

## How Can Time to File a Tax Assessment Appeal Be Extended?

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In this article, Agbada discusses the point at which the 30-day statute of limitations begins to run for filing an appeal of a tax assessment in Nigeria and explains how the time can be extended.

Statutes of limitation in Nigeria define the time limits for commencing an action before a court. In addition to the general statutes of limitation, specific laws prescribe the time limits for filing an action to enforce specific rights or against specific people. An example is the Federal Inland Revenue Service (Establishment) Act, 2007 (FIRS Act), which allows a period of 30 days to appeal a tax assessment by the Federal Inland Revenue Service (FIRS).<sup>1</sup>

A suit commenced after the expiration of the statutory period is statute-barred and liable to be dismissed. Therefore, an appeal against a tax assessment filed after 30 days will ordinarily be considered statute-barred and liable to be dismissed. However, application of the limitation rules is not always straightforward in tax matters, and this article discusses a cause of action's maturity point to appeal a tax assessment and when that cause of action becomes statute-barred.

### Cause of Action to Appeal a Tax Assessment

A cause of action is the fact or combination of facts that gives a person the right to seek judicial relief.<sup>2</sup>

According to paragraph 13(1) of the fifth schedule to the FIRS Act, a taxpayer aggrieved by an assessment, demand notice, or other FIRS

action may appeal to the Tax Appeal Tribunal (TAT) within 30 days. However, the facts behind the taxpayer's appeal are not limited to the assessment or demand notice as isolated events — they begin with the service of a notice of assessment or notice of additional assessment and usually end with a notice of refusal to amend (NORA).

The FIRS and the various state tax authorities are empowered to assess tax against individuals and companies by serving a notice of assessment or additional assessment. Taxpayers may:

- pay the assessed tax in the notice; or
- serve the tax authority with an objection to the assessment within 30 days of receipt of the assessment.

The tax authority may issue a revised assessment in which it agrees with the taxpayer, or disallow the objection and issue a NORA and a demand notice. The factual situation becomes complete with the issuance of a NORA. The taxpayer's cause of action to appeal the assessment therefore crystallizes on the date of service of the NORA and becomes the date for computing the limitation period to appeal the assessment. Against this background this article explains the maturity point to commence an appeal against an assessment.

### Limitation Period to Appeal a Tax Assessment

Paragraph 13(2) of the FIRS Act provides that a taxpayer must file an appeal against an assessment or demand notice at the TAT within 30 days from the date the assessment or demand was made or deemed to have been made.

Generally, an action that is commenced after the expiration of the prescribed period is statute-barred and liable to be dismissed. A party who fails to commence an action within the prescribed

<sup>1</sup>Section 41 of the Petroleum Profits Tax Act contains similar provisions.

<sup>2</sup>*Alalade v. Morohundiya*, (2002) 16 NWLR (Part 792) 81.

period loses the right to seek judicial redress.<sup>3</sup> This is also the consequence under paragraph 13(3) of the fifth schedule to the FIRS Act, which provides that if a taxpayer fails to appeal an assessment or demand notice within the prescribed period of 30 days, the assessment or demand notice becomes final and conclusive and the FIRS may charge interest and penalty on the assessed amount.<sup>4</sup>

However, the courts and the TAT have held that a tax assessment that is issued in contravention of statutory provisions is a nullity and cannot qualify as a final and conclusive assessment. The courts and the TAT can inquire into the validity of a tax assessment and set it aside if it is found to be noncompliant with statutory provisions — even if the taxpayer fails to challenge the assessment within the prescribed period.<sup>5</sup> Therefore, an appeal against a tax assessment that is filed outside the prescribed 30 days may still be entertained if the taxpayer can establish that the assessment is noncompliant with statutory provisions.

A finding of noncompliance will require an examination by the TAT of the merits of the appeal. Once the issue of noncompliance or defect of a notice of assessment is raised in an appeal, the TAT can consider the appeal's merits even after the limitation period has run. It is an exception to the general rules of limitation, which will usually preclude a court or tribunal from considering the merits of a case filed outside the statutory limitation period.

In addition to the TAT's powers to consider the legality of an assessment even when an appeal is not timely filed, the proviso to paragraph 13(3) of the fifth schedule to the FIRS Act provides that "the Tribunal may entertain an appeal after the expiry of the said period of 30 days if it is satisfied that there was sufficient cause for the delay."

However, the FIRS Act does not offer any guidelines for what constitutes sufficient reason for a delay. Determination of sufficiency is therefore completely at the discretion of the TAT.

In *Harbour Edge*,<sup>6</sup> the FIRS objected to the appeal of an additional assessment on the ground that the appeal was not made within 30 days of the NORA.

The FIRS contended that Harbour Edge objected to additional notices of assessment. The FIRS rejected the objection and served a NORA on June 29, 2020. It argued that the right of appeal of the assessment crystallized then, and the time frame for filing an appeal started on that date. Because Harbour Edge failed to appeal the assessments within 30 days from that date, the assessments became final. The FIRS contended that the appeal must therefore be dismissed.

Harbour Edge denied receiving the NORA and contended that after the service of the additional assessments, the parties engaged in settlement negotiations that suspended the time for filing an appeal. The appellant said that its cause of action to appeal the assessments only arose when the FIRS issued a letter dated October 13, 2020, indicating the breakdown of the settlement efforts, and advising the appellant to approach the TAT. The appeal was filed on November 12, 2020, and was therefore timely.

The TAT held that a taxpayer negotiating with the tax authority cannot be said to be aggrieved and does not come under the provisions of paragraph 13 of the fifth schedule to the FIRS Act and Order III of the Tax Appeal Tribunal (Procedure) Rules, 2021 (which contains identical provisions as paragraph 13). In the TAT's view, negotiations are an implied extension of time for a taxpayer, and it therefore:

does not lie in the mouth of the tax authority to state that, time should begin to run from the date of service of the notice of assessment or notice of additional assessment or even notice of refusal to amend (NORA).

The TAT held that the limitation period began to run in this case after the breakdown of negotiations, and the appeal was timely filed.

Based on this TAT decision, the service of a NORA or demand notice does not of itself trigger the cause of action to appeal an assessment where

<sup>3</sup> *Wali v. A.P.C.*, (2020) 16 NWLR (Part 1749) 82.

<sup>4</sup> See *FIRS v. Gazette Communication Ltd.*, (2013) 10 TLRN 1.

<sup>5</sup> See *Federal Board of Inland Revenue v. Joseph Rezcallah & Sons Ltd.*, (2010) 2 TLRN 59; *Global Scansystems Ltd. v. FIRS*, (2016) 22 TLRN 14.

<sup>6</sup> *Harbour Edge Investment Ltd. v. FIRS*, (2022) 70 TLRN 48.

the taxpayer enters negotiations with the tax authority. Time will not begin to run after the issuance of a NORA if the taxpayer initiates settlement talks with the tax authority.

This decision bases the right to appeal an assessment on the failure of settlement efforts. Thus, in addition to the provisions on extension of time to file an appeal, and the TAT's power to consider the merits of an appeal filed outside the prescribed period predicated on noncompliance with statute, a taxpayer can file an appeal outside the statutory period if engaged with the tax authority in settlement discussions after the issuance of the NORA.

The decision has not been reversed by an appellate court and seems to represent the law. However, it seems to derogate from the express provisions of the FIRS Act and the TAT Rules that expressly require the taxpayer to appeal an assessment or additional assessment within 30 days. The consequences for failure to comply are also clearly spelled out. The only instances in which exceptions are allowed are if a taxpayer furnishes sufficient reason for the failure to comply with the time requirement; or if the illegality of the assessment is established. In these cases, the event that caused the delay becomes the basis for extension of time by the TAT.

If the issuance of a NORA or demand notice triggers the cause of action to file an appeal, it is difficult to see how these events can be ignored or dismissed simply by opening negotiations. In any event, the law is settled that negotiations do not stop time from running for calculating the limitation period for commencing an action.<sup>7</sup> The only qualification is if a defendant admits liability during the negotiations.<sup>8</sup> Therefore, negotiations between a taxpayer and the tax authority ought not to automatically stop the time to file an appeal from running.

However, negotiations could, in some situations, be a good reason to extend time to file an appeal. Granting an extension of time to appeal an assessment on the ground of negotiations that were initiated after the issuance of a NORA, or which lasted beyond a NORA, is likely to

encourage amicable settlement of tax disputes. This will relieve a taxpayer of the cost of litigation and ease the burden of administration for the tax authority. It is therefore a mutually beneficial outcome that needs to be encouraged, and in deserving cases, time to appeal an assessment ought to be extended on the ground of negotiations.

### Conclusion

The TAT decision examined is a deviation from express statutory provisions and judicial precedent, and it is likely to be set aside on appeal. The service of a NORA triggers the cause of action to appeal, and it is advisable to file an appeal upon the receipt of a NORA, even if there are ongoing negotiations with the FIRS. According to the proviso to paragraph 13(3) of the fifth schedule to the FIRS Act, and relevant jurisprudence, an appeal that is filed outside the prescribed 30 days may only be heard if the TAT extends time to file the appeal or a defect in the assessment is established. Failure to file an appeal within 30 days after the receipt of a NORA on the ground of negotiations could prove detrimental to the right of appeal. It is therefore advisable for taxpayers who fail to timely appeal assessments because they are negotiating with the tax authority to expressly apply for an extension of time to appeal the assessment. ■

<sup>7</sup> *Eboigbe v. NNPC*, (1994) 5 NWLR (Part 347) 649.

<sup>8</sup> *Id.*

