# LITIGATION UPDATE

## JULY & AUGUST, 2018

ADVOCAAT
LAW PRACTICE

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***WHAT TYPE OF COMPANIES ARE ENTITLED TO 100% CAPITAL ALLOWANCE UNDER THE COMPANIES INCOME TAX ACT IN NIGERIA?***

***OANDO PLC. V. FEDERAL BOARD OF INLAND REVENUE (2016) 6 N.W.L.R. (PT. 1509) 494 CA***

***Background***

Companies' income tax is one of several taxes payable on the profits of any company accruing in, derived from, brought into, or received in Nigeria. The tax is regulated by the Companies Income Tax Act Cap 60 Laws of the Federation of Nigeria, 1990 which has now been amended by the Companies Income Tax (Amendment) Act 2007 ("**the Act**"). The Act applies to all companies incorporated in Nigeria excluding companies engaged in upstream petroleum exploration and production activities. It also applies to foreign companies that earn and/or derive their income from Nigeria. All organizations limited by guarantee engaged in profit making activities other than the promotion of their primary objects are subject to the Act including liquidators, receivers, or agents of liquidators or receivers of any taxable company.
It is important to state that the Act also provides for certain incentives to companies operating in various sectors of the economy where in **Paragraph 24 (7) of the Second schedule** to the Act it provides that:

> ***"…the amount of capital allowances to be deducted from assessable profits in any year of assessment shall not exceed 662/3per cent of such assessable profits of a company, but any company in the agro-allied industry or which is engaged in the trade or business of manufacturing, shall not be affected by the restriction under this sub-paragraph."***

The Court of Appeal in interpreting the above provision of the Act held in the case of ***OANDO PLC. V. FEDERAL BOARD OF INLAND REVENUE,*** that the above provision of the Act only applies to companies engaged in the agro-allied activities or manufacturing and that a company seeking to claim 100% capital allowance must limit its business to either agro-allied and or manufacturing and this must be reflected in its annual returns and financial statements so to assist the relevant tax agency in ensuring proper assessment.

***Brief Facts***

By virtue of two Notices of Assessment dated 29th August, 2005, the Federal Board of Inland Revenue (FBIR) assessed that Oando Plc. ("Oando") was liable to pay the sum of N172,416,369 (approximately USD478,138.96) and N23,279,331 (approximately USD64,557.42) as tax for the 2004 year of assessment. Whilst the sum of N172,416,369 was assessed as additional tax liability because FBIR discovered that Oando was engaged in both manufacturing of lubricants and extensive marketing and therefore was not entitled to claim 100% capital allowance under the paragraph 24(7) of the 2nd Schedule to the Companies Income Tax Act, the sum of N23,279,331 was assessed as tax payable by Oando for the year.

Oando objected to the assessments but the FBIR refused to reverse the assessments leading Oando to challenge the assessments before the Body of Appeal Commissioners. The evidence presented before the Commissioners however revealed that Oando did not mention manufacturing as its business in its year 2003 annual report but

rather presented itself as a marketer of petroleum products in its self-assessment returns to the FBIR. It was also revealed that Oando's manufacturing activities contributed between 0% and 5% to its year 2004 turnover. The evidence further showed that Oando made provision for tax in its year 2003 financial statement but did not pay the tax, and also paid dividend which was less than its accounting profit. The Body of Appeal Commissioners was of the view that Oando was not solely engaged in the business of manufacturing, and thus dismissed the appeal ordering Oando to pay the taxes as assessed by FBIR. Not satisfied with their decision, Oando further appealed to the Federal High Court (FHC) who affirmed the decision of the Body of Appeal Commissioners though allowing the appeal in part. The FHC therefore ordered Oando to pay the sum of N172,416,369 less 5% and the full sum of N23,279,331.

Oando still disatisfied with the decision of the FHC lodged an appeal to the Lagos Division of the Court of Appeal which unanimously dismissed the appeal. In arriving at its decision, the Court of Appeal interpreted the provisions of paragraph 24(7) of the 2$^{nd}$ Schedule to the Companies Income Tax Act in deciding when a company can be entitled to 100% per cent capital allowance. ***It held that for any company to enjoy 100% relief of capital allowance under the said paragraph 24(7) of the 2$^{nd}$ Schedule to the Companies Income Tax Act, it must be clearly and wholly shown that it is in the business of manufacturing as a matter of indisputable fact, not speculation.*** The Court went further to hold that though Oando is engaged in the blending of lubricants which constitutes manufacturing, its main business is marketing of petroleum products and the evidence presented before the Board of Appeal Commissioners showed that the blending (manufacturing) activity of Oando contributed 0% to 5% of its turnover in the year 2003. In conclusion the Court held that Oando was not entitled to claim 100% capital allowance for the 2003 assessment year for both its marketing and manufacturing activities.

***Commentary***

While most of the provisions of the Companies Income Tax Act relating to reliefs are yet to be tested before the courts, this case provides judicial precedent for companies seeking to claim capital allowance reliefs under the Act. It is therefore imperative that foreign companies and investors seeking to carry on business in Nigeria familiarize themselves with the laws relating to tax reliefs for the purposes of framing key business decisions. Although, this decision is a Court of Appeal decision, it remains the position of the law pending a Supreme Court's decision on same.

## *CONDITION PRECEDENT TO THE EXERCISE OF JURISDICTION BY THE INVESTMENT AND SECURITIES TRIBUNAL*

**EZE OKOROCHA v. UBA BANK & ORS (2018) LPELR-45122(SC)**

### *Background*

The Securities and Exchange Commission (SEC) by virtue of the Investments and Securities Act 2007 is charged with the sole responsibility of protecting the integrity of the securities market in Nigeria. It may as part of its enforcement powers; seek judicial order to freeze the assets (including bank accounts) of any person whose assets were derived from the violation of the Investment and Securities Act, or any securities law or regulation in Nigeria or other jurisdictions. The SEC is to also act in the public interest having regard to the protection of investors and the maintenance of fair and orderly markets and to this end establish a nationwide trust scheme to compensate investors whose losses are not covered under the investors protection funds administered by securities exchanges and capital trade points.

That there will be disputes between capital market operators and investors is not in doubt however, it is how these disputes are resolved that is important. The Act provides that in the event that there is a dispute between an investor and a capital market operator, SEC must first be notified of the dispute before any action is filed at the Investment Securities Tribunal. This need for notification has now been confirmed by the decision of the Supreme Court in the case under reference.

### *Brief Facts*

The Appellant applied for 200,000 units of shares of United Bank for Africa (the 1st Respondent) on the 23rd February 2007 at N35.00 per unit and paid the sum of N7,000,000.00 (Seven Million Naira) for the said shares. However, aggrieved by the delay in issuing the share certificate to him he filed on the 12th February, 2008 an originating application before the Investment and Securities Tribunal (IST) sitting in Lagos against United Bank for Africa Plc. (UBA), UBA Global Markets Ltd, BGL Security Ltd, UBA Registrars Ltd and Security and Exchange Commission (SEC). The Appellant sought both declaratory and injunctive reliefs against the Respondents and also sought particularly against SEC (the 5th Respondent), an order compelling SEC to sanction the 1st Respondent for breach of the Investment and Securities Act and the Securities and Exchange Commission Rules and Regulations made pursuant to the Act for its delay in issuing him with the shares certificate for the shares he had applied and fully paid for. The IST in the course of the proceedings declined to entertain the application and *suo motu* raised the issue of jurisdiction to hear the matter on the premise that the Appellant had not taken the important step by notifying SEC before recourse to the IST.

Dissatisfied by the decision of the IST, the Appellant appealed to the Court of Appeal. The Court of Appeal in totally affirming the decision of the IST held that by virtue of Section 284 (1) (a) of the Investments and Securities Act 2007, the IST lacked the jurisdiction to entertain the Appellant's claim against the 1st - 4th Respondents on the premise that the action in itself against SEC could not be sustained because no valid order could be made by the IST against SEC without joining the 1st - 4th Respondents given that the claim against SEC was to sanction the 1st – 4th Respondents for breach of the ISA and SEC Rules. The provision of the Act is as follows:

*"284 (1)(a) The Tribunal shall, to the exclusion of any other court of law or body in Nigeria, exercise jurisdiction to hear and determine any question of law or dispute involving-*

*(a) a decision or determination of the Commission in the operation and application of this Act, and in particular, relating to any dispute-*

*(i) between capital market operators;*

*(ii) between capital market operators and their clients;*

*(iii) between an investor and a securities exchange or capital trade point or clearing and settlement agency;*

*(iv) between capital market operators and self-regulatory organisation;"*

The Court of Appeal further explained that the condition precedent to the activation of the jurisdiction of the IST is that a decision or determination of the matter would first have been done by the SEC. The conclusion therefore is that the Court below was right to hold that the IST lacked jurisdiction to entertain the Appellant's claim against the 1st - 4th Respondents. The Court of Appeal therefore upheld the decision of the IST in declining jurisdiction to hear the application of the Appellant.

The Appellant not satisfied with the Court of Appeal's decision further appealed to the Supreme Court. The Supreme Court in its decision affirmed the judgment of the Court of Appeal and dismissed the appeal.

**Commentary**

This decision affirms the quasi-judicial powers of the Securities and Exchange Commission (SEC) as it relates to capital market disputes in Nigeria and provides precedent to guide investors in the capital markets and operators alike.


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