BANWO & IGHODALO

Grey Matter Tax Digest

A specialised newsletter providing strategic alerts and comprehensive analyses on tax matters in Nigeria

ISSUE NO: ALERT 03

TAX APPEAL TRIBUNAL RULES ON VALIDITY OF ELECTRONIC SERVICE OF OBJECTION AGAINST TAX ASSESSMENT, PENALTY FOR FILING INCORRECT TAX RETURNS, AND RELATED MATTERS

Introduction

The Tax Appeal Tribunal, Lagos Zone ("**TAT**" or the "**Tribunal**"), in ***Earth Moving International Ltd. v FIRS*** (unreported judgement delivered on September 17, 2019 in Appeal No. TAT/C2/CIT/030/2018) ("**Earth Moving**") pronounced that electronic service of a taxpayer's objection, against a notice of assessment issued by the Federal Inland Revenue Service ("**FIRS**"), is valid and binding on the FIRS. The Tribunal also held that an industrial action can extend the statutory timeframe, within which a taxpayer may object to a notice of assessment issued by the FIRS.

Also, the TAT held in ***Siem Offshore Rederi AS v FIRS*** (unreported judgment delivered on September 17, 2019 in Appeal No. TAT/LZ/CIT/016/2017) ("**Siem Offshore**"), that:

(i) The failure of a taxpayer to file correct tax returns and pay the full amount of tax due on its taxable income for any relevant accounting period, within the time statutorily allowed for the purpose, renders the taxpayer liable to payment of interest and penalty on the payable tax assessment; and

(ii) An appellant seeking to rely on a previous decision of the TAT in a present appeal pending before the Tribunal, must show that the facts and circumstances of both cases are so similar that it would amount to injustice for the Tribunal to reach a different decision in the present appeal.

The Earth Moving *case*

In ***Earth Moving***, the FIRS conducted a tax audit exercise on the appellant's business operations for the 2016 accounting year and thereafter, raised an additional tax assessment of ₦25,469,873 on the appellant's taxable income for the period.

The appellant objected to the additional assessment. The FIRS subsequently issued a revised assessment dated August 27, 2018, which was served on the Appellant on August 29, 2018. By law, the appellant was required to communicate its objection to the revised assessment within 30 days of the receipt of same (specifically, on September 28, 2018). However, the appellant challenged the revised assessment by way of an official email sent to the relevant Tax Controller of the FIRS on September 26, 2018, and thereafter delivered a physical copy of the objection to the FIRS on October 2, 2018. In response, the FIRS issued a Notice of Refusal to Amend the revised assessment ("NORA"), dated October 5, 2018 to the appellant. The NORA was based on the ground that the appellant's notice of objection was filed out of time.

The appellant resisted the FIRS' position on the point and requested a review of its objection to the additional assessment on merit, in order to allow the parties conclude the tax audit exercise. The appellant also contended that the delay in delivering the physical copy of the objection to the FIRS was as a result of an industrial action embarked upon by members of the Nigerian Labour Congress ("NLC") between September 27 and 28, 2018. It was further contended that the next three days following the industrial action were work-free days, in that September 29 and 30, 2018 fell on a weekend while October 1, 2018 was a public holiday in Nigeria.

The FIRS disregarded the appellant's contentions and instead issued another NORA dated October 22, 2018 which was served on the appellant on October 15, 2018. The bases of the FIRS' reissued NORA were that (i) the appellant's objection to the revised assessment was invalid, having been filed out of time; and (ii) the additional tax assessment remained final and conclusive. Aggrieved, the appellant lodged an appeal at the TAT, challenging the validity of the additional assessment. The key issues that arose for determination by the Tribunal in the appeal include:

(i) Whether in the circumstances of the appeal, the appellant's notice of objection against the revised assessment sent by email on September 26, 2018 and subsequently delivered physically to the FIRS on October 2, 2018 was filed out of time;

(ii) Whether the revised assessment had become final and conclusive by reason of the appellant's physical delivery of its objection on October 2, 2018, well over 30 days after receipt of the revised assessment; and

(iii) Whether there was a valid and competent appeal lodged before the TAT to invoke the jurisdiction of the Tribunal.

The Tribunal resolved all three questions in favour of the appellant and held as follows:

- By section 69(1) and (2) of the Companies Income Tax Act[1] ("CITA"), a taxpayer who disputes a tax assessment raised by the FIRS is required by law to file its notice of objection within 30 days of its receipt of the relevant notice of assessment, but the medium through which the written objection should be transmitted is not stated in the law.

- The appellant's emailed notice of objection, validly received by a senior official of the FIRS September 26, 2018 but physically delivered to the FIRS on October 2, 2018, was filed within 30 days as required by law. Hence, it is binding on the FIRS because the receipt of a document by a relevant FIRS Tax Controller, translates to receipt of the document by FIRS.

[1] Cap. C21 Laws of the Federation of Nigeria ("LFN") 2004 (as amended in 2007). Section 69(1) and (2) of the CITA provides that if any company disputes an assessment served on it by the FIRS, it may apply to the FIRS by notice of objection in writing to review and to revise the assessment made upon it. Such an application shall (a) be made within 30 days from the date of service of the notice of assessment, and (b) contain the ground of objection to the assessment, that is, (i) the amount of assessable and total profits of the company for the relevant year of assessment, and (ii) the amount of tax payable for the year, which the company claims should be stated on the notice of assessment.

- The revised assessment raised by the FIRS had not become final and conclusive because the time within which the appellant was statutorily required to file its objection against the revised assessment froze on September 27, 2018; when the NLC industrial action commenced and re-started on October 2, 2018; when work resumed after the weekend of September 29 and 30, 2018 and the public holiday on October 1, 2018.

- A valid appeal was lodged by the appellant, competent enough to evoke the jurisdiction of the Tribunal to hear and determine the appeal because the appellant showed to the satisfaction of the Tribunal, the existence of exceptional circumstance occasioning the delay in physically delivering the appellant's notice of objection[2].

[2] Paragraph 13(2) of the FIRS Act allows the TAT to entertain a tax appeal after the expiry of the statutory period of 30 days within which the appeal ought to have been filed if it is satisfied that there was sufficient cause for the delay.

The Siem Offshore case

In **Siem Offshore**, the FIRS issued a demand notice dated April 11, 2017 to the appellant; based on an additional tax assessment of US$53,270 on the appellant's taxable income for the relevant assessment year with interest and penalty on the additional assessment in the sum of US$19,310. The demand notice resulted from a revision by the FIRS of the taxable profit attributable to the appellant's permanent establishment in Nigeria, from US$844,318 to US$1,021,855. The appellant settled the additional tax assessment but raised objection to the interest and penalty assessment.

Consequently, the appellant approached the TAT challenging the interest and penalty in the sum of US$19,310, on the grounds that; having admitted to the additional tax assessment and settled same but objected to the interest and penalty, all within 2 months of the receipt of the demand notice as required by law, interest and penalty should not accrue on the assessment; and that admission of an additional assessment, without more, would not attract interest and penalty under the CITA. The key issues that arose for the Tribunal's determination in the appeal were:

(a) Whether the appellant's failure to pay the additional assessment of US$53,270 at the time it paid its income tax for the relevant period justified the assessed interest and penalty of US$19,310 levied by the FIRS;

(b) Whether, having regard to the facts and circumstances of the case and relevant provisions of applicable legislation, the appellant will be availed by the TAT decision in **Weatherford Services S.D.E.R.L. (WSSDRL) v FIRS**[3] ("**Weatherford**");

(c) Whether the appellant's failure to file its correct tax return for the relevant period by the due date validated the US$19,310 interest and penalty assessment; and

(d) Whether the appellant's admission of not paying the full tax on its taxable income for the relevant period as at when due justified FIRS' exercise of the statutory powers to assess interests and penalties against defaulting taxpayers [4]

[3] (2016) 26 TLRN 44. In Weatherford, the TAT held that interests and penalties on overdue tax start to run when the taxpayer does not object or appeal within 2 months. The Tribunal also held that since the appellant in that case had objected within the statutory window, interests and penalties would not attach to the additional assessment payable by the appellant in that case.

[4] Section 32 of the FIRS (Establishment) Act, 2007 empowers the FIRS to levy interests and penalties on taxpayers in default of payment of tax within the statutory period allowed for the purpose.

The Tribunal resolved all four issues in favour of the FIRS and held as follows:

- The US$19,310 interest and penalty assessment raised by FIRS was valid and payable, because the appellant failed to avail itself of the opportunities provided under the law (section 53 of the CITA), whereby a taxpayer may validly and legally delay parts of an assessed tax liability without incurring interest and penalty; by correctly and timeously filing its tax return, accompanied with evidence of part-payment of the total tax assessment and an application for payment by instalment, stating a payment plan for the balance.

- The facts and circumstances of **Weatherford**, which the appellant sought to rely upon, are not similar to that of the appellant's case[5]. Thus, **Weatherford** will not operate as a judicial precedent.

- The failure of the appellant to file its correct tax returns, on the due date, validated the US$19,310 interest and penalty assessment raised by the FIRS on its taxable income[6].

- The exercise of the statutory powers of the FIRS to assess interests and penalties on the taxable income of the appellant, as a defaulting taxpayer, was justified.

Commentary

The TAT decisions in the two recent cases of **Earth Moving** and **Siem Offshore** have both further developed our jurisprudence on the mode of service of objections to tax assessments, penalty for filing incorrect tax returns, calculation of time within which to object or appeal against tax assessments, applicability of judicial precedents at the TAT and related matters. The cases have also highlighted the need for taxpayers to correctly assess and file their tax returns timeously, and to pay the full amount of taxes due on their taxable income for relevant accounting periods, in order to avoid becoming liable to the payment of interest and penalty.

The decision in **Earth Moving** on the validity of electronic service of objections against tax assessments is notable. It effectively lends credence to an earlier and rather controversial decision of the High Court of Taraba State, in the case of **Mohammad Awwaldanlami, Esq. v Governor of Taraba State & 24 Ors.**[7] ("**Mohammad Awwal**");

[5] In arriving at this decision, the Tribunal relied on the decision of the Supreme Court in Union Bank of Nigeria Plc v Olori Motors & Co. Ltd (1988) 5 NWLR (Pt. 551) 652, 654.

[6] Section 55(2)(a) of the CITA, which requires companies that have been in business for more than 18 months to file their tax returns within 6 months from the end of their accounting year. The Tribunal also held that Section 55(3) of the CITA renders companies in breach of the provisions of section 55(2)(a) of the CITA liable to payment of penalty for late filing. Furthermore, the Tribunal relied on the provisions of section 32 of the FIRS Act, which impose penalties for failure to file tax returns or pay tax liabilities as at when due.

[7] Unreported ruling of the High Court of Taraba State delivered on July 26, 2018 by Hon. Justice E. A. Garba in Suit No. TRST/11/2018 and Motion No. TRST/67M/18

where the court ordered that "the originating process and other processes of this court in respect of the substantive case, including order or judgment of the court, should be served on the 3rd to 25th Defendants/Respondents by posting and sharing on social media".

While the decision in **Mohammad Awwal,** which was seen by many critics as somewhat overly revolutionary has heralded a new era in which the Nigerian courts are gradually recognising the impact of digital disruptions on justice administration through application of modern technologies, the decision in **Earth Moving** on the validity of electronic service of objections against tax assessments has further established the fact that law should evolve with the times, particularly in the adoption of contemporary technological advancements.

Also, of paramount importance is the TAT decision in **Earth Moving** in which it was held that an industrial action can extend the statutory time-frame within which a taxpayer may object to a notice of assessment issued by the FIRS. This decision appears logical as it takes into consideration practical social realities and endorses purposeful interpretation of tax statutes. It suggests that where the final date for filing an objection to a tax assessment falls on a date on which it is impracticable for the taxpayer to file the objection, the taxpayer may validly file the objection on the next possible date. It is interesting that while the Interpretation Act does not define "holiday" to include industrial actions,[8] the TAT construed the 30-day period within which taxpayers may file objections against tax assessments under section 69(1) and (2) of the CITA, to exclude days on which industrial actions were commenced by relevant staff of the FIRS. Thus, the Tribunal applied purposeful interpretation to the relevant tax statute as opposed to the general rule that tax legislation should be construed strictly, notwithstanding the harsh effect it may have on the taxpayer's accounts.[9]

Similarly, the decision in **Siem Offshore** as it relates to penalty for filing incorrect tax returns and the applicability of judicial precedents in the TAT, is noteworthy. The decision establishes that a taxpayer's failure to file correct tax returns will attract similar penal consequences as late filing of tax returns or failure to file tax returns at all. It will be interesting to see how these landmark decisions will be treated by other divisions of the TAT or the courts in similar circumstances, in future.

The Grey Matter Concept is an initiative of the law firm, Banwo & Ighodalo.

[8] Section 15(5) of the Interpretation Act defines "holiday" to mean a day which is a Sunday or a public holiday.

[9] See the Court of Appeal decision in Federal Board of Inland Revenue v Integrated Data Services Limited (2009) LPELR-8191(CA).

EDITORIAL TEAM

Ken Etim
(Managing Partner)
ketim@banwo-ighodalo.com

Abimbola Akeredolu, SAN, FCIArb.
(Partner)
aakeredolu@banwo-ighodalo.com

Azeezah Muse-Sadiq
(Partner)
asadiq@banwo-ighodalo.com

Kemi Ajayi
(Chief Operating Officer)
kajayi@banwo-ighodalo.com

Oluwatoba Oguntuase
(Practice Support Lawyer)
ooguntuase@banwo-ighodalo.com

Emmanuel Onyeabor
(Associate)
EOnyeabor@banwo-ighodalo.com

OUR OFFICES

48, AWOLOWO ROAD, SOUTH WEST IKOYI
LAGOS, NIGERIA

AFRI-INVESTMENT HOUSE
50, AGUIYI-IRONSI STREET, MAITAMA
ABUJA, NIGERIA

234 9060003561-2; 8050875883; 8092714452;
9020524921
(ABUJA - 09 2912127)
BANWIGHO@BANWO-IGHODALO.COM
WWW.BANWO-IGHODALO.COM