# TAT rules that Insurance Companies are subject to excess dividend tax rule in CITA

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The Lagos zone of the Tax Appeal Tribunal (TAT) recently issued a ruling in the case involving **FBN Insurance Limited *(FBN or "the Company" or "the Appellant")*** **and *Federal Inland Revenue Service (FIRS or "the Respondent").*** The TAT has ruled that insurance companies are not only liable to tax under Section 16 of the Companies Income Tax Act (CITA) but also subject to other non-conflicting provisions of CITA.

## Background of the Case

The Respondent conducted a tax audit exercise on the Company's 2016 and 2017 financial records, resulting in an additional Companies Income Tax (CIT) assessment of ₦917,234,580 (Nine Hundred and Seventeen Million, Two Hundred and Thirty-Four Thousand, Five Hundred and Eighty Naira) only. Additionally, the Company was assessed to Withholding Tax (WHT) liabilities, inclusive of interest and penalties, on the following transactions:

- Commission on premiums amounting to ₦112,987,000 (One Hundred and Twelve Million, Nine Hundred and Eighty-Seven Thousand Naira) and ₦34,008,000 (Thirty-Four Million and Eight Thousand Naira), for 2016 and 2017 financial years, collected by First Bank of Nigeria Limited (FBN Ltd), on behalf of the Company in respect of life insurance policies taken by the customers of FBN Ltd.

- Amortized repayment of rent in the total sums of ₦106,047,000 (One Hundred and Six Million and Forty-Seven Thousand Naira) and ₦74,731,000 (Seventy-Four Million, Seven Hundred and Thirty-One Thousand Naira) paid by FBN Ltd to Scandirect Ltd for the premises occupied by the Company during the period under review.

- Reimbursable expenses amounting to ₦49,531,000 (Forty-Nine Million, Five Hundred and Thirty-One Thousand)

- Professional fees amounting to ₦160,865,000 (One Hundred and Sixty Million, Eight Hundred and Sixty-Five Thousand) and ₦53,980,000 (Fifty-Three Million, Nine Hundred and Eighty Thousand) paid to FBN Capital Management Limited (FBN Capital).

The Appellant duly objected to the assessments on the basis that the FIRS failed to consider various aspects of its business. Despite the Company's objection and clarifications, the Respondent refused to discharge the additional liabilities and subsequently issued a Notice of Refusal to Amend (NORA). Dissatisfied with the Respondent's position, FBN filed an appeal before the TAT, seeking to have the liabilities set aside.

## Appellant's Argument

FBN raised six issues for determination in making its argument. The Appellant submitted that the only Section of the CIT applicable to the determination of the tax liability of insurance companies in Nigeria was Section 16, an exhaustive section containing a non-obstante clause and a mandatory language that prohibits the application of any other tax rules for the taxation of insurance companies. The Appellant, relying on ***Commissioner for Finance and Economic Development & Anor v Ukpong & Anor (2000),*** argued that the stated section had provisions for excess dividends and minimum tax provisions and any inherent ambiguity should be resolved in favour of the taxpayer.

The Company further submitted that the provisions of Sections 16(1),(2),(3),(4) and (5) indicated the intendment of the legislature to create a special tax regime for insurance companies distinct from the general rules applicable to other companies. The Company, relying on the judicial precedent in the case between ***Uyo Local Government v Akwa Ibom State Government (2021),*** reiterated that when the phrase **"notwithstanding anything to the contrary contained in this Act",** is used in a section of a statute, it is meant to exclude an impeding effect of any other provision of such statute. The Company also relied on the judicial precedents in the cases between ***NDIC v Okem Enterprises Ltd (2004)*** and ***Total Nig Plc v Morkah (2002)*** to buttress its point.

Based on the above considerations and reliance on the cases between ***America Specification Autos Ltd v AMCON (2017) and Inakoju & Ors v Adeleke & Ors (2007), Mobil Oil Producing Nig Unlimited v Federal Inland Revenue Service (2021) LPELR-53436 (CA); Nigerian National Petroleum Corporation v Komolafe(2021) LPELR-55824 (CA),*** the Appellant opined that the consideration of Section 19 of the CIT would impede or conflict with Section 16(1) and (2). It argued that a statutory provision should not be interpreted in a way that would defeat the intendment of the legislature in enacting the law provision and that the application of Section 19 to the insurance business would result in a different tax regime for insurance companies, contrary to the intent of Section 16. Therefore, the appellant asserted that Section 19 should not apply to insurance business.

The Appellant further submitted that section 16(3) served as an anti-tax avoidance provision for companies in the insurance industry which the Respondent ought to have applied to the computation of excess dividend tax. According to the Appellant, section 16(9) provided a minimum amount that must be available as total profit of an insurance company, whether profit is made in that year. The Appellant, therefore, stood on the grounds that the Respondent applied an interpretation which was averse to the legislation, which would make section 16 the governing section for insurance companies.

On the issue of excess dividend, the Appellant argued that tax-exempt income should not attract CIT liabilities on any year and the Respondent wrongly assessed its tax-exempt income to excess dividend tax[1]. The Company, relying on ***Harbour Egde Investment Company Limited v Federal Inland Revenue Service (2022) and Dangote Industries Limited V Federal Inland Revenue Service (2022),*** argued that neither dividends from the previous year's profit nor tax-exempt income should form part of the taxable income of insurance companies under CITA. As such, the Respondent had acted erroneously by taxing the income of the Appellant under section 19 of the CITA.

On the issue of WHT on the transactions entered between the Appellant and FBN Capital, the Appellant submitted that the applicable WHT on all fees paid out on qualifying transactions for the relevant years had already been remitted.

[1] The transactions happened prior to 2019 year of assessment when the Finance Act amended the excess dividend tax rule

On the fourth issue, the Appellant submitted that the Respondent lacks the power to impose WHT on the **bancassurance arrangement** (an arrangement whereby an insurance company can sell insurance products through a bank's distribution channels)). FBN Ltd. retains some amounts as its commission on premiums collected on behalf of the Appellant. The Appellant argued that, because of the arrangement between the parties, it could not have deducted WHT on the commission and that the bank had paid corporate income tax on its profits, including the commission. The Appellant also argued that it was not liable to WHT on amortized repayments of rent as the premises was subleased by FBN Ltd., which had deducted and remitted WHT to the Respondent on the actual rent paid to Scandirect for the said premises.

On the issue of Reimbursable expenses, the Appellant relied on ***Comviva Technologies Nigeria Limited v Federal Inland Revenue Service (2020)*** to argue that reimbursable expenses, especially those that qualify as wholly, reasonably, necessarily and exclusively incurred in connection with business, should not be liable to tax as they do not constitute taxable income or revenue in the hands of the taxpayer.

## FIRS' Argument

The FIRS formulated two issues for determination. The Respondent stated that exclusions from tax could not be inferred unless expressly provided for by the legislation and, as such, a company might be liable to tax under various provisions of the tax law. The Respondent further stated that section 19 was not inconsistent with section 16 and should, therefore, be considered in the assessment of any company. Furthermore, the Appellant did not bring credible facts or evidence against the Respondent thus solidifying the argument of the Respondent.

## Issues for Determination

Based on the prayers and arguments submitted by the parties, the TAT adopted three issues for determination as follows:

i. Whether the Respondent can lawfully subject the incomes of the Appellant to tax, outside the provisions of section 16 of the CITA.

ii. Whether the Respondent lawfully assessed the Appellant to tax under section 19 of the CITA.

iii. Whether the Respondent rightfully assessed the Appellant to additional WHT, interest and penalties inclusive for the 2017 and 2018 YOAS.

## TAT's Decision

After considering the arguments of both parties, the TAT ruled as follows:

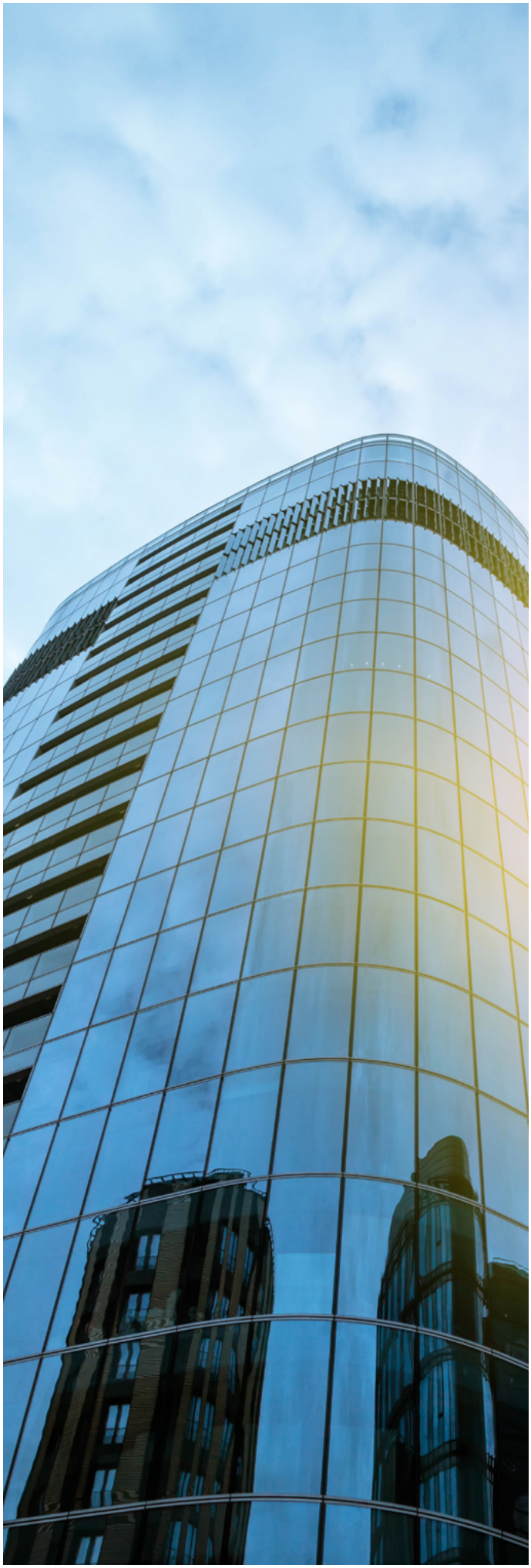
1. With respect to the subjection of the Appellant's income to tax outside the provisions of Section 16 of CITA, the TAT, aligning with the decisions of the Supreme Court in India in the cases of ***Orient Paper and Industries v State of Orissa (supra); Union of India v G.M Kokli (supra) and Indra Kumar Patodia v Reliance Industries Ltd (supra),*** where the different sections of a statute are not conflicting, the sections can be taken into

consideration. According to the Tribunal, Section 19 relates to completely different situations with specific triggers and would apply to any company that has activated the triggers. On this breath, the TAT ruled in favour of the Respondent, holding that the Respondent can lawfully assess the Appellant to tax outside the provisions of section 16.

2. In deciding whether the Respondent lawfully assessed the Appellant to tax under section 19 of the CITA, the Tribunal considered the amendment made by the Finance Act 2019 but ruled that the amendment could not be applied retrospectively. As such, the Appellant cannot take benefit of the amendment. The TAT relied on ***Oando Plc v Federal Inland Revenue Service (2014); Actis Africa (Nigeria) Ltd v Federal Inland Revenue Service*** to hold that the Appellant was liable to the payment of excess dividend tax under section 19 of the CITA as it had paid dividends which were higher than profits. It was, therefore, held that the Respondent acted lawfully in assessing the Appellant to tax under section 19 of the CITA.

3. With respect to the additional WHT, the Tribunal held that the Appellant failed to provide appropriate evidence to prove any of its claims of properly remitting WHT to the tax authorities. The TAT also ruled that the Appellant was liable to the payment of interests and penalties as it failed to deduct and remit tax from its transactions within the period prescribed by law.

Ultimately, the matter was resolved in favour of the Respondent and the Appellant was ordered to pay the additional CIT and WHT liabilities (penalties and interest inclusive), as well as ₦250,000 (Two Hundred and Fifty Thousand Naira) as cost to the Respondent. The Appellant's appeal was, therefore, dismissed.



## Commentaries

There are three key takeaways from the TAT ruling - the interpretation of non obstante clause, a legal provision that means 'notwithstanding', the importance of providing documentary evidence to substantiate the assertions being made and the timing for the payment of interest and penalty on disputed assessments that have not become final and conclusive.

With respect to the interpretation of 'notwithstanding' in an enactment, the TAT is of the opinion that section 16 of CITA relates to the computation of income tax by insurance companies while section 19 focuses on the payment of dividend by any Nigerian company. Therefore, according to the TAT, the sections deal with different situations and are not in conflict. In other words, where there is an inconsistency, the non obstante clause would override. However, where there is none, the clause cannot be relied upon. The Tribunal also states that where there are no specific sections in the statute that are being overridden, as in the case of section 16, the non obstante clause must be given a restrictive meaning as the intention of the Legislature cannot be for that clause to override the entire Act and, therefore, stand alone.

This ruling has helped to provide clarity on how non obstante clauses should be interpreted. The conclusion is that such clauses can only override conflicting provisions relating to the same issue. This clarification will greatly help in resolving future conflicts between taxpayers and tax authorities.

The second takeaway is that it is not enough for taxpayers to state that an assessment is excessive, they must provide documentary evidence to substantiate their claims. The responsibility does not lie with the tax authorities but with the taxpayers challenging the disputed assessments. Otherwise, the probability of them losing any disputed appeal will be very high. In the instance case, the Appellant lost its WHT appeal simply for lack of evidence. The guiding principle is that he that asserts must prove and the Appellant failed to abide by this. However, one interesting issue is the decision with respect to the bancassurance arrangement. This raises the question of how the TAT may rule in the case of WHT due on interest payable by a taxpayer to a bank given that the taxpayer does not have the ability to withhold at source. Can the Tribunal or the Court compel a taxpayer to do that which is not possible?

The last takeaway is that interest and penalty will accrue from the time the duty to pay the principal liability arose. In other words, it is not enough to claim that the disputed assessment has not become final and conclusive. The TAT generally seems to be adopting the precedent set in the Federal High Court judgment in *CMA CGM Delmas v. FIRS* unless it is set aside by a superior or higher court. It should be noted that a TAT panel in the Lagos zone recently ruled, in the case between MTN v. FIRS[2], that an assessment that has not become final and conclusive should not be liable to interest and penalty.

[2] Please see our Newsletter titled: TAT rules on the interpretation of final and conclusive assessment and other Matters | Issue No. 11.2 | November 2023.

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