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TAX APPEAL PROCEDURE IN NIGERIA: REQUIREMENT FOR PAYMENT OF SECURITY DEPOSIT PRIOR TO FILING AN APPEAL AGAINST ADVERSE TAX ASSESSMENTS AND ADVERSE TAX RULINGS

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ABSTRACT

Recent legislation and administrative rules now require an aggrieved taxpayer to pay a security deposit prior to prosecuting a tax appeal. It is argued that the tax appeal procedure must not deny an aggrieved taxpayer of his right to a fair hearing under Sections 6(6) and 36 of the 1999 Nigerian Constitution. The method adopted in the Paper is to review all the applicable statutes and the decisions of the Nigeria Tax Appeal Tribunal (TAT), while taking the position that the administrative court rules mandating payment of security deposits are untenable in law, equity, and in practice. The Paper finds that there are multiple statutes providing for payment of security deposit pending tax appeal, to wit- (a) 2007 Federal Inland Revenue Service (Establishment) Act, (b) Federal High Court (Federal Inland Revenue Service) Practice Directions 2021, (c) Tax Appeal Tribunal (Procedure) Rules 2021, and (d) Federal High Court (Tax Appeal) Rules 2022. The constitutionality, scope and extent of the security deposit requirement have become a subject matter of intense discourse, with conflicting TAT decisions in *Multichoice v. FIRS, First Bank v Taraba,* and *Investment Holdings v. FIRS*. There are no decisions of the superior courts on these provisions yet. The Paper concludes that security deposit requirement provisions violate the fair hearing rules under the 1999 Constitution and that disputes on taxes payable to the sub-National States (tax revenue accruable to States) are clearly not subject to the security deposit payment rules. The paper recommends the introduction of an amendment for the appointment of a Special Panel to hear tax appeals where there are conflicting cases filed before or decisions issued by coordinate tax appeals/tribunals so as to prevent multiple opinions.

Keywords: Nigeria, Tax Appeal, Security Deposit, Fair Hearing, Constitutionality

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INTRODUCTION

Currently, in Nigeria, apart from judicial decisions, there is a dearth of legal treatises and/or scholarship on the position of Nigerian tax laws on the requirement for payment of security deposit while tax appeals are pending before the courts. Therefore, this paper attempts scholarly research, from an academic standpoint, to fill the gap. The position of this work in scholarship is to review all the applicable statutes and the decisions of the Nigeria Tax Appeal Tribunal (TAT). The Paper attempts to resolve the conflicts existing among the various conflicting legislation and judicial decisions on the subject of payment of security deposits pending tax appeal proceedings, so as to provide clarity on the position of the law for all tax stakeholders.

As stated, the method adopted in the Paper is to review all the applicable statutes and the decisions of the TAT, while taking the position that the administrative court rules mandating payment of security deposits is untenable in law, equity, and in practice. Thus, this is a desk review of various articles from various authors. It is situated within the doctrinal methodology.

The tax appeal process is the procedure whereby a taxpayer, who is dissatisfied with an adverse tax assessment or ruling, applies for judicial review to consider and change the adverse decision of the Relevant Tax Authority (RTA) based on certain grounds. Payment of security for the cost of prosecuting an appeal is not alien to appeals and other civil matters in civil jurisdictions.[2] In Nigeria, tax appeal is an important component of the tax administration and dispute resolution system. The 2017 Nigerian Tax Policy[3] in its appeal process provisions emphasizes the importance of the tax appeal process, as it offers a step-by-step objection and appeal process which gives the aggrieved taxpayer an opportunity to explore other dispute resolution mechanisms before gaining access to the regular court system.[4] However, there is currently an enduring legal discourse[5] as to whether the recent statutory requirements for payment of a security

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[2] Order 7 Rule 3(r)&(z) of the Supreme Court Rules, 1999.

[3] Federal Ministry of Finance, National Tax Policy (Abuja 2012) at 21-26. (NTP 2012); See, also, Svden Stenimo, Taxation and Democracy (Yale University Press, New Haven & London, 1993) at 1; Taxes are imposed under the authority of the legislature, and are levied by a public body with an intention for public purposes; See Major J, in Re Eurig's Estate (1998) 165 DLR (4th) 1, at 10, citing Duff J inLawson v Interior Tree, Fruit and Vegetable Committee of Direction[1931] SCR 357 (Can).

[4] See, Executive Brief of the Nigerian Tax Appeal Tribunal. Available at: http://tat.gov.ng/node/6. Last visited on: February 9, 2022

[5] Babajimi Ayorinde and Olumayowa Oluwole, "Nigeria: Constitutionality Of The Multichoice Ruling By The Tax Appeal Tribunal,"10 September 2021. Available at: https://www.mondaq.com/nigeria/tax-authorities/1110 472/constitutionality-of-the-multichoice-ruling-by-the-tax-appeal-tribunal. (Ayorinde & Oluwole).; See, also, Abiola Sanni, "Changes Introduced in the Federal High Court Practice Directions,

deposit prior to filing a tax appeal would not inhibit and/or undermine the tax appeal process. In this paper, I argue that the tax appeal procedure must not deny an aggrieved taxpayer his right to a fair hearing under Sections 6(6) and 36 of the Constitution of the Federal Republic of Nigeria of 1999 (1999 Constitution).[6] Courts must strictly construe statutes that deprive litigants of their constitutional right of access to court, as uninhibited accessibility to the court of law is an essential feature of the rule of law and the hallmark of civilization.[7]

Starting on the 31st of May 2021, there has been a flurry of new rules mandating the payment of a security deposit as a condition for prosecuting a tax appeal, in the form of legislation and administrative guidelines now requiring a taxpayer in Nigeria, who intends to appeal against either an adverse tax assessment or an adverse judicial tax decision, to pay a security deposit *prior* to prosecuting the appeal. Earlier, in 2007, Paragraph 15(7) of the Fifth Schedule to the *Federal Inland Revenue Service (Establishment) Act 2007* (FIRSEA)[8]—an Act of Parliament and a primary legislation were enacted to prescribe three (3) guidelines which the Tax Appeal Tribunal (TAT)[9] may consider *prior* to ordering a taxpayer to make a security deposit before a tax appeal. However, on 31st of May 2021, the Chief Judge of the Federal High Court (FHC), Honourable Justice John Terhemba Tsoho,[10] issued the *Federal High Court (Federal Inland Revenue Service) Practice Direction, 2021* (FHC Practice Direction 2021).[11] Also, in September 2021, the Honourable Minister of Finance, acting under delegated

2021: The Taxpayer's Plight," ASCO LLP Newsletter. Available at: https://abiolasanniandco.com/wp-content/uploads/2021/07/FHCPRACTICE-DIRECTION-THE-TAX-PAYERS-PLIGHT.-1-converted.pdf, at 4, accessed 22 June 2022. (Sanni); Yusufu Ideguh, "Tax dispute: Tribunal strikes out Taraba Revenue Board's suit against FirstBank," BUSINESS December 10, 2021. Available at: https://www.nationalaccordnewspaper.com/tax- dispute-tribunal-strikes-out-taraba-revenue-boards-suit-against-firstbank/. accessed 22 June 2022; Bashir Oyintiloye, "MultiChoice vs FIRS: Tax tribunal's strange flip-flop," November 7, 2021. Available at: https://www.vanguardngr.com/2021/11 /multichoice-vs-firs-tax-tribunals-strange-flip-flop/, accessed 22 June 2022.

[6] Constitution of the Federal Republic of Nigeria, 1999, Cap C23 Laws of the Federation of Nigeria (LFN) 2004. (1999 Constitution).

[7] Cotecna Intl Ltd. v. Churchgate (Nig.) Ltd., (2010) 18 NWLR (Pt. 1225) 346. (S.C.).

[8] Federal Inland Revenue Service (Establishment) Act, No. 13 of 2007. (FIRSEA).

[9] The TAT, established under Section 59(1) of the FIRSEA, is an administrative tribunal, from which further tax appeals proceed to a superior court of record—the Federal High Court.

[10] Pursuant to his powers under Section 44(1) & (2) of the Federal High Court Act Cap F12 LFN of 2004 (FHC Act) and Paragraph 17(5) of the Fifth Schedule to the FIRSEA. The Rules repeal the FHC (Tax Appeal) Rules, 1992.

[11] Federal High Court (Federal Inland Revenue Service) Practice Direction, 2021 (FHC Practice Direction 2021)

power conferred by the FIRSEA,[12] issued the *Tax Appeal Tribunal (Procedure) Rules 2021* (TAT Rules 2021)[13]—another subsidiary legislation. Both the FHC Practice Directions 2021 and TAT Rules 2021[14] provide for the payment of 50% of the assessed tax amount as a security deposit before challenging the assessment via judicial review.[15] Finally, on 10th January 2022, the FHC Chief Judge, again, released fresh *Federal High Court (Tax Appeal) Rules 2022* (FHC Rules 2022),[16] mandating that a taxpayer appealing a decision from the TAT to the FHC must pay the judgment sum into an interest yielding account maintained by the Chief Registrar of the FHC and must show evidence of payment before the appeal can be heard and there is no provision for stay of execution of judgments under the FHC Rules 2022.[17]

These new enactments constitute the focus of this paper as they raise the following issues:

a. Whether these statutory provisions which require payment of security deposit pending appeal offend against the provisions of the 1999 Constitution as to deny an aggrieved taxpayer of his right to fair hearing under Sections 6(6) and 36 of the 1999 Constitution?;
b. In the event of a conflict between the provisions of (i) Paragraph 15(7) of the Fifth Schedule to the FIRSEA, (ii) FHC Practice Direction 2021, (iii) TAT Rules 2021, and (iv) FHC Rules 2022, which enactment would prevail over the others?;
c. Within the Nigerian legal discourse, how do courts treat Practice Direction and Court Rules viz-a-viz statutes enacted by the legislature?;
d. What are the effects of Sections 13 and 22 of the Finance Act 202[18]—Nigerian most recent primary tax statute on the legislation providing for payment of security deposit?; and
e. As Nigeria is a federation with both federal and sub-National state legislatures and separate court systems, would these security deposit legislations apply to

[12] FIRSEA, supra note 8, at Paragraph 17(5) of the Fifth Schedule.
[13] Tax Appeal Tribunal (Procedure) Rules 2021 (TAT Rules 2021). See, especially, Order III Rule 6.
[14] Ibid. per Order III Rule 6 which requires an appellant to pay half of the disputed assessment as security deposit before it could file an appeal before the TAT, and to file an affidavit verifying the payment
[15] FHC Practice Direction, supra note 11, at Order V Rule 3.
[16] Federal High Court (Tax Appeal) Rules 2022 (FHC Rules 2022).
[17] Ibid. at Order V, Rule 1.
[18] Finance Act 2021, was signed into law on 31st December 2021. It became effective on 1st January 2022.

taxes payable to sub-National states or to proceedings befor State High Courts?

In answering these questions, the scope and extent of the security deposit requirement as well as its constitutionality has become a subject matter of intense discussion with conflicting judicial decisions arising therefrom. First, in *Multichoice Nigeria Limited v. FIRS,*[19] the TAT (Lagos Zone) mandated the payment of the security deposit, before appeal. However, in *First Bank of Nigeria Limited v Taraba State Board of Internal Revenue,*[20] the TAT came to a different conclusion. Finally, on 8th March 2022, the TAT (Lagos Zone) ruled in *Investment Holdings Limited v. FIRS*,[21] that Paragraph 15(7) of the Fifth Schedule to the 2007 FIRSEA supersedes the provision of Order III Rule 6 of TAT Rules 2021 and that the TAT Rules 2021 derive its legitimacy from the FIRSEA. The controversies continue unabated, as former Solicitor-General of Lagos State, Lawal Pedro (SAN) has described Order III Rule 6 of TAT Rules 2021 as *akin* to a forced admission of liability before actual adjudication of the dispute, and "[t]his will amount to forced admission of liability before adjudication of dispute contrary to[Nigerian] justice system of fair hearing and equality before the law."[22] Similarly, the Chairman of the Nigeria Bar Association's Section on Public Interest and Development Law (NBA-SPIDEL), Monday Ubani, has noted that the TAT Rules 2021 are at variance with the grain of rationality and the country's legal jurisprudence and that "[i]t is an affront to the rights of fair hearing and access to justice guaranteed by the constitution of Nigeria. I have personally written to the Minister of Finance over this issue and highlighted the dangers of the Rules, which are capable of stifling businesses and sending a wrong signal to prospective investors."[23]

The method adopted in the paper is to review all the applicable statutes and TAT decisions and takes the position that the administrative court rules mandating payment of security deposits that do not constitute Parliamentary legislation are legally deficient. The Paper evaluates the requirements laid down under Paragraph 15(7) of the Fifth Schedule to the FIRSEA. However, it appears that the FIRSEA provisions would violate the constitutional fair hearing rules under Sections 6(6) and 36 of the 1999 federal Constitution. Clearly, tax disputes on taxes payable to the sub-National States—

[19] (2022) 66 TLRN 1. A decision of the TAT (Lagos Zone), dated 24th August 2021, in Suit No.: Appeal No: TAT/LZ/C1T/062/2021.
[20] Unreported decision of the TAT (North East Zone), dated 30th November 2021, in Suit No.: Appeal No. TAT/NEZ/002/2020.
[21] (2022) 66 TLRN 52.
[22] Quotation from Oyintiloye, supra note 5.
[23] Ibid.

Personal Income Tax (PIT),[24] Withholding Tax (WHT),[25] Capital Gains Tax (CGT),[26] and Stamp Duties[27] are not subject to the security deposit payments. The Paper also asserts that notwithstanding the practice directions and court rules, the relevant provisions for a taxpayer to file an Objection to a tax assessment are Paragraph 13 of the Fifth Schedule to the FIRSEA, Section 69 of the Companies Income Tax Act (CITA)[28] and Section 58 of the Personal Income Tax Act (PITA)[29] under which the taxpayer has the right to file an Objection before the RTA within 30 days after service, upon his disagreement with the assessment served upon him. As these *primary* tax statutes do not provide for payment of a security deposit whatsoever—even where the taxpayer intends to challenge an assessment on appeal, there is no legal basis to demand such under any court rule, practice direction, or other rule.

NATURE AND HISTORICAL EVOLUTION OF THE TAX APPEAL PROCESS IN NIGERIA

It was the *repealed* Companies and Income Tax Act No. 22 of 1961 that established the *defunct* Federal Board of Inland Revenue (FBIR)[30] and tax appeal process in Nigeria[31] with the establishment of the Body of Appeal Commissioners (BAC) as the first point of call in the resolution of tax disputes between taxpayers and the FBIR on assessment and payment of taxes.[32] Further, the *repealed* Income Tax Management Act 1961 created the Joint Tax Board and charged it, primarily, with ensuring uniformity of standards and application of personal income tax in Nigeria. Apart from the BAC, the introduction of the Value Added Tax Act in 1993[33] created the Value Added Tax Tribunal (VAT Tribunal) to handle VAT disputes separately from other tax disputes. The tax

[24] See, Section 2(2) of the Personal Income Tax Act Cap P8, Laws of the Federation of Nigeria 2004 (PITA); See, also, the Personal Income Tax (Amendment) Act (2011), Government Notice No. 175, Federal Republic of Nigeria Official Gazette No. 115, Vol 98, of 24thJune 2011

[25] PITA, ibid, at Sections 69-75; See, also, Personal Income Tax Act Rates e.t.c of Tax Deducted at Source (Withholding Tax) Regulations (PITA WHT Regulations).

[26] Capital Gains Tax Act Cap C1 LFN 2004 (CGTA), at Sections 2, 3, and 4.

[27] Stamp Duties Act Cap S8 LFN 2004 (SDA), at Sections 4(2).

[28] Companies Income Tax Act Cap C21 LFN (2004), as amended, (CITA)

[29] PITA, supra note 24.

[30] Now replaced by the Federal Inland Revenue Service (FIRS), by virtue of Section 1 of FIRSEA.

[31] Federal Inland Revenue Service, "Reforms and Transformation." Available at: http://www.firs.gov.ng/cg/Pages/FIRS-Reforms-and-Transformation.aspx. accessed on 7th June 2022.

[32] Ibid.

[33] Value Added Tax Decree No. 102 of 1993, now contained in the Value Added Tax Act Cap V1 Laws of the Fermion of Nigeria (2004). (VAT Act).

appeal process continued to change. First, there were the two Court of Appeal's decisions in both *Stabilini Visioni v FBIR and Cadbury (Nig.) Plc v. FBIR*,[34] which struck down the jurisdiction and powers of the VAT Tribunal to hear cases on VAT as being in violation of Section 251 of the 1999 Constitution.[35] Second, there was also the enactment of the FIRSEA in 2007 which completely abolished all provisions relating to appeal procedure under the VAT Act. The TAT, which emerged under Section 59(1) of the FIRSEA, formally took off pursuant to the Tax Appeal Tribunal Order 2009[36] issued by the Minister of Finance.[37] TAT, therefore, replaced both the former BAC and VAT Tribunal.[38]

Paragraph 17 of the Fifth Schedule to the FIRSEA allows an appeal by the aggrieved party, and this is by way of seeking a judicial review. When a dispute arises, the taxpayer seeks judicial review through suits seeking either (a) an Order of *Certiorari* or (b) an Order of *Prohibition*.[39] According to Akinsola:

> Judicial Review is a court's power to review the actions of other branches or levels of government, especially the court's powers to invalidate legislative and executive (administrative) actions as being unconstitutional.[40]

Akinsola also stated that:

> The purpose of judicial review is t ensure that inferior courts and public authorities do their job and that they do it properly. The court, in exercising their judicial review powers, may grant certain remedies to

[34] (2010) 2 NWLR (Pt 1179) 561

[35] 1999 Constitution, supra note 6, at Section 251 confers exclusive jurisdiction on the FHC to hear all disputes regarding the federal revenue.

[36] As published in the Federal Government Official Gazette No 296, Vol. 96 of 2nd December, 2009

[37] Federal Inland Revenue Service, "Welcome to Tax Appeal Tribunal – Nigeria." Available at: http://www.tat.gov.ng/. accessed on 8th June 2022.

[38] Olumide K. Obayemi, "The Jurisprudence of Withholding Tax Exemption Applicable to Contracts and Sales in the Ordinary Course of Business Under the Finance Act Bill 2020" (2021) Vol. 7 No. 1 University of Jos Journal of International Law and Jurisprudence 47-60 (Obayemi I); See, also, CITA, supra note 26, at Sections 78-84; PITA, supra note 24, at Sections 69-75, Petroleum Profits Tax Act Cap P13, LFN (2004), at Sections 54 and 56 (PPTA);; and Companies Income Tax Act Rates e.t.c of Tax Deducted at Source (Withholding Tax) Regulations (CITA WHT Regulations).

[39] Lanre Akinsola, Personal Income Tax: Principles & Cases in Nigeria, (ASCO Publishers, Lagos, Nigeria, 2014), at 35-39.

[40] Ibid. at 35.

> aggrieved persons who invoked the judicial review powers of the court.[41]

Akinsola further defined *Certiorari* and *Prohibition* thus:

> Certiorari is the process by which superior courts review the decisions of inferior Tribunals or statutory bodies.[42]
>
> Prohibition is an order of the court, which restrains a judicial or a person with authority required to act judicially from embarking upon a course of action which may adversely affect the legal rights of another person.[43]

The above are the legal theories underpinning the tax appeal system. As stated, the tax appeal procedure is a process whereby a taxpayer who is dissatisfied with an assessment applies to the TAT to consider and change the decision of the RTA on certain grounds. After the TAT has decided the case, either a taxpayer or the RTA may appeal to the FHC, and further to the Court of Appeal, and finally to the Supreme Court. The issue now is whether the taxpayer may be required to pay a security deposit prior to filing a tax appeal.

REVIEWING THE SECURITY DEPOSIT PROVISIONS UNDER CURRENT ADMINISTRATIVE AND LEGISLATIVE ENACTMENTS

Four separate enactments currently provide for payment of security deposit pending appeal:

Security Deposit Provisions Under the Federal Inland Revenue Service (Establishment) Acy 2007—an Enactment of the Federal Legislature

Since 2007, the FIRSEA evinced the first attempt to require an aggrieved taxpayer to pay a security deposit for the prosecution of a tax appeal. The FIRSEA is an Act—a primary legislation of the federal legislature although contained in a Schedule. Paragraph 15(7) of the Fifth Schedule to the FIRSEA 2007 is clearly superior to the TAT Rules 2021, FHC Practice Directions 2021, and the FHC Rules 2022, respectively. In *Registered Trustees of Hotel Owners and Managers Association of Lagos v. A. G.*

41 Ibid.
42 Ibid.
43 Ibid. at 36.

Federation & Others (HOMAL)[44]of October 2019, the FHC held that the Schedule to an enactment cannot be amended by delegated legislation since it is actually part of the enabling legislation having the same legal force as the Act itself. In this connection, Paragraph 15(7) of the Fifth Schedule to the FIRSEA 2007 states:

> (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 II;
> (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 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.

Paragraph 15(7) of the Fifth Schedule to the FIRSEA 2007 must continue to govern proceedings before the TAT, and as primary legislation, it benefits from the provisions under Section 68(1) of the FIRSEA (as amended) by Section 22 of the Finance Act 2021,[45] which provides as follows:

> This Act and the laws listed in the First Schedule to this Act shall take precedence over any other laws with regards to the administration, assessment, collection, accounting and enforcement of taxes and levies due to the Federal Government or Federation in Nigeria, except

[44] Unreported decision of the Federal High Court (Lagos Division), Suit No. FHC/L/CS/1082/2019
[45] Finance Act 2021 supra note 18.

> in cases such tax or levy is a subject of litigation in a court of competent jurisdiction, and if the provisions of any other law, including the enactments in the First Schedule are inconsistent with the provisions of this Act, the provisions of this Act shall prevail and the provisions of that other law shall, to the extent of the inconsistency, be void.

Tax Appeal Tribunal (Procedure) Rules 2021 (TAT Rules 2021)—a Subsidiary Delegated Legislation Issued by the Minister of Finance

Pursuant to the powers granted to the Minister of Finance to amend the Schedule to the FIRSEA[46]—a delegated legislative power, the Minister, via subsidiary legislation, on 31st May 2021, issued TAT Rules 2021. Order III Rule 6 of TAT Rules 2021 provides thus:

> For an Appeal against the Service or relevant tax authority under Rules 1 and 2 of this Order, the aggrieved person, shall –
> a. pay 50% of disputed amount into a designated account by the Tribunal before hearing as security for prosecuting the appeal;
> *b.* file the Notice of Appeal as in Form TAT 1A, along with a deposition as in Form TAT IB.

The TAT Rules 2021 are to govern proceedings before the TAT. Obviously, Paragraph 15(7) of the Fifth Schedule to the FIRSEA 2007 is a primary legislation and also gives discretion to the TAT to apply certain guidelines in determining whether to require the taxpayer to pay a security deposit. Conversely, the TAT Rules 2021 is a delegated subsidiary legislation purporting to stipulate a non-discretionary condition precedent for payment of a 50% security deposit pending appeal. With this conflict, it is apposite to review *HOMAL*, where the FHC examined the powers of the Finance Minister to amend the Schedule to the Taxes and Levies (Approved List for Collection) Act,[47] and held that delegated legislation is an exercise of powers given by the Legislature to another body to give effect to the enabling legislation and not to override the principal legislation, as the Schedule to an enactment cannot be amended by delegated legislation since it is actually part of the enabling legislation having the same legal force as the Act itself. Therefore, any exercise of power that affects the terms and wordings of the enactment cannot be by delegated legislation but by an amendment to the legislation. The

[46] FIRSEA, supra note 8, at Paragraph 17(5) of the Fifth Schedule.
[47] Cap T2 LFN 2004.

FIRSEA—a principal legislation that cannot be amended by the Minister via TAT Rules 2021.

Security Deposit Provisions Issued by the Chief Judge of the Federal High Court

These enactments are to apply as condition precedents in tax proceedings before the FHC. First, they are subsidiary rules of the court. Second, they cannot apply to tax matters and proceedings outside Section 251 of the 1999 Constitution which enumerates the subject matters under the FHC's jurisdiction. *Ipso facto*, these FHC court rules are inapplicable to tax proceedings before State High Courts, with separate subject matters under Section 272 of the 1999 Constitution.

Federal High Court (Federal Inland Revenue Service) Practice Direction, 2021 (FHC Practice Directions 2021)

As stated earlier, on 31st May 2021, the FHC Chief Judge issued the FHC Practice Directions 2021,[48] which became effective on 1st June 2021, seeking far-reaching procedural provisions on FIRS' powers to enforce the payment of tax and/or recover unpaid tax liabilities from taxpayers, while applying to both criminal matters and civil causes in respect of tax cases before the FHC. The FHC Practice Directions 2021 provide the FIRS with "how to proceed" in the exercise of some of its powers under the FIRSEA. Order V Rule 3 of the FHC Practice Direction now mandates that a taxpayer who seeks to challenge an assessment shall pay 50% of the assessed amount pending the determination of the application.[49]

Federal High Court Tax Appeal (Procedure) Rules, 2022 (FHC Rules 2022)

Further, the CJ of the FHC, on 10th June 2022 released the FHC Rules 2022,[50] following the FHC Practice Directions 2021. The FHC Rules 2022 repealed the Federal High Court (Tax Appeal) Rules 1992, and provide guidance on the preparation of notices of appeal against decisions of the TAT, and other issues relating to the commencement and prosecution of tax appeals at the FHC. Order V Rule 1 of FHC Rules 2022 now requires taxpayers to deposit any judgment debt from the TAT's ruling in an interest-yielding account of the FHC as a security deposit for prosecuting an appeal and an

[48] Pursuant to his powers under Section 44(1)&(2) of the FHC Act, supra note 10. and Paragraph 17(5) of the Fifth Schedule to the FIRSEA, supra note 8.
[49] FHC Practice Direction, supra note 11, at Order V Rule 3
[50] Pursuant to his powers under Section 44(1)&(2) of the FHC Act, supra note 10. and Paragraph 17(5) of the Fifth Schedule to the FIRSEA, supra note 8.

appeal may be struck out or dismissed where a taxpayer fails to make such security deposit.[51]

A REVIEW OF THE TAT ADMINISTRATIVE DECISIONS ON THE SECURITY DEPOSIT STATUTES

In *Multichoice Nigeria Limited v FIRS,*[52] Multichoice filed an appeal challenging a N1.8 Trillion (about US$1.4Million) tax assessment against FIRS. FIRS requested that Multichoice be compelled to comply with Paragraph 15(7) of the Fifth Schedule to the FIRSEA as the TAT would lack the jurisdiction to hear the appeal if Multichoice did not pay a security deposit. The TAT ordered Multichoice to make a deposit with the FIRS as security for the assessed tax in line with Paragraph 15(7) of the Fifth Schedule to the FIRSEA, and held that TAT would not have jurisdiction to hear the appeal unless Multichoice made the required deposit.[53]
Similarly, on 26th October 2021, the TAT (Abuja Zone), in a sister case *MultiChoice Africa Holdings v FIRS*,[54] dismissed MultiChoice's appeal against an alleged US$342million VAT bill, while upholding FIRS' objection, on the ground that MultiChoice had failed to pay half of the disputed assessment as security deposit before appeal and also failed file an affidavit verifying the payment, pursuant to Order III Rule 6 of the TAT Rules, 2021.

It must be noted that both the Lagos and Abuja TATs respectively reached the same decisions, *albeit*, while using two (2) different laws. While the TAT (Lagos Zone) in the *Multichoice* decision of 24th August 2021 relied upon Paragraph 15(7) of the Fifth Schedule to the FIRSEA, the TAT (Abuja Zone)'s *Multichoice* decision of 26th October 2021 was premised upon Order III Rule 6 of the TAT Rules, 2021 to order payment of 50% security deposit.

However, in a later case, *First Bank of Nigeria Limited v. Taraba State Board of Internal Revenue,*[55] the TrAT (North-East Zone—in Bauchi) came to a different conclusion. In *First Bank*, the FIRS, by a motion, prayed the TAT for an order directing First Bank to pay an amount as security for the prosecution of its appeal on the grounds, *inter alia*,

[51] FHC Rules 2022, supra note 16, at Order V, Rule 1
[52] MultiChoice v FIRS, supra note 19.
[53] Tile TAT reviewed a long line of judicial authorities and concluded that the payment of the security deposit was a condition precedent to its assuming jurisdiction.
[54] An unreported decision dated 26th October 2021, by the TAT (Abuja Zone),
[55] First Bank v Taraba, supra note 20.

that First Bank failed to satisfy and comply with the condition precedent to institute and prosecute the appeal. In determining the application, the TAT, relying on Paragraph 15(7) of the Fifth Schedule to the FIRSEA held that, based on the circumstances of the case, it was *not* expedient to order the taxpayer to pay a security deposit, and held thus:

> We have gone through the entire contents of the affidavit filed by the revenue agency and we did not find any fact establishing that it is expedient to require the appellant to pay an amount as security. The question is, has [FIRS] the Respondent/Applicant proved to the satisfaction of the Tribunal that it is expedient to require [First Bank] the Appellant to pay an amount as security for prosecuting the Appeal? Would the Tribunal lack jurisdiction to hear the Appeal if it fails to order [First Bank] the Appellant to pay an amount as security for the prosecution of the Appeal? A holistic reading of the Schedule does not in our view entitle the tribunal to make an order for payment of security as a matter of course. Although, the tribunal has the power to order deposit of security for the prosecution of the appeal, however, the power to do so can only be exercised when sufficient materials are placed before it. The respondent/applicant [FIRS] has not placed before the tribunal sufficient materials and we do not under the circumstances consider it expedient to make the order for deposit of any sum as security for the prosecution of this appeal. The failure to deposit an amount for the prosecution of the appeal has not and cannot rob this tribunal of jurisdiction to hear this appeal. Accordingly, the respondents/applicant' [FIRS] application is hereby dismissed. Any party dissatisfied with this judgment may with leave of the tribunal appeal against it on point(s) of law to the Federal High Court within thirty days from date of this ruling.[56]

Further, on 8th March 2022, the TAT (Lagos Zone) ruled in *Investment Holdings Limited v FIRS,*[57] that paragraph 15(7) of the Fifth Schedule to the FIRSEA 2007 supersedes the provision of Order III Rule 6 of TAT Rules 2021 and that the TAT Rules 2021 derive from the FIRSEA. The *Investment Holdings* TAT further clarified that the burden of proof lies upon the FIRS to convince the TAT of the existence of the conditions prescribed in the FIRSEA before the TAT will mandate payment of a security deposit before the

[56] Ibid, at 11-12.
[57] Investment Holdings v FIRS, supra note 21.

prosecution of the tax appeal. In *Investment Holdings,* the FIRS had sought to dismiss the taxpayer (IHL)'s appeal on the grounds that the TAT lacked jurisdiction as IHL failed to satisfy the condition precedent of paying a security deposit before appeal under both Order III Rule 6 TAT Rules 2021 and Paragraph 15(7) of the Fifth Schedule to FIRSEA *jointly*, and that by the failure of IHL to comply with both provisions jointly, the TAT lacked jurisdiction to entertain the appeal. In review, the TAT identified the sole issue thus "[w]hether, in the circumstances of this case, the Tribunal should not order the deposit of 50% of the disputed assessment or any amount as security for the prosecution of the Appeal?"[58] The central issue was whether the deposit of 50% of the disputed assessment is a strict requirement for the prosecution of an appeal before the TAT. The TAT identified a major flaw as contained in FIRS' a—the FIRS erroneously lumped together two different requirements under separate provisions of both Order III Rule 6 TAT Rules 2021 and Paragraph 15(7) of the Fifth Schedule to FIRSEA as jointly requiring a deposit of 50% of the assessed tax:

> Two provisions are relevant to the determination of this question and by extension, this application. The two provisions have been referenced by [FIRS]'s Counsel in urging this Tribunal to find in the [FIRS]'s favour. We note that [FIRS]'s PO was argued both on the provisions of Order III Rule 6 of the TAII Rules 2021 and paragraph 15(7) of the Fifth Schedule to the FIRS Act. It was not argued in the alternative. The impression created thereby is that both provisions command the same effect. But, is this really the case? Do they, that is Order III Rule 6 of the TAT Rules 2021 and paragraph 15(7) of the Fifth Schedule to the FIRS Act, speak the same language or, do they in fact, produce a discordant tune?[59]

The TAT noted that Order III Rules 6 of the TAT Rules 2021 introduces a *condition precedent* and makes it mandatory for an aggrieved taxpayer to deposit 50% of the disputed assessment as a condition to have its appeal heard by TAT. However, Paragraph 15(7) of the Fifth Schedule to FIRSEA makes the payment of the deposit conditional on the existence of one of three events which must be proved by the FIRS to the satisfaction of TAT.[60] Thus, under Order III Rule 6, an aggrieved taxpayer is required to pay 50% of the disputed amount into an account designated by TAT and file

[58] Ibid. at 58.
[59] Ibid. at 59-60.
[60] Ibid. at 61.

a deposition to that effect, along with the Notice of Appeal—introducing a condition precedent to the hearing of an appeal filed against the RTA.[61] *Conversely*, Paragraph 15(7) of the Fifth Schedule to the FIRSEA vests TAT with the discretion to order payment of security in defined circumstances—where certain conditions exist—introducing conditions upon which TAT may order the payment of security for the prosecution of an appeal before TAT. The deposit so ordered must be deposited with the FIRS.

Thus, failure to comply with Order III Rule 6 renders the appeal incompetent and the TAT may strike out the appeal (or even adjourn to allow the appeal to comply with the condition precedent with the result that the taxpayer may subsequently bring an application to relist the appeal upon the satisfying the condition precedent). *However,* failure to comply with the order of TAT under Paragraph I5(7) is extremely drastic as the disputed assessment will be confirmed and the taxpayer's further right of appeal foreclosed forever.[62]

What about the conflict between the two (2) laws? Clearly, Order III Rule 6 TAT Rules 2021 differs from the statutory provision in Paragraph 15(7) of the Fifth Schedule to the FIRSEA and they are not complimentary—Order III Rule 6 TAT Rules 2021 seeks to derogate from, vary, or supplant the provision of paragraph 15(7). The law is that rules of procedure, such as TAT Rules 2021, cannot override statutory provisions of the law.[63] In *Famfa Oit Ltd v AG Federation,*[64] the Court of Appeal, per Abdullahi, JCA stated that subsidiary legislations must conform with the principal law which provided the source of their existence. Therefore, the provision of Order III Rule 6 TAT Rules 2021 cannot override the provision of Paragraph 15(7). Further, the hierarchy of legislative authorities places an Act of the federal legislature at the apex of statutes second only to the 1999 Constitution.[65] Third, the TAT Rules have as their source, the Fifth Schedule to the FIRSEA, and expectedly, Order III Rule 6 must conform with the provisions of the Fifth Schedule to the FIRSEA—it cannot be the other way—a point made clear by Section 68(1) of the FIRSEA which makes the FIRSEA superior to every other law in Nigeria except the Constitution.[66]

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[61] Ibid. at 61-62.
[62] (2022) 66 TLRN 52 at 62-63.
[63] See Afribank v Akwara (2006) 5 NWLR (Pt. 974) 679 (SC).
[64] (2007) LPELIR - 9023 at 29 (CA).
[65] Investment Holdings, supra note 21, at 64.
[66] See, FIRSEA, supra note 8, at Section 68(1), as amended by Section 22 of the Finance Act 2021

Therefore, the prevailing position of the law is that under Paragraph 15(7), the TAT may only direct the payment of the security deposit *only* if the FIRS proves *to the satisfaction of TAT* that the taxpayer has, either for the year of assessment, failed to file returns, deems the appeal an abuse of the appeal process, or it is expedient to require the taxpayer to pay an amount as security for prosecuting the appeal. Further, if any of these conditions is present, the TAT may adjourn the hearing and order the taxpayer to deposit with the FIRS an 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." In *Investment Holdings*, the FIRS failed to prove the presence of any of the three conditions under Paragraph 15(7) of the Fifth Schedule to the FIRSEA, and so, the TAT refused to order payment of any deposit. For the TAT to make an order under Paragraph 15(7) of the Fifth Schedule to the FIRSEA, at least one of the following conditions must be proved by the FIRS:

1. the taxpayer has failed to prepare and deliver the tax returns for the relevant year;
2. the tax appeal is frivolous or vexatious or is an abuse of the appeal process; or
3. it is expedient to require the appellant to pay an amount as security for prosecuting the appeal.

The first condition is fairly easy to determine as it is a matter of fact and records.[67] In respect of the second condition, where the taxpayer is able to establish a prima facie case, Paragraph 15(7) cannot be invoked.[68] The third condition requires the RTA to demonstrate that there is a danger that the taxpayer will move its assets out of the jurisdiction of the TAT by the time the TAT makes a decision, and where there is no prospect of such an event occurring, there is no basis for the TAT to make the order under Paragraph 15(7) of the Fifth Schedule to the FIRSEA.[69]

The requirements for payment of security deposit pending tax appeals are not applicable in tax appeal proceedings initiated before State High Courts and/ or tax matters involving revenue accruable to sub-national States.

[67] Ayorinde & Oluwole, supra note 5.
[68] Ibid.
[69] Ibid.

Under Section 4(2) of the SDA, stamp duties payable on transactions solely between two or more individuals are payable to the sub-national States.[70] Also, CGT accruing on the disposal of capital assets located within the territory of sub-national States can only be administered by the States.[71] Similarly, WHT deducted made by a vendor on account of rents, interest, dividends, commissions, etc payable to an individual is to be paid to sub-national States.[72] Further, all PIT under PITA is payable to individual sub-national States,[73] with the only exception being under Section 2(1A)(b)(i–iv) of the PITA which provides that PIT may be collected only by the Federal Government of Nigeria on the following persons: residents of the Federal Capital Territory (Abuja), members of the Nigeria Armed Forces and the Nigeria Police Force, diplomatic corps and non-resident persons. All these taxes relate to the revenue of sub-national State governments within the Nigerian federation.

The sum total of the above provisions is that under the principle of federalism, disputes over the collection and administration of the above taxes and items of income are strictly within the jurisdiction of State High Courts under Section 272 of the 1999 Constriction.

In *Wilbros Nigeria Limited v AG, Akwa Ibom State*,[74] and *LSBIR v Motorola Nigeria Limited*,[75] respectively, the Court of Appeal held that pursuant to Section 272 of the 1999 Constitution, where the matter in dispute arises under PITA and relates to revenue of a State government within the Nigerian federation, such actions must be commenced before the State High Courts. Thus, the jurisdiction of the State High Courts over PAYE and PIT and other WHT, CGT and stamp duties belonging to States of residents within the State is now affirmed, because by virtue of section 2(2) of the PITA, Section 4(2) of SDA, Sections 2, 3, and 4 of CGTA and the WHT Regulations, tax for any year of assessment may be collected only by the State in which the individual is deemed to be resident for that year.[76] The *Wilbros* court also held that the jurisdiction of the FHC to entertain tax matters under section 251(1)(b) of 1999 Constitution is limited to and connected with the taxation of companies and other business bodies established or

[70] SDA, supra note 27, at Section 4(2).
[71] CGTA, supra note 26, at Sections 2, 3, and 4.
[72] PITA, supra note 24, at Sections 69-75; See, also, Personal Income Tax Act Rates e.t.c of Tax Deducted at Source (Withholding Tax) Regulations (PITA WHT Regulations), supra note 24.
[73] PITA, supra note 24, at Section 2(2).
[74] (2008) 5 NWLR (Pt. 1081) 484; (2013) 1 NRLR 117
[75] (2012) LPELR-14712 (CA).
[76] However, Section 2(1A)(b)(i–iv) of the PITA, supra note 24, further provides that tax may be collected only by the Federal Government of Nigeria on the following persons: residents of the Federal Capital Territory, Abuja, members of the Nigeria Armed Forces and the Nigeria Police Force, diplomatic corps and non-resident persons.

carrying on business in Nigeria and all other persons subject to federal tax, and certainly does not extend to PIT or WHT of individuals not subject to federal taxation:

> The jurisdiction of the Federal High Court to entertain tax matters under section 251(1)(b) of the 1999 Constitution is limited to and connected with the taxation of companies and other bodies established or carrying on business in Nigeria and all other persons subject to Federal taxation, and does not extend to the personal income tax or withholding tax of individuals that are not subject to federal taxation. Section 251(1)(b) of the 1999 Constitution qualifies the provision of section 251. This at the same time excludes the tax accruable to a State. In the instant case, the issue before the court was on personal income tax, PAYE and the eligible court to try the issue is the State High Court. [*A.M. Shittu v. Nigerian Agricultal & Co-operative Bank Ltd.* (2001) 10 NWLR (Pt. 721) 298.][77]

As to the Court with jurisdiction over matters arising from revenues accruing to States, the court held:

> The State High Court can hear and determine matters arising from revenues that accrue to a State Government except that the revenue court of the State has original jurisdiction to determine matters relating to the recovery of such revenue.[78]

The same decision was reached in *LSBIR v Motorola Nigeria Limited & Anor,*[79] that as to which level of government has the constitutional responsibility to collect income tax mentioned in Item D7 of the Concurrent Legislative List

> I accept the submission made by learned counsel for the Appellant that the collection of income tax mentioned in Item D7 of the Concurrent Legislative List is the constitutional responsibility of the State Government. Therefore, the imposition and enforcement of Pay As You Earn of employees of companies (including those of the 1st Respondent) resident in Lagos State is vested in the Appellant.[80]

Further, as to which court has jurisdiction over the enforcement of the payment of States' PIT,

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[77] See, Omage, JCA and Owoade, JCA in Willbros, supra note 75) at 495-496, paras. F-A; 505-506, paras. G-C.
[78] Ibid. per Ngwuta, JCA at 03, paras. A-B.
[79] LSBIR v Motorola Nigeria Limited & Anor, (2012) LPELR-14712 (CA).
[80] Ibid. per Akaahs, J.C.A, at 18-19, paras. E-A.

CGT, stamp duty, and WHT that are part of the revenue of the sub-National States, the court in *A.M. Shittu v. Nigeria Agricultural & Cooperative Bank Ltd & Ors*[81] held:

> The subject matter of this suit has nothing to do with the operation of the 1st Respondent's company and even if the action is to challenge the lawfulness of the act of enforcing an alleged tax liability it is not questioning the power of the National Assembly to make the law and since it is expressly stated that it is the State that can enforce the payment of personal income tax, the challenge should go to the State High Court. The collection of taxes due to Lagos State Government is definitely not covered by Section 251(1) of the 1999 Constitution.[82]

Finally, the *Shittu* court also held that there is no provision express or implied in PITA conferring jurisdiction on the FHC to hear and determine civil causes and matters connected with or pertaining to the revenue accruable to the government of a State by virtue of the provisions of PITA. The facts in *Shittu*'s case are similar to those in *Motorola's* appeal and the decision in *Shittu*'s case is quite apposite to the resolution of the issue raised in *Motorola*.[83]

To be sure, the security deposit provisions under (i) Paragraph 15(7) of the Fifth Schedule to the FIRSEA, (ii) FHC Practice Direction 2021, (iii) TAT Rules 2021, and (iv) FHC Rules 2022, would not apply to proceedings that are not before TAT or FHC. Matters on revenue of sub-national States do not fall under the jurisdiction of either TAT or FHC and so would not be subject to security deposit requirements. Thus, in *Skye Bank Plc v. Kwara State Internal Revenue Service*,[84] it was held that both the TAT and FHC lack jurisdiction over PITA revenue accruing to States, as the Court of Appeal held:

> The Federal High Court does not have jurisdiction over a claim based on personal income tax accruable to a State Government under the provisions of the Personal Income Tax Act and under the provision of section 7(l) of the Federal High Court Act, 1973 (as amended)…The Tm Appeal Tribunal is merely an administrative tribunal set up to determine the correctness of assessment to tax without fixation with formality….The provisions of the First Schedule to the Federal Inland Revenue Service (Establishment) Act by

[81] (2001) 10 NWLR (pt.721) 298
[82] Ibid. at 310; See, also, Progressive Insurance Co. Ltd. Adepoju (1991) 1 NWLR (Pt.166) 248 and Ministry of Works v. Tomas Nig. Ltd (2002) 2 NWLR (Pt.752) 744.
[83] See, Akaahs, J.C.A, in Motorola, supra note 55, at 19-20, paras. G-F.
[84] (2021) 12 NWLR (Pt 1789) 44.

> virtue of section 59 of the Act and section60 of the Personal Income Tax Act do not confer jurisdiction on the Tax Appeal Tribunal in respect of dispute arising from taxes that are due to a State Government. They only relate to dispute arising from taxes and levies that are due to the Federal Government of Nigeria under the Act.[85]

CONSTITUTIONAL AND PROCEDURAL ISSUES ARISING FROM SECURITY DEPOSIT REQUIREMENT

The Subsidiary Laws

Clearly, the provisions of TAT Rules 2021, FHC Practice Directions 2021 and FHC Rules 2022 are against the provisions of the primary/principal tax enabling statutes to wit: the FIRSEA, CITA and PITA—which clearly delineated the procedure on which an assessment by the RTA can be challenged.[86] A taxpayer may object to an assessment under Paragraph 13 of the Fifth Schedule of FIRSEA, Section 69 of CITA and Section 58 of PITA under which the taxpayer has the right to object within 30 days if he disagrees with the assessment served upon him, and these enabling primary tax statutes do not provide that the assessed sum be paid where a taxpayer objects to or intends to challenge an assessment on appeal.[87] Clearly, the requirement to pay a deposit pending appeal cannot be imposed either through TAT Rules 2021, FHC Practice Directions 2021, or through FHC Rules 2022 but only an amendment of the substantive primary legislation can impose such a requirement.[88] In particular, Section 68 of PITA also grants a taxpayer 60 days to pay PIT where the assessment has not been subjected to an objection or appeal. Likewise, Section 77(2) of CITA grants a taxpayer 30 days to pay the assessed sum where it is not subject to an objection or appeal. To Abiola Sanni, these clear provisions of the enabling statutes cannot be overridden by either TAT Rules 2021, FHC Practice Directions 2021, or FHC Rules 2022 when the assessment has not become final and conclusive or where the taxpayer seeks to object to the assessment.[89]

Also, from the above analysis, the major differences between TAT Rules 2021, FHC Practice Directions 2021, and FHC Rules 2022, on the one hand, when compared with the FIRSEA, on the other, are that while the former subsidiary enactments establish a

[85] Ibid. 44, at 24.
[86] Sanni, supra note 5, at 4
[87] Ibid.
[88] Ibid.
[89] Ibid. at 4-5.

pre-condition (condition precedent) for tax appeal, the FIRSEA vests TAT with the discretion to order payment of security in defined circumstances, that is, where certain conditions exist.

Further, the TAT Rules 2021, FHC Practice Directions 2021, and FHC Rules 2022 are also at variance with the provision of Section 77 of CITA in view of the amendment introduced via Section 13 of the Finance Act 2021 which now provides that collection of disputed CIT assessment shall be in abeyance until the determination of objection or appeal and that only undisputed tax assessment is to be paid within 30 days except otherwise extended by FIRS.[90] Thus, Paragraph 15(7) of the Fifth Schedule to the FIRSEA and the extant Section 77 of CITA being substantive primary legislation on payment of security deposit pending appeal would take precedence over TAT Rules 2021, FHC Practice Directions 2021, and FHC Rules 2022. Thus, in *Independent Television Radio v. E.S.B.I.R.*,[91] the Court of Appeal held that:

> Although Rules of Court are to be followed, in cases where an Act of the National Assembly provides for a special procedure to be adopted by the courts in doing a thing, the Act of the National Assembly shall supersede the provisions of the court Rules. Court Rules are adjectival Rules rather than substantive law and can never supersede an enactment of the National Assembly. Rules of court are not as sacrosanct as statutory provisions of law.

In addition, the TAT Rules 2021, FHC Practice Directions 2021 and FHC Rules 2022 seek to curtail the right of access to court granted by the Constitution, as an order for payment of the judgment sum or payment of 50% or 100% of the disputed tax would constitute an impediment—by paying the security deposit, the case of the taxpayer is already predetermined in violation of Sections 6(6) and 36 of 1999 Constitution. Thus, Wole Obayomi noted:

> the requirement for taxpayers to pay TAT judgment debts into court before appeals can be heard would likely fetter the right of aggrieved taxpayers to lawfully challenge the TAT's adverse decisions. Given the current economic climate, taxpayers may be constrained by business exigencies from depositing such economic lifelines to court. Indeed, it is arguable that this requirement may be a breach of taxpayers'

[90] CITA, supra note 28, at Section 77, as amended by Section 13 of the Finance Act 2021
[91] (2015) 12 NWLR (Pt. 1474) 442.

> fundamental right to fair hearing guaranteed under the 1999 Constitution, given that the FIRS would not be required to make similar deposits to court.[92]

The TAT Rules 2021, FHC Practice Directions 2021 and FHC Rules 2022 are meant to only give effect to the substantive legislations, i.e., FIRSEA, PITA and CITA relating to the subject matter during a judicial review and they can, by no means, be the substantive law. The provisions of TAT Rules 2021, FHC Practice Directions 2021 and FHC Rules 2022 however seek to clog the right of litigants or limits the rights inherently preserved in the statutes, going contrary to established principles of fundamental rights and should be disregarded with the same ingenuity with which it was made.[93] The Nigeria Court of Appeal has further held in *Olaniyan v. Oyewole*,[94] that the rules of procedure cannot undermine the constitutional right of free access to courts. Thus where procedural rules attempt to regulate legitimate rights of access to court with specific particular requirements which constitute infringements of the exercise of judicial power by courts or which abridge the citizen's right of access to courts, such erring procedural rules are clearly inconsistent with the 1999 Constitution. This is in line with the Nigeria Supreme Court ruling in *Kayili v. Yilbuk*,[95] that the right of access to court is constitutionally guaranteed and cannot be derogated from, taken away or be made subject to any other legislation whatsoever. Undeniably, the TAT Rules 2021, FHC Practice Directions 2021 and FHC Rules 2022 have some merits for their intended purpose of expediting the tax litigation process and revenue generation, however, it is necessary that the rights of taxpayers are balanced in an equitable manner against the revenue generation drive of the government.[96] To reiterate, the treatment to be ascribed to rules of court or practice direction in conflict with the substantive laws it seeks to give effect was also considered in *Abubakar v. Yar'Adua*,[97] where the court held that practice direction in conflict with the Constitution or the enabling statutes will have no force of law. In *Mobil Oil (Nig) Ltd V. Federal Board of Inland Revenue*[98] the Court reiterated the limits of a Practice Direction when it stated thus:

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[92] Wole Obayomi, "Nigeria: Federal High Court Adopts New Tax Appeal Rules," KPMG (Nigeria Newsletter) 07 February 2022. Available at: https://www.mondaq.com/nigeria/tax-authorities/1158572/federal-high-court-adopts-new-tax-appeal-rules. Last accessed on 8th June 2022. (Obayomi)
[93] Sanni, supra note 5, at 5.
[94] (2008) 5 NWLR (Pt. 1079) 114.
[95] (2015) 7 NWLR (Pt. 1457) 26.
[96] Obayomi, supra note 93.
[97] (2008) 4 NWLR (Pt. 1078) 455
[98] (1977) 1 NCLR 1.

> ……. it is our view that the "practice direction ……. does not affect the right of an appellant or respondent in an income tax appeal before the Federal Revenue Court to adduce evidence…

Certainly, the right of access court under Section 36(1) of the 1999 Constitution provides that:

> 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.

Thus, in *Cotecna Int'l Ltd v Churchgate (Nig.) Ltd*,[99] the Supreme Court held that the Constitution guarantees citizens' rights to vent their grievances in court, with Section 36(1) of the Constitution being drafted in unequivocal and absolute terms and should not be unduly fettered or qualified by any other law in such a manner as to subvert or neutralise the right of access conferred by the Constitution.[100] Thus, the Supreme Court held in *Amadi v NNPC*,[101] that:

> We are of the view that Paragraph 15(7) of the Fifth Schedule to the FIRS Act is unconstitutional as it breaches the taxpayer's fundamental rights of access to the court and fair hearing enshrined in Section 36(1) and (2) of the Constitution. The provision of section 36(1) undoubtedly couched in wide absolute terms and is not unqualified. The purport of the provision is to enable right of access to the court absent legal obstacles in his path neutralising exercise of the right.

Also, the Supreme Court went ahead in *Amadi v NNP*[102] to hold as follows:

> It is however, not consistent with the exercise of the right of access to court to make regulations which subvert the exercise of the right or render the right nugatory. ... where an enactment regulates the right of access to the court in a manner to constitute an improper obstacle to access to court, such enactment could be appropriately regarded as an infringement of section 36(1) ... of the Constitution.

[99] (2010) 18 NWLR (1225) 346 at 384.
[100] Ayorinde & Oluwole, supra note 5.
[101] [2000] 10 NWLR (PT. 674) 76 at 87.
[102] (2000) 10 NWLR (674) 76 at 109 – 110.

There are also issues as to constitutional guarantees of Fair Hearing as enshrined in Section 36(2) of the Constitution which provides as follows:

> Without prejudice to the foregoing provisions of this section, a law shall not be invalidated by reason only that it confers on any government or authority power to determine questions arising in the administration of a law that affects or may affect the civil rights and obligations of any person if such law –
>
> a. provides for an opportunity for the persons whose rights and obligations may be affected to make representations to the administering authority before that authority makes the decision affecting that person; and
> b. contains no provision making the determination of the administering authority final and conclusive.

By purporting to deprive the taxpayer of the opportunity to present its case even after an appeal has been filed before the Tribunal, Paragraph 15(7) of the Fifth Schedule to the FIRS Act has breached the taxpayer's fundamental right to a fair hearing.

Based on the above analysis, it is arguable that the listed subsidiary legislation which imposes *conditions precedent* for filing appeals would impede fair hearing provisions.

The provisions of the above Subsidiary Legislation and those of Paragraph 15(7) of the Fifth Schedule to the FIRSEA would lead to the crystallisation of burdensome interim orders. Courts and tribunals are discouraged from making *interim orders* which have the effect of granting the reliefs which a litigant has sought in its substantive suit. An order made pursuant to the TAT Rules 2021, FHC Practice Directions 2021 and FHC Rules 2022, as well as Paragraph 15(7) of the Fifth Schedule to the FIRSEA is a direct breach of this rule in view of the fact that the decision of TAT can result in a crystallisation of the assessed tax which is being challenged in the appeal. In *Altine v Afribank Plc*.,[103] the Court of Appeal held:

> In applications for the grant of interlocutory injunction pending the determination of the substantive claim, the judge has a duty to ensure that he does not in the determination of the application determine the same issues that would arise for determination in the substantive suit as it is not proper for the court at that stage to express any opinion as to such rights as such an opinion might give the impression that the

[103] (2000) 15 NWLR (Pt 689) 181 at 194 paras F – H.

> court has made up its mind on the substantive issue for trial before it. See A.C.B Ltd v. Awogboro (1996) 3 NWLR (pt 437) 383; Orji v. Zaria Ind. Ltd (1992) 6 NWLR (pt. 216) 124. The court should also desist from making orders touching on substantive issue at interlocutory stage. See Ojukwu v. Military Governor of Lagos State (1986) 3 NWLR (pt.26) 39 Nnaemeka Agu JCA (as he then was) said at page 25:- "I cannot over emphasis the need of trial Judges in interlocutory rulings desisting from making any findings which may prejudice the substantive case. It is true that if the above findings were rightly made and allowed to stand, they have completely knocked the bottom out of the substantive suit.

CONCLUSION

The Paper has carried out an in-depth review of the conflicting decisions by the differing Abuja and Lagos divisions of the TAT in two *MultiChoice* opinions. The Paper also extrapolated on the *Investment Holdings* opinion by the Lagos TAT. From above, the *Investment Holdings* Tribunal has clearly resolved that the FIRSEA provisions will govern the imposition of the security deposit in proceedings before the TAT—resolving the conflict created by the two *MultiChoice* decisions. Further, there are serious constitutional and procedural challenges to FHC Practice Direction 2021 and FHC Rules 2022. Finally, with State High Courts, there are clearly no provisions for payment of security deposit. The appeal process in Nigeria is fairly straightforward. However, the emergence of multiple provisions stipulating payment of security deposit pending tax appeals appears to create an excessive burden for taxpayers. Perhaps it is true that such is *akin* to a forced admission of liability before actual adjudication of the dispute.[104] It is highly likely that the decision of TAT under all the enactments listed above, including the FIRSEA, can result in a crystallisation of the assessed tax which is being challenged in the appeal. The saving grace is that all the decisions currently interpreting the security deposit provisions are those of TAT, an administrative tribunal with the effect that stakeholders would await the pronouncement by a superior court of record as an authoritative legal rule on the subject. There should be evidence of capital flight from jurisdiction before an order for a security deposit can be made pending judicial review. It must be reiterated that there are no decisions of the superior courts on these

[104] See, Oyintiloye, supra note 5.

provisions yet. Thus, the Paper concludes that security deposit requirement provisions would violate the fair hearing rules under Sections 6(6) and 36 of the 1999 federal Constitution and that tax disputes on taxes payable to the sub-National States (Personal Income Tax, Withholding Tax, Capital Gains Tax and Stamp Duties that are revenues of a State) are clearly not subject to the security deposit payment rules.

While the dust may appear to have settled on the controversy surrounding the payment of security deposit pending tax appeals, it is this Paper's position that there should be an amendment in the tax appellate procedural rules in Nigeria, to the effect that where (a) there has arisen multiple tax appeals (filed before different divisions of the same court/tribunal) on an identical legal issue or (b) there are conflicting judicial decisions (by courts of coordinate jurisdictions) regarding an identical contentious legal issue, the proposed amendment should enable the supervising judicial officer (such as either the Chief Judge of the Superior Court or the President of the Tax Appeal Tribunal) to consolidate all multiple cases before a single Special Panel of judicial officers to hear the multiple cases, towards the issuance of a single unifying legal opinion on the subject. The appointed Special Panel must also be empowered to invite legal contributions from all stakeholders as *amicus curiae* to enable the Special Panel to reach a robust and comprehensive decision on the legal issue under consideration. This would also help to prevent the issuance of conflicting decisions on the subject matter as discussed above.

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