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(Procedure) Rules, 2021 - An Overview**

NOTABLE CHANGES IN THE TAX APPEAL TRIBUNAL (PROCEDURE) RULES, 2021 - AN OVERVIEW

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Introduction

*Tax practice, like other aspects of our society, evolves. The same applies to the rules that govern the resolution of tax disputes. Most of the tax disputes in Nigeria are resolved at the Tax Appeal Tribunal (the “**Tribunal**”). The Tribunal was established by the Federal Inland Revenue Service (“FIRS”) (Establishment) Act, 2007. Proceedings at the Tribunal are regulated by the TAT (Procedure) Rules.*

*The TAT Rules was first promulgated in 2010 (the “**Old Rules**”) and was recently revoked by and replaced with the TAT Rules of 2021 (the “**New Rules**”). The New Rules attempt to align the practices and procedures of the Tribunal with modern practices and procedures. Thus, the New Rules include innovation to ensure faster and easier proceedings by adopting current technological and electronic developments.*

In this Article, we shall review the New Rules, highlighting the new provisions and innovations and those provisions that were formerly in the Old Rules but have been altered in the New Rules. We argue that the New Rules are welcome as far as they go, but they should have gone further than they in fact do.

Highlights of the Notable Changes

Electronic Filing

A key innovation in the New Rules is the introduction of an electronic filing system¹. Any court process can now be filed at the Tribunal by approved electronic means. This is to align the Tribunal’s filing system with developments in information technology. It is a welcome alternative, making the filing of court processes less cumbersome, saving time and effort. It is expected that the Tribunal would have in place the necessary facilities and platforms required to achieve the efficiency and effectiveness that electronic filing offers. It must be pointed out that prior attempts to digitalize court filings in Nigeria have not yielded positive results. Rather than bringing efficiency to the process, it has compounded the inefficiency of the same. For instance, the High Court of Lagos State has in some way tried to introduce electronic filing. However, the system ended up being used mainly for the electronic storage of court processes. As the High Court of Lagos State experience has shown, electronic filing systems tend to complicate the procedure and elongate the time for filing court processes.

¹ New Rules Order III Rule 5.

For the electronic filing procedure to thrive efficiently, a simple and navigable online process should be adopted in a system built with a high standard of technicality and technology to stand the test of time and network traffic. Accordingly, we hope that the electronic filing system of the Tribunal would improve on the shortcomings of the past efforts to fully achieve the objective of Order III Rule V.

Security for Prosecution of an Appeal

The most controversial provision in the New Rules is the requirement for a party filing an appeal before the Tribunal to pay 50% of the disputed amount into a designated account of the Tribunal as security for prosecuting the appeal². This provision is akin to directing the appellant to “obey before complain”. For example, if a person is assessed to pay ₦300,000 in tax and the taxpayer's undisputed tax amount is ₦120,000, the disputed tax amount is (₦300,000 minus ₦120,000) ₦180,000. According to the New Rules, the taxpayer must pay ₦90,000 (50% of ₦180,000) as security for the appeal. Otherwise, his appeal would not be heard by the Tribunal.

The issues raised in this controversial provision revolve around apparent violations of taxpayers' rights to a fair hearing and unrestricted access to justice. Since this is not the main focus of this paper, we will not go into great depth in analyzing these issues here. However, we have expressed our thoughts in depth on the issues in another article concerning a similar provision in the Federal High Court (Federal Inland Revenue Service) Practice Directions, 2021³.

Conceivably, the essence of this requirement is to discourage frivolous appeals, ensure that the appellant prosecutes his appeal diligently and deter taxpayers from unnecessarily prolonging tax proceedings. The provision also tends to ensure that the tax authorities are able to enforce any judgment that will be given against the taxpayer.

Strangely, there is a *lacuna* in the New Rules on what happens to the security deposit should a taxpayer succeed in the appeal. Our view is that if the Appellant's appeal is successful, his security deposit will be refunded, in addition to any other orders the Tribunal may make. This is implicit in the fact that the New Rules themselves call it a “deposit”, and any other result would be harsh and unimaginable.

Place of Filing an Appeal

The New Rules⁴ allow for more flexibility in the filings of appeals. Appeals can now be filed at any Zone of the Tribunal but must be headed in the name of the appropriate Zone where the case shall be heard. Thus, a person is not required to file an appeal in the Secretariat of the Tribunal's Zone where the matter would be heard, but the processes must reflect the name

² Order III Rule 6.

³ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3907267.

⁴ Order IV.

of the appropriate Zone where the matter will be heard⁵. This relieves the Appellant of the inconvenience and costs of making sure the matter is filed in the Zone where the appeal originates or will be heard.

Electronic Service of Notices or Processes and Proof of Service

Order VII Rule 3 provides for the service of Notices of Appeal or other processes by e-mail or other electronic means that the Tribunal may approve, and such service is deemed sufficient. Not only is this a cost-effective way of service, but it is also quick and reliable.

Re-listing of Appeals

Prior to the New Rules, the re-listing of an appeal that has been struck out for the non-appearance of an Appellant was entirely at the discretion of the Tribunal⁶. The New Rules⁷ now confer both a right and obligation on the Appellant to make a formal application before such a matter is re-listed. Consequently, the Tribunal can no longer *suo motu* direct that an appeal be re-listed.

Non-Appearance by the Respondent

Under the Old Rules, the Tribunal could order that a matter should proceed to hearing or make a decision on the appeal if the Appellant is present before the Tribunal, whether or not the Respondent is present. The Tribunal is now specifically required by the New Rules⁸ to make such order(s) only where the interest of justice so requires. This pays particular attention to justice, that is, the implementation of rules in an equitable and just manner. It essentially suffices that the Tribunal may still proceed with hearing or render its decision, but this is only where it had directed itself to consider whether justice will be served by continuing with the appeal in the absence of the Respondent.

Virtual Hearings

The New Rules by Order XI (4) provides for virtual hearings. This is a step in the right direction, considering the world's trajectory in terms of virtual meetings and physical distancing. The Tribunal can now accept applications and issue rulings using virtual modes. The hearing will use virtual audiovisual communications technology, which means that all parties must be represented by video conferencing rather than just audio.

It is unsatisfactory that literally only the "hearing of applications" and the "delivery of rulings" are covered by the virtual hearings rule. There is no reason to think the procedure would not

⁵ Order IV Rule 2.

⁶ Old Rules, Order IX Rule 2.

⁷ Order IX Rule 2.

⁸ Order IX Rule 3.

work well. Ideally, the law should also allow the virtual hearing of witness trials and final oral addresses. Such virtual hearings are now routine events in major arbitrations⁹.

Ex Parte Applications

In a bid to align the Tribunal proceedings with regular court proceedings, the New Rules provides in Order XI (5) that *ex parte* and non-contentious applications may be heard in chambers, with the Tribunal having the authority to adjourn proceedings from chambers to Tribunal and *vice versa*.

Documents only Procedure (the “DOP”)

The New Rules now provides for the DOP. By that procedure, an appeal could be determined based **only** on specified documents submitted by the parties, without any oral examination of witnesses¹⁰. This procedure, which is set out in Order XV, is entirely new.

A DOP can only be implemented if the parties request for it prior to the start of the trial¹¹. In other words, the default hearing procedure of the Tribunal would apply where such an application for the DOP is not made before trial commences¹². The documents to be adopted for a DOP are the: (a) Notice of Appeal, (b) Respondent’s Reply, (c) Witness Statement on Oath, (d) relevant documentary evidence, (e) Final Addresses of the parties and (f) any other documents or processes as may be directed by the Tribunal¹³.

However, the FIRS may on its own or at the request by any person directly affected by a FIRS’ decision, refer any question as to the interpretation of the tax laws to the Tribunal¹⁴. Also, the FIRS may reserve any question of law for the consideration of the Tribunal. Where a question is referred to the Tribunal, the parties shall file their Written Addresses or any process as the Tribunal may direct¹⁵.

Summary Appeal Procedure (the “SAP”)

Like what obtains under general court procedure in summary judgment situations, a party can invoke summary proceedings using the TAT SAP Form to recover a debt or a liquidated amount where the party believes the other party has no defence¹⁶. The Tribunal shall consider it and, if satisfied, shall enter the appeal under the SAP¹⁷. Upon receipt of the Notice of Appeal under the SAP Form, the Respondent, if it intends to defend the appeal, shall file a Notice of

⁹ <https://www.finra.org/arbitration-mediation/dispute-resolution-statistics#virtual>; <https://iccwbo.org/content/uploads/sites/3/2020/12/icc-checklist-cyber-protocol-and-clauses-orders-virtual-hearings-english.pdf>.

¹⁰ Order XV Rule 3.

¹¹ Order XV Rule 1.

¹² Order XV Rule 1.

¹³ Order XV Rule 2.

¹⁴ Order XV Rule 4

¹⁵ Order XV Rule 5.

¹⁶ Order XVI Rule 1.

¹⁷ Order XVI Rule 1.

Intention to Defend (“**Defence Notice**”) and other specified accompanying processes¹⁸. The Appellant has a consequential right to respond to the Defence Notice¹⁹.

If the Tribunal finds that the Respondent has a defence to the appeal, it can order or direct the appeal for hearing²⁰. In the event that the Tribunal disagrees, it will issue a judgment on the appeal²¹.

In the absence of a Defence Notice and upon appropriate proof of the TAT SAP Form, the Tribunal will hear the Appellant and render a decision on the appeal (while considering the interests of justice) without an oral hearing²².

Pre-Trial Conferencing

The New Rules has now introduced a pre-trial conference (“**PTC**”) to the Tribunal proceedings²³. Essentially, this permits an amicable settlement of the issue(s) between the parties for the purpose of narrowing down the issues before trial.

Limiting Number of Adjournments

While both the Old and New Rules allow the Tribunal to adjourn matters *suo motu* or at the request of parties²⁴, the New Rules now empower the Tribunal to limit the adjournments to be granted at the request of the parties to a number it deems appropriate²⁵.

This would help to reduce the number of frivolous applications for adjournments and avoid unnecessary delays in proceedings.

Deemed Adoption of Written Address

Under the Old Rules, the parties must adopt their Final Written Addresses before the Tribunal renders a decision²⁶. The New Rules now deal with a situation where a party fails to appear to adopt his Final Written Address. In the absence of a party, his Written Address that has been duly filed before the Tribunal may be deemed adopted²⁷. This provision will help to ensure that the Tribunal and a party who is present in court are not at the mercy of a party who has refused to appear at the Tribunal. Hence, appeals can now proceed to the delivery of judgment whether or not a party is physically present to adopt his Written Address.

¹⁸ Order XVI Rule 2(1).

¹⁹ Order XVI Rule 2(2).

²⁰ Order XVI Rule 3(a).

²¹ Order XVI Rule 3(b).

²² Order XVI Rules 3 and 4.

²³ Order XVII (2).

²⁴ Old Rules Order XVII; New Rules Order XIX

²⁵ Order XIX.

²⁶ Old Rules, Order XVIII

²⁷ Order XX Rule 2.

Determination of Appeal and Review of Decision

Order XXI of the New Rules provides for a period of six (6) months to determine an appeal from the time of its commencement. There was no such provision under the Old Rules. Nevertheless, the provision is not rigid. It gives the Tribunal the latitude to limit or extend the period beyond six (6) months.

Further, within 14 days of the Tribunal's judgment, there is now a method for reviewing, correcting, rescinding, or amending it. On a party's request or *suo motu*, the Tribunal may modify, revise, or retract its decision based on an error, ambiguity (to the degree of the ambiguity or error), or fraud²⁸.

Settlement

The New Rules have now expressly provided for a procedure permitting parties to settle tax disputes themselves amicably²⁹. Accordingly, the Terms of Settlement reached by the parties amicably would, upon the application and consent of both parties, be adopted as a consent decision, unless the Tribunal considers their terms unreasonable or inconsistent with the extant tax laws³⁰.

Costs

The New Rules make provision for costs in Order XXII. The parties will now be generally responsible for their own costs except in two situations. One is where there is a default, impropriety, or unreasonable delay. There, the defaulting party or his legal representative would be responsible. Second, where the Tribunal, in the exercise of its discretion, awards cost in favour of one party and against the other. This new provision has been long expected.

Before the New Rules, there was uncertainty as to whether the Tribunal could order costs against a party even in explicitly deserving situations. For instance, where a party willfully delays the proceedings or wastes the Tribunal's time and that of the other party. It used to be unheard of for the Tribunal to award costs in such instances because the Tribunal was not expressly empowered to do so. This provision can now be evoked to sanction defaulters and compensate a party who suffers from undue delay, misconduct, or default.

Conclusion

On consideration of these provisions, it becomes clear that the New Rules has attempted to align the civil procedure rules of the regular courts with the procedure of the Tribunal and to modernize the procedure of the Tribunal. This is welcome because it ensures a more organized and more judicial approach in the Tribunal's proceedings. Moreover, incorporating

²⁸ Order XXI Rule 7.

²⁹ Order XXI Rule 9.

³⁰ Order XXI Rule 9(3).

procedures like Cost, Settlements, Pre-Trial Conferencing, and Summary Appeal Procedure makes the entire process more judicialized and efficient.

There is also an emphasis on the “interest of justice” in a situation where the Tribunal is empowered to exercise discretion. The primary purpose of any Tribunal or court is to administer the law to do justice. Justice is the hallmark of any legal system, and where justice is faulted, the entire essence of the law is faulted. Paying firm attention to ensuring that justice is done helps fulfil the central purpose of the tax statutes, the Tribunal, and the TAT Rules itself. On other hand, the requirement for a deposit before an Appellant is heard negates the “interest of justice” that the New Rules aim to uphold. This needs to be reconsidered.

The TAT Rules also introduce contemporary technical settings and to pay attention to current social and technological changes as they emerge. But they could and should have gone further, for example, allowing witnesses to be examined virtually rather than physically. Indeed, in several respects, the regular courts can learn from the New Rules. For example, the limiting numbers of adjournment, flexibility on the place of filing appeals and DOP in the New Rules are desirable and workable, but most, if not all, courts do not have any comparable provisions.

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