

An Evaluation of the TAT's Ruling in Multichoice Nigeria Limited vs the FIRS

Background

The Federal Inland Revenue Service (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 alleged under-remitted sum and pay over to the FIRS. MCN disputed the assessment and filed an appeal at the Tax Appeal Tribunal (the Tribunal or TAT).

Reacting to the appeal, the FIRS raised a preliminary oral 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. Therefore, the FIRS requested the Tribunal make an order compelling MCN to make a statutory deposit of an amount under the provisions of the FIRS Establishment Act (FIRSEA).

TAT's Ruling

After hearing oral arguments from counsel to MCN and the FIRS, the Tribunal ruled in favour of the FIRS and ordered MCN to make a deposit with the FIRS as security for the assessed tax in line with paragraph 15(7) of the 5th schedule to the FIRS Act. According to the Tribunal, it would not have jurisdiction to hear the appeal unless MCN made the required deposit. We have carried out an analysis of this case as follows:

Analysis of the Case

To start with, 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, whichever 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.

Conditions for the Order

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

The opening words of the paragraph state that “...if the representative of the Service proves to the satisfaction of the Tribunal...”, this means that the onus 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 to pay the statutory deposit

It is curious that the Tribunal did not refer to any of the three conditions in dishing out its ruling in this case. 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' points were convincing enough to trigger the provision. It is essential to note the Tribunal ignored this fundamental part of the provision and focused attention on the order for the statutory deposit.

Also, Paragraph 13 of the Fifth schedule to the FIRSEA provides for persons who are aggrieved by the 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 pay the necessary filing fees. Beyond this, it is crucial 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 the Tribunal doesn't need to make the order for the 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 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 adjourning and ordering the deposit. This means the Tribunal can consider other factors such as the appellant's attitude to the prosecution of the appeal

in deciding whether to make such a ruling. It may also make other orders, such as an accelerated hearing of the appeal.

Also, the Tribunal in its ruling ordered the Appellant to make "the required deposit as provided under Schedule 5 para 15(7) ..." This order is equivocal, 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). At the same time, 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

It is clear from the above analysis that the Tribunal's ruling, in this case, did not provide insights into how a conclusion was reached 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 before filing an appeal.

It is advisable for the Tribunal to consider the requisite conditions for ordering the statutory deposits carefully, 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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