then the applicable provision of **section 1 (3) of the Constitution** shall apply. More particularly, the constitution is the grundnorm and any law or enactment that is inconsistent with the provisions of the constitution is null and void and the provisions of the constitution shall prevail. In **NWAIGWE AND ORS v NZE EDWIN OKERE (2008) LPELR - 2095 (SC)**, the Supreme Court held per Onnoghen, JSC on the effect of any law or act that is inconsistent with the constitution, thus; "...***the constitution is the Supreme law of the land and it is settled law that any law or Act or Section thereof that is inconsistent with any provision of the constitution is null and void to the extent of the inconsistency***."

By the provisions of **Paragraph 13 of the Fifth Schedule to the FIRSEA**, a tax payer aggrieved by an assessment, demand notice or decision of the Service may appeal against such within stipulated time to the TAT. Such appeal must be accompanied by such fee as may be prescribed by the TAT. This provision guarantees the right of the tax payer to appeal an assessment or decision of the service without facing any other obstacle such as the payment of 50% of the disputed amount before the TAT hears such an appeal. In the case of ***SARAKI v. F.R.N.* (*2016*) 3 NWLR (Pt. 1500) 531** the Supreme Court held that a schedule to an enactment is considered a part of that enactment. Thus the power of the Minister to make rules of procedure for the prosecution of an appeal before the TAT is limited to the FIRSEA including the provisions of Paragraph 13 of the 5th Schedule thereof.

It is the writer's humble view that the provisions of **Paragraph 15 (7) (c) of the 5th Schedule to the FIRSEA** permit the Appellant, who files an appeal, to be heard on the determination of any evidence or application of the Service to the TAT, on the expedience of the Appellant to pay an amount as security for the prosecution of an appeal. There is no such right of hearing in Order III Rule 6 (a) of the Rules. Furthermore, the proviso to Paragraph 15 (7) of the Fifth Schedule to the FIRSEA confers discretion on the TAT to make an order against the Appellant to pay any amount to the Service as security for prosecution of the appeal. Again as it is with all discretion of an adjudicating authority, the exercise of such discretion must be done judicially and judiciously, for a right of appeal lies on the exercise of such discretion.

Finally, Karibi Whyte JSC in the case of **AMADI v. NNPC (2000) LPELR-445 (SC)** held as follows:

The Provision of Section 36 (1) (sic) undoubtedly couched in wide absolute terms and is not qualified. The purport of the provision is to enable right of access to the Court absent legal obstacles in his path neutralizing exercise of the right... It is however, not consistent with the exercise of the right of access to court to make regulations which subvert the exercise of the right or render the right nugatory… Courts guard the words of statutory provisions depriving them of the exercise of their constitutional jurisdiction jealously. Hence, the language of such provisions will be watched and will not be extended beyond their least onerous meaning… It seems to be accepted that where an enactment regulates the right of access to the Court in a manner to constitute an improper obstacle to access to Court, such enactment could be appropriately regarded as an infringement of section 36 (1)… Access to Court means approach or means of approach to Court without constraint. In my opinion, a legitimate regulation of access to Courts should not be directed at impeding ready access to the Courts. There is no provision in the constitution for special privileges to any class or category of persons. Any statutory provision aimed at the protection of any class of persons from the exercise of the Court of its constitutional jurisdiction to determine the right of another citizen seems to me inconsistent with the provisions of section 6 (6) (b) of the Constitution.

COMMENTARY

We therefore opine that any tax payer should be allowed to submit an appeal for determination before an impartial tribunal or court and to be heard without paying security for prosecution as it is such tax payer's fundamental right to be given fair hearing on determination of any obligation as imposed by any authority of the federation.

Furthermore to the extent that Order III Rule 6 is inconsistent with the intents and purpose of the law makers of the FIRSEA, in light of the provision of section 6 (6) (b) and section 36 of the Constitution, it should be discarded and considered void. Otherwise such a rule is liable to be declared void and a nullity upon an aggrieved and constrained party's take out of a summons for interpretation and directions before the Federal High Court.

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