

TAX APPEAL TRIBUNAL RULES ON APPLICABILITY OF AN EXECUTIVE ORDER GRANTING TAX EXEMPTION AND WHEN A TAX ASSESSMENT BECOMES FINAL AND CONCLUSIVE

Introduction

The Tax Appeal Tribunal, Lagos Zone (“TAT” or “Tribunal”), in **United Capital Assets Management Limited v Federal Inland Revenue Service** (unreported judgement delivered on September 24, 2019 in Consolidated Appeal Nos: TAT/LZ/CIT/006/2018 and TAT/LZ/CIT/007/2018)¹ (“**United Capital**”), has pronounced on the extent to which tax exemption granted by an Executive Order can be validly enjoyed by a taxpayer; as well as the manner in which tax benefits conferred in an Executive Order should be administered by tax authorities.

The TAT also gave a ruling on when a tax assessment becomes final and conclusive.

¹ Originally, TAT/LZ/CIT/006/2018 and TAT/LZ/CIT/007/2018 were two different Appeals separately filed by United Capital Assets Management Limited and United Capital Trustees Limited respectively. The two Appellants are members of the United Capital Group Plc and the facts of their Appeals are similar. Consequent upon these facts, the Tribunal made an Order on March 20, 2019, consolidating the two Appeals into one.



Brief Facts of United Capital

The Federal Inland Revenue Service (“**FIRS**”) conducted tax audit in respect of the affairs of the Appellant for the period from 2011 to 2016. The audit report showed that the Appellant paid dividends in excess of its taxable profit for the relevant period. Based on this, the FIRS subjected the distributed excess dividends to Companies Income Tax (CIT), Educational Development Tax (EDT), Withholding Tax (WHT) and Value Added Tax (VAT); resulting in the issuance of additional tax assessment.

In a bid to resolve the tax liability arising from the additional assessment, the Appellant held meetings with FIRS but did not object to the assessment in writing. During the course of the ensuing negotiations, the Appellant submitted an application to self-assess and regularize its

tax defaults under the [Voluntary Assets and Income Declaration Scheme² \(“VAIDS”\)](#); a time-bound tax amnesty programme of the Federal Government in force at the time. The application was turned down by FIRS. At the expiration of the thirty (30) days³ window required to file a notice of objection, FIRS pasted notices of non-compliance on the premises of the Appellant’s corporate headquarters. Following this development, the Appellant negotiated a payment plan with the FIRS and secured a grant of 25% waiver on the tax liability but thereafter filed an Appeal at the TAT, on the 20th of March, 2018.

Arguments of Parties

Having failed to object in writing to the additional assessment within 30 days, as prescribed by law, the Appellant filed the suit with a Motion-On-Notice praying the Tribunal for an order to extend the time within which it may appeal against the decision of FIRS in relation to the additional assessment. The order was granted by the Tribunal. In its brief of argument, the Appellant contended that:

² VAIDS was a tax amnesty scheme, established by the Federal Government of Nigeria under the Executive Order No. 004 of 2017; offering defaulting taxpayers opportunity to voluntarily declare their unpaid taxes in a prescribed form, self-assess the tax liabilities payable, and remit the amount to the FIRS. For participating in VAIDS, taxpayers were granted amnesty from the legal consequences of tax evasion and late payment. VAIDS was initially established to run for nine months between July 1, 2017 and March 31, 2018. The scheme was later extended for an additional six months to September 30, 2018.

³ The 30 days begin to count from the date the additional assessment was raised and served on the Appellant



- FIRS was wrong to have subjected the excess dividends distributed to tax, because they were paid out of the returns on its investment in government bonds and treasury bills. In support of this argument, it was submitted that income derived from investment in government securities are exempt from tax under the **Companies Income Tax (Exemption of Bonds and Short-Term Government Securities) Order 2011⁴ (“Exemption Order”)**; and
- FIRS was wrong to have turned down its application to regularize its tax liability by seeking relief under the [VAIDS](#), having met the eligibility criteria prescribed under paragraph 4 of the [Executive Order No. 004 of 2017⁵](#).

The FIRS, on the other hand, prayed the Tribunal to dismiss the appeal for lacking in merit on the grounds that:

- The Exemption Order relied upon by the Appellant is inferior to the

⁴ The Exemption Order which came into force on January 2, 2012 exempts interest earned from government and corporate bonds/short-term securities in Nigeria from companies’ income tax for a period of 10 years.

⁵ See footnote “1” above.

Companies Income Tax Act⁶. By the strict provisions of section 19 of the CITA, any dividend paid in excess of total profit declared in the relevant year of assessment is subject to tax, notwithstanding whether it was paid out of a profit on which no tax is payable;

- The additional assessment had become final and conclusive since a written objection was not raised by the Appellant within 30 days of the service of the assessment; and
- The Appellant's [VAIDS](#) application was rejected because it failed to meet the requirements for a valid declaration.

Decisions of the Tribunal

In the final analysis, the TAT considered arguments of both the Appellant and FIRS and the gravamen of the decisions of the Tribunal is summarized as follows:

- i) FIRS was right to have subjected the Appellant's paid dividends to tax because **any dividends paid in excess of declared total profit is taxable under section 19 of the CITA, irrespective of the origin of the profit; whether from retained earnings or any other sources.** Hence, the Exemption Order that grants tax exemption to this type of companies' income is inconsistent with the clear provisions of the primary tax legislation; and consequently void and inoperative to the extent of its inconsistency.
- ii) The additional tax assessment is final and conclusive and thus payable

⁶ Cap. C21 Laws of the Federation of Nigeria ("LFN") 2004 (as amended in 2007)

because the Appellant failed to object in writing within the stipulated period of 30 days. The order of the Tribunal extending the time to appeal could not cure the error of failing to object as clearly prescribed under section 69 of the CITA.

- iii) FIRS was wrong to have refused to consider the Appellant's application to seek relief under the [VAIDS](#), because the purported failure to meet requirements for valid declaration should not prevent initial consideration of a taxpayer's application where the prescribed eligibility criteria are met. Thus, FIRS was prohibited from charging interest and penalty on the payable additional assessment.



Commentary

The decisions of the Tribunal in **United Capital** raise questions as to the "weight" of executive exemption orders which purport to grant tax amnesty or incentives to investors, particularly at a time when the Government is looking to attract private capital for economic development. Subjecting income exempted from tax to Excess Dividends Tax makes a mockery of the Exemption Order. Whilst it is not yet certain if the Exemption Order will be renewed, it is obvious that the primary legislation needs to be amended to make it clear that section 19 is not applicable to income specifically exempted from tax.

Furthermore, in our view, the position that a tax assessment is final and conclusive where a taxpayer appeals straight to the Tribunal, without first issuing a notice of objection against the assessment in writing to the Board of Internal Revenue, in accordance with section 69 of the CITA, is in clear conflict with a previous decision of the Tribunal on the issue. In **Oando Supply & Trading Ltd. v FIRS (2011) 4 TLRN 113 (“Oando”)**, the TAT Lagos Zone held that under the **Federal Inland Revenue Service (Establishment) Act 2007 (“FIRS Act”)**, a Notice-Of-Refusal-To-Amend (“NORA”) is not a requisite pre-action protocol for proceedings at the TAT and is therefore not required to be issued by tax authorities before a taxpayer can approach the TAT for redress. NORA is a negative decision of the FIRS against a taxpayer’s objection which gives the taxpayer a course of action before the Body of Appeal Commissioners. The TAT specifically stated that a taxpayer may elect to object to an assessment using the mechanism provided for in section 69 of CITA or file an appeal straight to the Tribunal against any assessment, demand notice, action or decision of the FIRS under the FIRS Act.



The decision in **Oando** finds legislative support in section 68 of the FIRS Act, which provides that where any of the enactments listed in the First Schedule to the FIRS Act (CITA inclusive) conflicts with

the FIRS Act, the enactment shall be void to the extent of its inconsistency⁷. In addition, section 18(2) of the CITA (Amendment) Act 2007 provides that “appeals shall be as provided in the FIRS Act”. Thus, section 69 of the CITA does not govern appeals to the Tribunal but by the provisions of Paragraph 13 of the Fifth Schedule to the FIRS Act, an appeal against a tax assessment can lie directly to the TAT⁸ (either within 30 days of the taxpayer’s receipt of the assessment or supported with an application for extension of time where the Appellant appeals outside the 30-days limit).

We note that the Tribunal could have followed its earlier decision on this point in **United Capital**, if it had averted its mind to the decision in **Oando**.

Whilst the decision of the Tribunal on the refusal by FIRS to allow the Appellant benefit from [VAIDS](#) is encouraging, and will likely ensure compliance by both taxpayers and tax authorities in similar schemes in future; the decision on the validity of the Exemption Order in relation to excess dividends tax may reduce investors’ appetite for government securities as the purpose of the Exemption Order seems to have been defeated by

⁷ In *The Shell Petroleum Development Company of Nigeria Limited v Lagos State Board of Internal Revenue (2019) 43 TLRN 1*, the Tribunal held that where FIRS is administering a tax specific legislation that conflicts with the provisions of the FIRS Act, section 68(1) & (2) of the FIRS Act will ‘come alive’ to render the affected provisions of the tax specific legislation inoperative.

⁸ In *Mobil Producing Nigeria Unlimited v FIRS (2016) 23 TLRN 40*, the Tribunal held that “FIRS Act is the superior Act and that it governs appeals”. It was further held Paragraph 13(1) - (3) of the Fifth Schedule to the FIRS Act ... governs appeal to the Tribunal by a taxpayer who is aggrieved by FIRS’s assessment, Demand Notice, action, inaction or any decision whatsoever.

the charging provisions of section 19 of the CITA.

It remains to be seen, how corporate entities, tax authorities and the Government will resolve the issues thrown up by the decisions in **United Capital**.

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

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