Tax Litigation: Paradigm Shift on Notice of Refusal to Amend Assessment (NORA)

'Taxspectives' by **Afolabi Elebiju** | Originally published in *ThisDay Lawyer, 6th September 2011, p.6*

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Background

In a recent epochal decision, ***OANDO SUPPLY & TRADING LTD V FBIR (2001) 4 TLRN 113,*** the Lagos Zone of the Tax Appeal Tribunal (TAT) headed by Mr. Kayode Sofola, SAN held that taxpayers need not wait indefinitely on the FIRS to issue NORA before filling tax appeals to the TAT. *"Unreasonably delay"* by the FIRS is deemed to be refusal to revise the assessment as desired by the tax-payer, pursuant to his objection. This piece examines the ramifications of this decision for the tax objection/appeal process in Nigeria, whilst prefacing the discussion with an overview of the tax dispute resolution process, pre and post *FIRS (Establishment) Act No. 13, 2007 (FIRS Act).*

The Tax Objection/Appeal Process

Prior to the enactment of the *FIRS Act,* the tax objection and appeal process was respectively enshrined in *sections 69-76 CITA (for CIT, CGT and ET), sections 38-43 PPTA (for PPT and ET), section 20* and 2nd *Schedule VATA (for VAT)*. For upstream tax disputes, the process per PPTA provisions, entailed: (a) issue of assessment by FIRS to tax payer; (b) written objection within 21 days to FIRS; (c) consideration of objection by FIRS and issue of revised assessment or NORA; (d) appeal to Tax Appeal Commissioners within 30 days; (e) further appeal to the Federal High Court (FHC) and thereafter, to the Court of Appeal and the Supreme Court. CITA's *section 69(2)* and *PITA's 58(1)* provides for thirty-day objection period, and had similar provisions as PPTA on NORA, and appeal thereafter to Federal or State High Court as the case may be. On its own part, the VATA initially provided for direct appeal (no objection) to the VAT Tribunal if a person is aggrieved by an assessment, within 15 days of receipt of such assessment but *section 10 VAT Amendment Act (VATTA) 2007* rectified the omission.

> ***"a person aggrieved by an assessment or demand notice made upon him by the Service or aggrieved by any action or decision of the Service under the provisions of the tax laws... may appeal against such decision or assessment or demand notice within the period stipulated under this Schedule to the [Tax Appeal] Tribunal"***

Generally, an uncontested assessment or unchallenged NORA (i.e. assessment not objected to/NORA not appealed against within time), renders the assessment final and conclusive against the taxpayer – the Revenue can enforce collection of the tax represented therein. *CITA* and *PPTA* had provisions for extension of time within which to object/appeal. I submit that although *PITA* had no such provision, upon satisfactory reasons being shown for delay, a taxpayer should enjoy such relief, so as not be shut out from contesting an objectionable assessment. The inherent jurisdiction of the Court and provisions of the relevant High Court Rules on extension, could be called in aid. Conversely, a valid objection puts the assessment in abeyance pending review/decision of the Revenue to revise/issue NORA on same; or pending appellate decision on the NORA.

The FIRS Act which became effective in April 2007, sought to impose uniformity in the tax dispute resolution process by repealing inconsistent provisions of tax laws or have them read subject to such modifications as would bring them into conformity with the *FIRS Act (section 68).* However, as a result of some gaps in the Act, should the appeal procedure in the *FIRS Act* not be read together with the tax objection provisions of the *CITA, PPTA* and *PITA*? Whilst *section 18 CITA Amendment Act 2007* (*CITAA*) repeals the CITA appeal process, it does not repeal *section 69(2) CITA* on tax objection, because the stipulation is *"appeals shall be as provided in the [FIRS] Act"*. This writer wonders whether *section 18 CITAA* is not even otiose, given the provisions of *sections 59* and *68 FIRS Act* - the inconsistent provisions for tax appeals in the *FIRS Act* automatically overrides equivalent provisions in *CITA*.

Paragraph 13(1), 5th Schedule FIRS Act provides that: *"a person aggrieved by an assessment or demand notice made upon him by the Service or aggrieved by any action or decision of the Service under the provisions of the tax laws... may appeal against such decision or assessment or demand notice within the period stipulated under this Schedule to the [Tax Appeal] Tribunal". Section 59 FIRS Act* provides the basis for the above prescription, with *section 59 (2)* vesting the TAT jurisdiction to *"settle disputes arising from the operations of this Act and under the First Schedule."*

It would seem therefore that the absence of *section 18 CITAA* type provision for

PPT/PIT taxpayers does not weaken the view that it is possible to appeal directly to the TAT. *Oando* (below) has indeed affirmed the right of direct access. However, for policy reasons, the objection procedure should not be thrown overboard; it could potentially lead to resolution of issues between FIRS and the taxpayer, thereby obviating the need for tax appeal and attendant costs.

Furthermore, whilst the *FIRS Act* replaces the administrative positions of the tax laws, where it fails to provide for detailed procedure that is already provided for by *PPTA*, such extant provision should be utilised if not inconsistent with the *FIRS Act*. Owing to years of ingrained practice, risk management or some other "strategic" reason, some taxpayers may prefer to utilize the objection process, as a first step towards resolution of their tax disputes. The FIRS is unlikely to challenge such approach, having set up *"arbitration desks"* at Integrated Tax Offices to handle tax disputes, and then at Regional Offices before resort to the TAT (*Nnamdi Duru, This Day, 14th July 2009*). In the event that it becomes necessary, a taxpayer can ask for extension of time to appeal as happened in *Oando*. In summary, one could either appeal against an assessment directly, or object before appealing.

OANDO v FIRS: The Facts & Decisions

The Appellant had received additional assessments for 2006 - 2008 years of assessment, and objected thereto in May 2010. Six months thereafter, the FIRS claimed it was still reviewing the Objection, pursuant to which *Oando* decided to appeal against the assessments to Lagos TAT and sought extension of time within which to appeal. The Respondent challenged the application as frivolous, the appeal incompetent, and that the TAT lacked jurisdiction because it (FIRS) had not issued NORA in respect of the assessments.

In dismissing the Respondent's submissions, the TAT held *inter alia* that: (a) NORA (or indeed objection) is no longer a prerequisite for tax appeal under the FIRS Act, given *Para 13(1) 5th Schedule* (reproduced as *Order 3, Rule 1 TAT (Civil Procedure) Rules);* (b) although the law only stipulated 30 days within which taxpayer must object to assessments, "a 90 day timetable" is reasonable and generous" within which the Revenue should respond to the objection. At *p. 123*, the TAT stated: *"the taxpayer anxious to know its correct and precise tax liability is entitled to get that information quickly… the tax collector should not be allowed to hang the dread of an impending NORA over the taxpayer's business –that would turn the taxman into a hangman."* This is moreso as *"the taxpayer cannot force NORA out of the dilatory tax collector. We must hold the Respondent, to a reasonable level of responsibility in the performance of its duties especially its duty of timely business correspondence with taxpayers";* (c) on the issue that appeals can only be against a 'decision' or 'order', the TAT affirmed that "an assessment entails both a decision and an order"; (d) a taxpayer challenging an assessment is a person aggrieved within *Para 13(1), 5th Schedule*; (e) the TAT can deem a decision to have been made by the FIRS: where *"the FIRS omits for too long to respond one way or another, their omission must be interpreted, or deemed as a refusal decision – a [NORA]."*

Conclusion

Oando is a welcome addition to our tax jurisprudence; particularly the recognition of the uneven playing field that the law has created by omitting to specify timelines for FIRS' response actions during the objection process, and the pragmatic approach the TAT took to address the problem. I agree wholeheartedly that 'reasonable' time must be imposed in the circumstances. In *Vestey v IRC (1980) STC 10,* at *19, Lord Wilberforce* was of the view that the UK Revenue must act with *"administrative common sense"* because *"no one is going to complain if they bring humanity to bear in hard cases."*

How much more in dealing with objections as in *Oando*! *Section 20(3) VATA* as amended by section 10 VATAA is also instructive in respect of VAT objections to the FIRS: *"an appeal [sic objection] before the FIRS shall be determined within 30 days."* Another parallel may be drawn with *section 5 FOI Act 2011* which mandates public institutions to decide on applications for access to information within 7 days. However, the omission of timeline on FIRS' right of appeal to the TAT under *Para 14, 5th Schedule*, if the FIRS is aggrieved with any person's non-compliance with the tax laws, is apparently less objectionable, since FIRS is to enforce the provision as its capacity and targets allows.

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