



## **A CRITICAL EVALUATION OF ORDER 3 RULE 6 (a) OF THE TAX APPEAL TRIBUNAL (PROCEDURE) RULES, 2021 AND ITS IMPACT ON ACCESS TO JUSTICE.**

The Honourable Minister for Finance, Budget and National Planning, Mrs. Zainab Shamsuna Ahmed, in exercise of her powers per Paragraph 21 of the Fifth Schedule of the Federal Inland Revenue Service (Establishment) Act, 2007, issued the new Tax Appeal Tribunal (Procedure) Rules, 2021 ("Rules"). The Rules came into force on 10<sup>th</sup> June, 2021 and repealed the 2010 Rules.

The Rules introduced several welcome developments into the practices and procedures of the Tax Appeal Tribunal. A few of such notable introductions are electronic filing, virtual hearing, summary appeal amongst others, a majority of which are geared towards a more effective and expeditious dispensation of justice in Tax Administration in Nigeria.

However, Order 3 Rule 6 (a) of the TAT Rules has been the subject of heated contention since the introduction of the Rules. It provides as follows:

*"(6) For an appeal against the Service or relevant tax authority under Rules 1 and 2 of this Order, the aggrieved person shall:*

*Pay 50% of disputed amount into the designated account by the Tribunal before hearing as security for prosecuting the appeal;"*

The debate surrounding the provision of Order 3 Rule 6 (a) of the Rules borders on the validity of this provision in light of the provisions of Section 36 (1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) ("the Constitution")

and Section 15 (7) of the Federal Inland Revenue Service (Establishment) Act, 2007 ("the FIRS ACT").

This article will consider the provision of Order 3 Rule 6(a) using the issues set out below as discussion points, viz:

1. The Constitutionality of Order 3 Rule 6 (a) of TAT Rules 2021 viz-a-viz the right of access to justice and fair hearing.
2. The legal effects of inconsistency between a subsidiary legislation and the Principal Act.

### **1. The Constitutionality of Order 3 Rule 6 (a) viz-a-viz the right of access to the justice and fair hearing.**

Section 36 (1) of the Constitution provides:

*"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."*

The right to fair hearing and right of access to court are guaranteed constitutional rights and no law can subtract or derogate from or deny any person those rights. Any law which attempts to deny such rights will be declared a nullity by virtue of section 1(3) of the Constitution.



An aspect of the right to fair hearing is that each party to the dispute is heard or given an opportunity to be heard before a decision is taken in the matter<sup>1</sup>. Our superior Courts have been quick to intervene where a person's right to fair hearing has been breached or has not been respected in any proceedings in a Court or Tribunal. For instance, where a person was not given an opportunity to be heard by a Court in the determination of his rights and obligations, it was held that the right to fair hearing was denied, thereby rendering the proceedings void.<sup>2</sup>

In light of the above, the provision of Order 3 Rule 6 (a) of the Rules which mandates an Appellant who challenges an assessment to deposit 50% of the sum challenged as security before he can be granted access to court is a denial of the Appellant's right to fair hearing and free access to court. Relying on the principle of *audi alteram partem* where a court must hear both sides in any given case, the mere fact that before an appellant can have access to the court, he must first deposit a part of the sum he challenges without being given an opportunity to state his case for or against the making of such payment is a blatant disregard and violation of his fundamental right to fair hearing.

This provision of the TAT Rules is so prejudicial to the Appellant that any Tribunal which enforces it, without need for further fact may be considered to be rigged in favour of the Federal Inland Revenue Service ("the Service"); because the

principle of fair hearing is germane to establish whether justice was served in any given case.

It is imperative to note that Nigeria operates a self-assessment tax regime wherein taxpayers are encouraged to disclose their income and pay the requisite tax thereon. The Service may dispute such self-assessment and re-assess a taxpayer to a sum based on their personal judgment (not based on facts, or law) to a sum over and beyond that originally declared by the taxpayer. It is this assessment that is subject to appeal. Thus, where the Service may have subjected a taxpayer to an arbitrary assessment and such taxpayer is unable or incapable of paying such assessment or a fraction thereof and seeks to challenge same, the taxpayer is compelled by Order 3 Rule 6 (a) to cough out and pay 50% of the sum irrespective of its ability to pay before it can be granted audience before the Tribunal to state its case. Such taxpayer has in essence been denied free access to court.

The courts have in a plethora of cases reiterated their duty to protect the fundamental right to justice.

*"A court of law will not allow the provisions of an enactment to be read in such a way as to deny citizens access to court."<sup>3</sup>*

*"Where in the course of prescribing the procedural administrative steps to be taken by a citizen, the law infringes on the citizen's fundamental right of access*

<sup>1</sup> Bon Ltd v. Adegoke (2006) LPELR 7599 (CA)

<sup>2</sup> Esiaga v. Univ. of Calabar (2004) 7 NWLR (Pt. 872) 366; Alsthom S.A. v. Saraki (2000) 14 NWLR (Pt. 687) 415.

<sup>3</sup> S.P.D.C.N. Ltd. v. Agbara (2016) 2 NWLR (Pt. 1496) 353 at 370



*to the courts, such a law would be struck down by the court, for its inconsistency against the constitutional provision that guarantees the fundamental right of access to the courts.”<sup>4</sup>.*

The TAT Rules mandates an appellant to make payment into an account designated by the Tribunal; it is curious how an appellant is expected to comply with this provision, will he be expected to file a prior application before the Tribunal seeking directive on which account to make the deposit and thereafter file its appeal?

There can be no fairness or justice in such a lopsided provision of the law. It is therefore our humble opinion that Order 3 Rule 6 (a) of the TAT Rules violates the provision of Section 36 (1) of the Constitution which guarantees the right of every citizen to fair hearing and free access to Court. Consequently, said provision ought to be declared null and void to the extent of its inconsistency with the constitution<sup>5</sup>.

## **2. Legal effect of the inconsistency in a subsidiary legislation with a Principal Act**

The TAT Rules is an example of a subsidiary/delegated legislation. Subsidiary legislations generally acquire their validity from the main/principal Act or Law. In this instant case, the principal legislation is the FIRS Act while the subsidiary legislation is the TAT Rules. Thus, the

TAT Rules derives its validity and enforceability from the FIRS Act.

The principal legislation provides a subsidiary legislation with its source of existence; it is the leg on which the subsidiary legislation stands. As such, a subsidiary legislation is bound to conform with the provisions of its principal Act or Law. The FIRS Act is the source from which the TAT Rules derives its validity. The TAT Rules can therefore not be seen to be inconsistent with the FIRS Act as this would amount to absurdity and a nullity.

FIRS Act established the Tax Appeal Tribunal<sup>6</sup> and made provisions for the applicable procedure before the Tribunal<sup>7</sup> which are as follows:

*“15. (7) 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*

<sup>4</sup> *Abuah v. Okosi* (2015)16 NWLR (Pt. 1484) 147 (P. 168, paras. A-B)

<sup>5</sup> Section 1 (3) of the Constitution

<sup>6</sup> Section 1 & 2 of the Fifth Schedule to the Federal Inland Revenue Service (Establishment) Act, 2007

<sup>7</sup> Section 15



*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.”*

The Court in **N.N.P.C. v. Famfa Oil Ltd**<sup>8</sup> held as follows:

*“... the Petroleum Act was the principal law or statute. Where it prescribed a particular method of exercising statutory power, the procedure so laid down must be followed without any deviation whatsoever. In the instant case, if any provision of the Back-in-Right Regulations was inconsistent with the provisions of the Petroleum Act, the provisions of the Regulation would to the extent of the inconsistency be declared void.”*

Also, in the case of **Ibrahim v. Fulani**<sup>9</sup> the Court held:

*“Where the provisions of the Rules of Court are inconsistent with the requirement of an Act, the applicable enactment should be the provisions of the Act.”*

The inconsistency of the TAT Rules with the FIRS Act is apparent and ought to be declared void to the extent of its inconsistency.

## Conclusion

The TAT Rules is a welcome development which embraces the reality of today and its provisions are germane for the speedy dispensation of justice.

However, provisions contained in Order 3 Rule 6 (a), being inconsistent with the provisions of the Constitution and the enabling Act, ought to be struck down in order to promote free access to justice in relation to tax disputes.



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<sup>8</sup> (2012) 17 NWLR (Pt. 1328) 148 (P. 195, paras. C-F)

<sup>9</sup> (2010) 17 NWLR (Pt. 1222) 241 (P. 268, paras. B-D)