

## THE TAX APPEAL TRIBUNAL HAS RULED THAT IT IS UNCONSTITUTIONAL FOR THE FEDERAL INLAND REVENUE SERVICE TO ISSUE A NOTICE OF ASSESSMENT/ ADDITIONAL ASSESSMENT SIMUTANEOUSLY WITH A NOTICE OF REFUSAL TO AMEND

### TAX ALERT

#### Introduction

The Tax Appeal Tribunal (“Tribunal”) sitting in Lagos on Friday the 27th day of September 2019 delivered its Judgment in the matter between Ponticelli Upstream (Ponticelli/Appellant) and Federal Inland Revenue Service (FIRS/Respondent). The Tribunal set aside the Assessment/Additional Assessment and Demand Notes issued by the Respondent and held that the simultaneous issuance of a Notice of Assessment/Additional Assessment alongside a Notice of Refusal to Amend (NORA) in the same document is a violation of the Appellant’s right to fair hearing which is guaranteed by the Constitution of the Federal Republic of Nigeria 1999 (As amended) and Section 69 of the Companies Income Tax Act (Cap. 21) Laws of the Federation of Nigeria 2004 (CITA).

#### Highlights of the Judgment

##### a) The Dispute

The Appellant filed an Appeal on the 30th of November 2017 against an assessment of USD3 Million for Companies Income Tax (CIT) including Penalty and Interest for 2012-2016 years of Assessment. The Tribunal was to determine whether the FIRS acted unconstitutionally when it raised Transfer Pricing (TP) Notices of Assessments and Demand Notes for the CIT simultaneously with a NORA without giving the Appellant any right of fair hearing in line with Section 36 (1) of the 1999 Constitution. Similarly, the Tribunal was to determine whether it was unlawful for the Respondent to issue a TP assessment for CIT without conducting TP audit. In giving its judgment on the case, the Tribunal raised three questions for determination:

1. *Whether the Respondent was not in breach of the Appellant’s Right to Fair Hearing in the Circumstances of this case*
2. *Whether the Tax Audit purportedly carried out on the Appellant by the Respondent was not a Transfer Pricing Audit*
3. *Whether having regards to the Double Taxation Agreement between Nigeria and France, the Appellant was not properly assessed to tax in Nigeria*

The Tribunal resolved issue one and concluded that consideration of both issues two and three becomes academic and did not delve into them.

**“The right to fair hearing is a fundamental right and the Tribunal acted aptly to recognize the Appellant’s right to object to the assessment cum NORA.”**

##### b) The Appellant’s Case

The Appellant argued that the assessment issued by the Respondent operates simultaneously as a NORA. This is stated on the face of the assessment as follows:

*“With reference to your objection to the assessment made on you pursuant to the Companies Income Tax Act 2004 as amended, notice is hereby given you*

- i. *Of refusal to amend the assessment as desired by you*



- ii. *That additional/amended assessment has been raised as detailed below*
- iii. *That the undermentioned tax is payable by you (in a manner mentioned overleaf) against the assessment given below. This notice of refusal give you a right of appeal (in the manner indicated overleaf) against the assessment.”*

As indicated above, the Appellant submitted that it has been precluded from exercising its constitutional right to fair hearing i.e. to raise an objection within a statutory period of 30 days objecting to the Assessment.<sup>1</sup> Contrary to the Respondent’s assertion that the Appellant failed to file an objection before filing its Notice of Appeal at the TAT, the Appellant responded that it acted in full compliance with the law upon the receipt of a NORA deeming the said assessment final and conclusive.

#### c) The Respondent’s Case

The FIRS contended that its assessment were only statutory notices preceding an option of objection by the Appellant and did not double as a NORA. The Respondent added that the assessment sent to the Appellant is a standard format and that in practice, a NORA is not issued together with a notice of assessment. He further added that a cover letter sent to the Appellant further shows proof that the Notice of Assessment was not also a NORA.

#### d) The Tribunal’s decision

In the judgement of the Tribunal, it critically examined the assessment issued on the Appellant and found that the assessment doubled as a NORA. In deciding whether to give credence to the case of the Respondent that the assessment issued is a standard document used in Practice, the Tribunal held that the operative words should be given their simple and grammatical meaning.

It relied on the case of **Union Bank of Nigeria vs Prof A.O Ozigi**.<sup>1</sup> The Tribunal held that though the Notice of Assessment had a heading namely “Notice of Additional/ Amended Assessment”. the Tribunal was more concerned with the substance as stated in the body of the letter which provides that it is also a NORA. That oral evidence cannot take away from the contents of the letter. Thus, the Respondent’s argument that the letter issued is a standard format and that NORA is not issued simultaneously with a Notice of Assessment, is only within the knowledge of the Respondent. Hence the Tribunal rejected the argument of the Respondent.

In conclusion, the Tribunal held that the assessment issued is both a Notice of Assessment and NORA and that the Appellant was denied its right to object as guaranteed under Section 36 of the 1999 Constitution and Section 69 of CITA. Thus, the Notice of Additional/Amended Assessment and the NORA for 2012 - 2016 years of assessment has been set aside and of no effect.

#### Our View

The right to fair hearing is a fundamental right and the Tribunal acted aptly to recognize the Appellant’s right to object to the assessment cum NORA. The 1999 Constitution is the grundnorm from which all other laws derive their validity. Section 2 of the Nigerian Constitution provides “(1) *This Constitution is supreme, and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.*(2) *If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.*”

Also Section 36 (1) of the Nigerian Constitution, provides “(1) *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.*”

In the interpretation of **Section 69 of CITA**, the Tribunal stated in its judgement that “*These provisions are not window dressing. Any departure from them could have dire consequences on the action of the tax authority*”. Hence, Where a law prescribes procedures no other means ought to be adopted.

<sup>1</sup> Section 69 of Companies Income Tax Act (CITA).

<sup>2</sup> (1994) 3 SCNJ 42

For enquiries:

**Azeez Alatoye**

Senior Partner

[azeez.alatoye@ascensioncsng.com](mailto:azeez.alatoye@ascensioncsng.com)

**Ademola Olanrewaju**

Partner

[ademola.olanrewaju@ascensioncsng.com](mailto:ademola.olanrewaju@ascensioncsng.com)

**Matthew Johnson**

Partner

[matthew.johnson@ascensioncsng.com](mailto:matthew.johnson@ascensioncsng.com)

W:[www.ascensioncsng.com](http://www.ascensioncsng.com)

E:[Info@ascensioncsng.com](mailto:Info@ascensioncsng.com)

T: +234 1 700 1006

**Office Locations:**

**Lagos**

3B, Bosun Adekoya Street  
Lekki Phase 1  
Lagos State,  
Nigeria.

**Abuja**

Apo Sparklight Mall (Suite CC10, 2nd  
Floor), Durumi Phase II (Federal  
Capital Territory).

**Port Harcourt**

102, Old Aba Road, Shell Industrial  
Area, Rumuobiakani, Port Harcourt,  
Rivers State.



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