

Tax Appeal Tribunal And Tax Dispute Resolution In Nigeria: Matters Arisings

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Abstract: *The quest for the appropriate tax dispute resolution mechanism has been a thorny issue in tax administration, collection and enforcement in Nigeria. Tax Appeal Tribunal otherwise referred to as TAT is a body statutorily created and charged with the resolution or settlement of tax disputes in Nigeria.¹ The tribunal exercises jurisdiction over all laws and other tax enactments² listed in the first schedule to the Act.³ From the provisions of the Federal Inland Revenue Service (Establishment) Act, 2007, otherwise herein referred to as FIRS (E) Act, 2007, it appears that the Federal Inland Revenue Service (FIRS) has plenitude of powers to administer and collect every tax pursuant to tax enactments in Nigeria. The FIRS (E) Act established adjudicatory body, the TAT, which also shall enjoy the jurisdiction or adjudicatory powers over the tax enactments in the country. It is trite that where the adjudicatory body lacks the requisite jurisdiction to entertain a matter before it, an appellate court will readily declare the whole proceedings a nullity, no matter how well conducted.⁴ The status of the tax disputes mechanism, the Tax Appeal Tribunal has been questioned and became a thorny issue in the resolution of the tax disputes in Nigeria. The constitution of the Federal Republic of Nigeria 1999 as amended enumerated the known courts of records but to the exclusion of Tax Appeal Tribunal (TAT). This work examined the laws in Nigeria to discover the status of TAT in the Corpus Juris. Doctrinal method was adopted and analytical approach used to review the provisions of the extant laws, judicial authorities and the opinion of authors on the issue. TAT as presently constituted is not a court, a fact finding or administrative tribunal but a statutory fiction sui generis. It hands down binding decisions in the resolution of tax disputes, yet it is not a court but procedurally the outcome of its decision leads an aggrieved party to appeal to the superior courts of record. There is urgent need for the amendment of the constitution⁵ to incorporate TAT at least as an inferior court.*

Keywords: Tax Appeal, Court, Legal fiction, dispute, administrative, fact finding.

1. Introduction

It is not an overstatement to state that the tax matters now occupy a prominent place in the life wire of Nigeria. Tax being a compulsory contribution⁶ enforced to support government on persons, property, income, commodities, transactions, services and others, there is no gain saying that there are bound to be disputes between the tax authority and tax payers.

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¹ Federal Inland Revenue Service (establishment) Act, FIRS (E) Act, 2007, s.59 and the fifth schedule to the Act.

² FIRS (E) Act, 2007, S.25(1) It provides that the service shall have power to administer all the enactments listed in the first schedule to the Act and any other enactments or law on taxation in respect of which the National Assembly may confer power on the service.

³ Legislations administered by the service include: Company Income tax Act, 2007, Petroleum Profits Tax Act cap p13 LFN 2004, personal Income Tax Act, 2011, capital Gains tax Act, Cap C1 LFN, 2004, Value Added Tax Act, 2007, Stamp Duties Tax Act, Cap s8 LFN, 2004 and others listed.

⁴ *CNOOC Exploration and Production (Nig) Ltd & Anor v NNPC & Anor* (2017) LPELR – 43800 (CA)

⁵ Constitution of the Federal Republic of Nigeria (CFRN) 1999 as amended s.251(i)

⁶ I A Ayua, Nigeria Tax law (Ibadan, Spectrum's law publishing 1996)9. He defined tax as a pecuniary burden laid upon individuals or property to support the government and is a payment exacted by legislative authority. In *Mathew's v Chicory Marketing Board* (1938) 60 CLR 263 at 276, a tax is compulsory exaction of money by a public authority for public purposes.

Just as it is naturally expected that there would be disputes between tax payers and tax authority, the law made some safeguard provision.⁷ The Constitution⁸ generally recognizes the right of every Nigerian to submit disputes to court⁹ for adjudication whether he is a tax payer or not. Other than the general disputes procedure, there is a specialized mechanism and process relating to the resolution of tax or fiscal disputes. In this regard, the TAT process which is an integral and important part of tax administration is provided for under the relevant tax legislations.¹⁰ The appeal process is available to a taxpayer who is aggrieved or dissatisfied with a decision or ruling made by tax authority relating to the tax status of such a tax payer. It is important to note that the status and jurisdiction of the TAT is not only subjected to a lot of criticisms by writers but the court has also adjudicated on them in some cases.¹¹ In those cases the constitutionality of the jurisdiction of the TAT were seriously challenged.

The status of the disputes resolution mechanism being a thorny issue that calls for the reappraisal of the status has somewhat been settled. The jurisdictional issue such as constitutionality, legality or otherwise of same has though continued to generate issues in the public fora. It is also imperative that now TAT is on an expansionist evangelism for enlightenment of tax payers in Nigeria, that the constitution, powers and efficacy of the adjudicatory body in resolving tax issues requires further review juxtaposing same with the provisions of the extant law. It is however, yet to be settled on the jurisdiction except with the intervention of *CNOOC Exploration and Production (Nig) Ltd & Anor v NNPC & Anor*¹².

2. Creation of Tax Appeal Tribunal (TAT).

The judicial powers¹³ of the Federation are vested in the courts established for the Federation. The National Assembly or any House of Assembly can establish courts other than those created by the Constitution¹⁴ though with subordinate jurisdiction to that of the High Court. Following this provision the Federal Inland Revenue Service (Establishment) Act¹⁵ created TAT. TAT's proceedings are in accordance with the Act¹⁶ and shall be deemed to be a judicial proceedings and the tribunal shall be deemed to be a civil court for all purposes. Despite series of interpretations, the court in *CNOOC Exploration and Production Nig (Ltd) v NNPC*¹⁷ held that the statute creating TAT did not intend that it be a court but only that it be deemed a civil court. The decision saw TAT as merely administrative body, the proceedings before it as a condition precedent to the assumption of jurisdiction by the Federal High Court and other superior courts. The Personal Income Tax Act¹⁸ just like other statutes provide that TAT established pursuant to the Federal Inland Revenue Service (Establishment) Act 2007 shall have powers to entertain all cases arising from the operations of the Acts¹⁹.

3. Establishment and Jurisdiction of Tax Appeal Tribunal

The FIRS (E) Act²⁰ established TAT and conferred the powers of determination of tax issues on it. The Tribunal was conferred with the powers to settle disputes arising from the operations of the Act and under the items in the first schedule to the Act.

⁷ K.J. Bielu, The Jurisdictional Question on the status of the Tax Appeal Tribunal: reflections on *CNOOC Exploration and Production (Nig) Ltd & Anor v NNPC*, IR1J2 (3) 2020 at 70-75

⁸ CFRN, 1999 as amended, S.6 (6) , 251 (1) and 272 (1)

⁹ Ibid, s.6 (1) (3); personal Income Tax Act 2011 (PITA) s.78, companies Income Tax Act (CITA) 2007, S.48 and Federal Inland Revenue Services (FIRS) (Establishment) Act, 2007 s.59(2).

¹⁰ FIRS (E) Act 2007, S.59 and the 5th schedule to the Act, CITA 2007, S.8., PITA 2011, 5.60, Petroleum Profit Tax Act (PPTA) 1996, 5.41 (1) and Value Added Tax Act (VAT) 2007, S.20 (1-5).

¹¹ *Stabilini Visionni Ltd v FBIR (2005) 2 CLRN 269, Cadbury (Nig) PLC v FBIR (2016 1 CLRN 215, CNOOC Exploration and production (Nig) Ltd & Anor v NNPC & Anor (2017) LPCLR-43800 (CA) and Shell Exploration and Production & Ors v FIRS & Anor*, unreported judgment in Appeal No CA/A/208 12012 delivered on 13/8/2016

¹² Supra.

¹³ CFRN 1999 as amended S.6 (1)

¹⁴ Ibid, S.6 (4) (a)

¹⁵ FIRS (E) Act 2007, paragraph 20(3) of the first schedule

¹⁶ Ibid

¹⁷ Supra at 19

¹⁸ 2007 NO 56, S.60

¹⁹ KJ Bielu, Resolving The Jurisdictional conflict between the State Tax Appeal Commission and The Tax Appeal Tribunal ; Lessons from Kenya;; Obafemi Awolowo University Press Ltd , Ile-Ife, Nigeria

²⁰ FIRS (A) Act, 2007 S.59(1)

By this provision²¹ TAT shall have the power to adjudicate on disputes and controversies arising from the following tax laws; Companies Income Tax Act,²² Personal Income Tax Act²³, Petroleum Industry Act²⁴, Value Added Tax Act²⁵, Capital Gains Tax Act²⁶ and any other law contained in or specified in the first schedule to the Act or other laws made or to be made from time to time by the National Assembly.

4. Appeal Procedure

A person aggrieved by an assessment or demand notice made upon him by the service may appeal to the Tribunal within 30 days from the date of service of the notice.²⁷ The present state of the laws is that an application for extension of time could be made and the tribunal would readily grant same.²⁸ TAT exercises jurisdiction, power and authority as conferred on it by the Federal Inland Revenue Services (Establishment) Act.²⁹

Prior to April 7, 2011, an aggrieved tax payer who desires to challenge an assessment must first forward a notice of objection to the FIRS within 30 days of being served with the assessment.³⁰ Where a tax payer fails to serve the objection to the FIRS within the time prescribed by law, the assessment will become final and conclusive.

In *FBIR v The Nigerian General Insurance Co. Ltd*,³¹ a company failed to forward its objection to the board within the time. The company's contention while seeking to set aside the assessment was that the notice of assessment ought to have been sent to the company's tax consultant was rejected by court. The court held the assessment to be final and conclusive. However, where a valid objection is received by the tax authority, the authority may accept the objection and accept the tax payer's prayers, revise the assessment to what is considered appropriate or refuse further amendment and issue a Notice of Refusal to Amend (NORA) to the tax payer.

In *Oando Supply and Trading Ltd v FIRS*,³² the appellant was served with notices of additional assessment for the 2006, 2007 and 2008 years of assessment imposing liability on it. The appellant forwarded the notice of objection to the FIRS in accordance with the provisions of Act. The appellants application was based on the provisions of the TAT rules³³ which provides that a person aggrieved by an assessment or demand notice made upon him by the service under the provisions of tax laws referred to in the rules may appeal against such decision or assessment or demand notice within the period stipulated.

The question is whether the appellant, a tax payer can appeal to the TAT against a tax assessment served on him by the respondent, the tax collector, while his objection to the assessment is yet to be resolved by the respondent. The TAT held that Notice of Refusal to Amend is no longer a condition precedent to filing an appeal.

5. Re-occurring Jurisdictional Issues.

No matter the pro-activeness exhibited by TAT in many of its proceedings, the preliminary question in every case that comes before it is whether considering the provisions of the Constitution³⁴ vis-à-vis the provisions of the FIRS (E) Act,³⁵ the tribunal can entertain an appeal that come before them. It appears Federal High Court enjoys exclusive jurisdiction in accordance with the provisions of the Constitution³⁶ on tax matters to the exclusion of any other court. The constitutionality of the jurisdiction of the tribunal has been

²¹ Ibid

²² 2007 No 58

²³ 2011 No 20

²⁴ 1999 No 30

²⁵ 2007 No 53

²⁶ 1999 No 45

²⁷ *Oando supply and Trading Ltd v FIRS (2011) 4 TLRN 133*

²⁸ Supra

²⁹ FIRS (E) Act 2007, para 11 of the schedule to the Act

³⁰ CITA 2007, S.72

³¹ (1969) ANLR S.33

³² Supra

³³ Order 3 rules 1 of TAT (Procedure) Rules, 2010, FIRS (E) Act 2007, S.59 (1) and fifth Schedule, Paragraph 13 (1)

³⁴ CFRN 1999 S.251 (1) (a) (b)

³⁵ FIRS (E) Act, S.59 (1)

³⁶ CFRN 1999, Op cit

so much questioned as to whether the tribunal could also be considered to be or fit into any of the following fall out of the jurisdictional issues;

- i. A court
- ii. An administrative Tribunal
- iii. A fact finding tribunal
- iv. And an arbitral body

In *Stabilini Visiononi v Federal Board of Inland Revenue*³⁷ the question was on the provisions of the Value Added Tax Act³⁸ pertaining to either the jurisdiction of the tribunal shall not be considered to be in conflict with and violates the provisions of the constitution.³⁹ The Court of Appeal upheld the objection and declared the offending section of the Value Added Tax inconsistent, null and void. In *Cadbury v FBIR*,⁴⁰ the question to the jurisdiction of the VAT Tribunal came up again and the Court of Appeal approved the decision in *Stabilini Visiononi v FBIR*⁴¹ and further declared the creation of VAT Tribunal inconsistent with the provision of the constitution. The decision in *Stabilini v FBIR*⁴² and *Cadbury PLC v FBIR*⁴³ followed the decision in *Shell v Federal Commissioner of Taxation*⁴⁴ in analyzing and considering the jurisdictional status of VAT Tribunal. In the case the judicial Committee of the Privy Council held amongst other reliefs that the following characteristics do not make a panel a court; giving final decisions, hearing witnesses on oath, deciding between parties appearing before it and availability of appeal to court.

Furthermore, the Privy Council added that an administrative tribunal may act judicially but still remain an administrative tribunal distinguished from a court strictly so called. Administrative tribunals are hybrid adjudicating authorities which straddle the line between government and the courts. They are not necessarily presided over by judges. They may at times be imbued with adjudicating authority which is quasi-judicial because it directly affects the legal rights of persons.⁴⁵ Notably, the decisions in both *Stabilini Visinoni v FBIR* and *Cardbury v FBIR* were based on the provisions of paragraph of the second schedule to the Value Added Tax Act⁴⁶ which provides that *any party aggrieved by the decisions of the VAT Tribunal may appeal against the decision on point of Law to the Court of Appeal on giving notice in writing to the Secretary to the VAT Tribunal within 30 days after the date on which the decisions was giving setting out the grounds on which the decision is being challenged.*

Furthermore, the Value Added Tax Act⁴⁷ in the main provides that appeal from the VAT Tribunal shall be made to the Federal Court of Appeal. These provisions of the law placed the jurisdiction of the VAT Tribunal and the Federal High Court on equal footing as courts of co-ordinate jurisdiction. This has been so much criticized.⁴⁸ It is wrong for the Act to provide that appeals from VAT Tribunal shall lie to the court of Appeal. This provision circumvented and usurped the powers and jurisdiction of the Federal High Court. The court rightly held in the two cases of *Stabilini* and *Cardbury* cases that both provisions of the VAT Act are invalid in view of its inconsistency with the provisions of the constitution.⁴⁹

³⁷ (2009) 1 TLRN 1 at 22

³⁸ VAT Act 1993, S.20

³⁹ CFRN 1999 as amended, 5.1 (3) & 251 (1) (a) (b0

⁴⁰ (2010) 2 TLRN 16 AT 33

⁴¹ Supra

⁴² Supra

⁴³ Supra

⁴⁴ (1931) AC 275. However, it has been observed that Civil litigation is the template for administrative hearings and so the use the terms like adjudicate, judicial and so on cannot convert a tribunal into a court of law.

Administrative and even domestic tribunals adjudicate on disputes. When a person or panel is required to decide judicially, it is often means no more than to decide fairly.

⁴⁵ CNOOC & SAPC v *FIRS & Anor* (2013) 9TLRN 28 at 35. It is also interesting to note that in *Durga Shakar Meilta v Raghuragi Singh* (1995) 15CR269, the Indian Supreme Court held that both court and administrative tribunals adjucate and finally determine disputes between parties over whom they have jurisdiction.

⁴⁶ VAT Act 1993, paragraph 24(10) of the second schedule to the Act

⁴⁷ Ibid, S.20(3).

⁴⁸ M.N. Umenweke & KK Ezeibe, *Nigerian National Petroleum Corporation (NNPC) v Tax Appeal Tribunal & 3ords-* The constitutionality of the jurisdiction of the Tax Appeal Tribunal Revisited, International journal of Business & Law Research 3(2) 73-81-April June 2015 at 92

⁴⁹ CFRN 1999 as amended, s.1 (3) & 251(1)

Interestingly both unconstitutional provisions of the VAT Act are no longer part of the extant VAT Act.⁵⁰ The Act⁵¹ makes appeal from the decisions of the Federal Inland Revenue Services (FIRS) to lie to the TAT and appeals from TAT shall be made to the Federal High Court.⁵² Despite the amendment to the VAT Act the controversies rages. In *TskJ II Construcões Intenacionais socialdade unipersonal LDA v FIRS*,⁵³ the court still followed the precedent and held that the provisions of the FIRS (E) Act⁵⁴ which created TAT is in direct conflict with constitution which established and conferred exclusive jurisdiction on Federal High Court on matters connected with or pertaining to federal taxation.⁵⁵ This decision was wrong in law as the court could not distinguish the facts of the previous case to note that the law did not provide same as it has been amended.⁵⁶ In *CNOOC & SAPC v FIRS*,⁵⁷ the tribunal distinguished the cases of *Stabilini Visioni v FBIR* and *Carbury v FBIR* and held that the authorities do not govern the appeal before it. In *NNPC v TAT or Ors*,⁵⁸ the court distinguished the cases and held that the FIRS (E) Act unlike paragraph 24(11) of the second schedule to the VAT did not create the 1st respondent to usurp, supplant or sidestep the jurisdiction of the Federal High Court that the *FIRS (Establishment) Act 2007 on the other hand did not create the 1st respondent to usurp, supplant or sidestep the jurisdiction of the Federal High Court. Rather, the 1st Respondent was created as an administrative framework by which aggrieved tax payers could resolve their tax disputes with the 4th Respondent before resorting to the Federal High Court by invoking its appellate jurisdiction.*

This was the position of the Federal High Court in *Ocean and Oil Ltd v FBIR*⁵⁹ which beautifully captured the position of the Supreme Court in *Eguanwense v Amaghizenwen*.⁶⁰ The court held that the administrative frame work of TAT does not derogate from the jurisdiction of the Federal High Court.

6. The CNOOC Exploration and Production (Nig) Ltd & Anor v NNPC & Anor⁶¹ intervention.

The facts of the case was whether it would be practically impossible to resolve the issues between the appellant and the FIRS (2nd respondent) without joining the 1st respondent. The appellants were aggrieved over tax assessment made by the 1st respondent which was submitted to the jurisdiction of the Tax Appeal Tribunal to determine whether the appellant's appeal No TAT/22/004/2012 as provided under the paragraph ⁶² of the fifth schedule to the FIRS (Establishment) Act, 2007 infringes on the exclusive jurisdiction of the Federal High Court to hear tax disputes. The decision calmed nerves on the issue of jurisdiction of TAT. The court of Appeal in the case approved and relied on the decision in *Shell Nigerian Exploration and Production & Os v FIRS & Anor*⁶³ and *ESSO Exploration and production Nigeria Ltd & Anor v Nigerian National Petroleum Corporation*⁶⁴ as both recognized TAT as a vital step forwards to the resolution of tax related disputes. The decision may not be the final on this issue until the Supreme Court had the opportunity of pronouncing on this thorny issue of jurisdiction of TAT.

6.1 Whether TAT is a court.

The Act⁶⁵ did not buttress the purported judicial status of TAT. However, it is obvious that nobody would say that with reference to courts established under the Constitution.⁶⁶ TAT therefore is a court within the contemplation of the sections. It is evident that no High Court rules of any state did or could conceivably provide that the court shall be deemed to be a court. The deeming clause is

⁵⁰ VAT Act, 2007 No 53 but section 20(3) of the 1993 Act and Paragraph 24(10) of the second schedule to the Act have been repeated.

⁵¹ Ibid, s.20 (2) (4)

⁵² Ibid, s.20(5)

⁵³ (2014) CLRN 220

⁵⁴ FIRS (E) Act 2007, S.59(1) (2)

⁵⁵ CFRN, 1999 as amended, S.251 (1)

⁵⁶ This decision reached in *Stabilini Visiononi and Cardbury* cases which was decided based on a repeated law. It would be recalled that in *Ritz & Co Kg V. Techno Ltd* (1994) 4 NWLR (pt. 598) 298 at 310 the court of Appeal called it primary requirement of judicial discipline under the principles of stare decisis. However the court depreciated the decision of the Court of Appeal in *NBCI v European Traders (UK) Ltd* (1990) 6 NWLR (Pt. 154) 36 at 41.

⁵⁷ (2013) 9 TLRN 28 at 36

⁵⁸ (2013) 9 All NTC 119 at 142

⁵⁹ (2011) 4 TLRN 135

⁶⁰ (1993) 9 NWLR (pt.315) 1 at 25

⁶¹ (2017) LPELR-43800 (CA)

⁶² FIRS (E) Act, 2007, paragraph 20(3) of the fifth schedule.

⁶³ Unreported judgment of Court of Appeal in Appeal No CA/A/208/2012 delivered on 31st day of August 2016 at 28

⁶⁴ Unreported judgment of Court of Appeal in Appeal No CA/A/507/2012 delivered on 22nd July 2016 at 11-12

⁶⁵ FIRS (E) Act 2007, para. 20 (3) fifth schedule

⁶⁶ CFRN, 1999 as amended, S6 (3) (5) and 251 (1) (a) (b). See also the detailed list under part 1 of chapter 11.

an acknowledgment that the tribunal is not a court. Going through the list under chapter VII of the constitution which deals with the judicature, the courts contemplated in that exclusive clause does not include TAT⁶⁷.

Furthermore, section 251(1) of the constitution did not intend to confer exclusive original jurisdiction in the Federal High Court on tax matters, if it was the intention, it would have expressly stated so. Any doubt as to the valid existence of an exclusive appellate jurisdiction in the Federal High Court has been settled by the enabling statute of the court. The Federal High Court Act⁶⁸ provides that;

The court shall have appellate jurisdiction to hear and determined appeals from

- (a) *The decisions of Appeal Commissioners (now TAT) established under the Companies income Tax Act in so far as applicable as Federal law...*
- (b) *The decision of any other body established by or under any other Federal enactment or law in respect of matters concerning which jurisdiction is conferred by this Act.*

Again, on the reoccurring issue of the provisions of paragraph 20(3) of the Act,⁶⁹ it is a trite law that the schedule to an Act cannot override the provisions of the Act. In *FCSC v Laoye*,⁷⁰ the Supreme Court held it would be quite contrary to the recognized principles of construction of statute to restrain the operation of clear and unambiguous words of sections of law by reference to what appears in a schedule, table or form. TAT cannot therefore be morphed into a civil court by the deeming provisions of the paragraph of the schedule as the word deem means to treat a thing as being something it is not or as possessing certain qualities it does not have. In legal drafting (which includes legislative drafting) deemed is commonly used to create a legal or statutory fiction.⁷¹ In *St Aubyn v Attorney General*,⁷² it was held that the word is used to extend the meaning of a word or concept to include a subject not otherwise within its nominal or ordinary meaning. In *R v Norfolk County Council*⁷³, the reasoning was that generally speaking when you talk of a thing being deemed to be, it is not what it is, rather, an admission that it is not what is deemed. In *Orji v DTM (Nig) Ltd*,⁷⁴ the Supreme Court further explained the essence of deeming provisions in statutes, thus:

In my humble view, a deeming provision in a statute is more of a caricature than anything. It is more of a camouflage, than anything. The word in short, stands in the place of a reality. And a deeming provision in a section of a statute will always operate in the absence of the real provision.

The reality is that TAT is merely an inferior administrative tribunal. It only means that TAT in carrying out its functions will be expected to adopt the practice and procedure of a civil court. It is to be noted that TAT owes its existence to the Minister of Finance,⁷⁵ unlike judges and other officers of the court who are judicial officers but are servants of the Executive arm of government appointed by the minister of finance.⁷⁶

6. 2 An administrative or a fact finding tribunal

Administrative tribunals conduct their proceedings in an adjudicatory manner, in the sense that they sometimes engage in fact finding, then apply legal rules to such facts impartially, without regard to executive policy. They remain administrative tribunal strictly so called. The only problem with this classification is that as a fact finding tribunal, the tribunal can only make recommendations to another body.

Tax Appeal tribunal (TAT) is not a fact finding tribunal.⁷⁷ The reason is that the Constitution⁷⁸ has not preserved the jurisdiction. They are hybrid adjudicating authorities that straddle the line between government and the court. By virtue of the FIRS (E) Act, the

⁶⁷ Part 11 of chapter VIII list states courts and part 111 relates to Election tribunals. All these courts and Tribunals are precluded by Section 251 (1) (a) (b) from assuming or exercising powers as a court of first instance or original tax dispute resolution jurisdiction in competition with the Federal High Court. *FIRS vs General Telecom PLC* (2012) 7 TLRN 108 at 138.

⁶⁸ Federal High Court Act, Cap F12, Laws of the Federal Republic of Nigeria 2004, S.28

⁶⁹ FIRS (E) Act 2007, paragraph 20(3) of the fifth schedule

⁷⁰ (1989) 2 NWLR (pt.106) 652

⁷¹ *Muller v Dalgety & Co ltd* (1909) 9 CR 693, M Duckworth and A Spyrou (ed) 30 Essays on Legal words and phrases, the centre for plain legal language, faculty of Law, s University of Sydney Australia State, p13

⁷² (1952) AC 15,53

⁷³ (1891) 60 LT Qas 379, 380

⁷⁴ (2009) 8 NWLR (pt. 173) 467, *Akeredolu v Akinremi* (1986)

⁷⁵ FIRS (E) Act, 2007, paragraph 21 of the fifth schedule

⁷⁶ Ibid, paragraph 2(1) of the fifth schedule

⁷⁷ *Carbury (Nig) Plc v FBIR* Supra

⁷⁸ CFRN, S.6 (d), *Stabilini Visinoni Ltd v FBIR* (2009)2 CLRN 269.

National Assembly has set up an administrative tribunal with a limited jurisdictional scope and without inherent powers of courts. The fact that a panel renders decisions and determines or even deliver judgments and rulings will not constitute it into a court. The truism is that a hood does not make one a monk (*cucullus non facit monachum*). Put simply administrative tribunals may wear the hood of a court but one should not trust costumes.

7. Power over State Tax Disputes

From the provisions of the Federal Inland Revenue Service (Establishment) Act, 2007, otherwise herein referred to as FIRS (E) Act, 2007, it appears that the Federal Inland Revenue Service (FIRS) has plenitude of powers to administer and collect every tax pursuant to tax enactments in Nigeria. The FIRS (E) Act established adjudicatory body, the TAT, which also shall enjoy the jurisdiction or adjudicatory powers over the tax enactments in the country. The on-going debate and criticism against the jurisdiction of TAT has dramatically witnessed the state governments making frantic efforts including enacting laws which made provisions or created a parallel Tax Appeal Commission whose jurisdiction sharply conflicts with the jurisdiction of the Tax Appeal Tribunal. Rivers State Government recently joined other states to create Tax Appeal Commission with the enactment of the Rivers State Value Added Tax Law.⁷⁹ It provides that where a taxable person is dissatisfied with the decision of the Rivers State Board of Internal Revenue Service, he shall appeal to the Tax Appeal Commission and any further appeal should be to the Rivers State High Court.⁸⁰

This development has thrown tax payers in Rivers State and Lagos State in particular and the entire federation in confusion as to the appropriate body to approach issues pertaining to their state tax obligations. This has also stirred up protests from the Federal Government of Nigeria, Federal Inland Revenue Services and some states in the Northern Nigeria against states' collection of value added tax and other taxes in Nigeria on the ground that they should be their brothers' keepers.

The *grundnorm*⁸¹ apart from creating and establishing the superior courts of record,⁸² granted powers to the National Assembly and State Houses of Assembly to by a law establish other courts to exercise jurisdiction on matters with respect to which the National Assembly may make laws⁸³ and such other courts as may be authorized by law to exercise jurisdiction at first instance or an appeal on matters with respect to which a House of Assembly may make laws.⁸⁴

Following the provision of the constitution, the Taxes and Levies (Approved List for Collection) Act⁸⁵ delineated taxes and levies which every tier of government will collect. From the listing of the taxes, the federal and the state government shared powers to collect taxes. The federal government collects companies income tax, withholding tax on companies, residents of the Federal Capital Territory, Abuja and non-resident individuals, petroleum profit tax, capital gains tax on residents of the Federal Capital Territory, Abuja, bodies corporate and non-resident individuals, education tax, stamp duties on bodies corporate and residents of the Federal Capital Territory, Abuja, personal income tax in respect of members of the armed forces of the federation, members of the Nigeria Police force, residents of the Federal Capital Territory Abuja and staff of the Ministry of Foreign Affairs and non-residents individuals.⁸⁶

The state government on the other hand collects personal income tax in respect of Pay-As-You Earn (PAYE) and direct taxation (self assessment), withholding tax (individuals only), capital gains tax (individuals only), stamp duties on instruments executed by individuals, pools betting and lotteries, gaming and casino taxes, road taxes, business premises levy, development levy (individuals only), naming of street registration fees in the state capital, right of occupancy fees and other state taxes.

In a flagrant disregard to the constitutional provision, the National Assembly enacted the Federal Inland Revenue Service (Establishment) Act, 2007. Looking at the fifth schedule to the Act⁸⁷ it provides;

⁷⁹ No 4 of 2021

⁸⁰ Rivers State Value Added tax Law; No 4 2020, Section 20 (3) – (5)

⁸¹ CFRN, 1999, as amended s6 (4) (a)

⁸² Ibid, S.6 (1) (2) (3) and (5) the Supreme Court of Nigeria, the Court of Appeal, the Federal High Court, High Court of a state, the Sharia Court of Appeal of the Federal Capital Territory Abuja, a Sharia court of Appeal of a state, the Customary Court of Appeal of the Federal Capital Territory Abuja and a Customary Court of Appeal of a state.

⁸³ Ibid, S.6 (5) (i)

⁸⁴ Ibid, S.6(5) (k)

⁸⁵ Cap T² LFN 2004

⁸⁶ Taxes and levies (Approved list for collection) Act, Schedule, Part I

⁸⁷ Ibid, Schedule Part II

That a pa Tax Appeal Tribunal established, as provided for in the fifth schedule to the Act. The Tribunal shall have power to settle disputes arising from the operation of this Act and under the first schedule.⁸⁸

It is important to note that the Act⁸⁹ included amongst others included the entire provisions of the Personal Income Tax Act, Stamp Duties Act, Capital gains tax and others to come under the jurisdiction of the TAT. Again while amending the Personal Income Tax Act, the Act in line with the provisions of section 59 of FIRS (E) Act, made the TAT to enjoy exclusive jurisdiction over personal income tax matters or disputes. It is most unconstitutional to have included states tax disputes to the jurisdiction of TAT.

The FIRS (E) Act⁹⁰ contrary to the intent and spirit of the constitution again provides;

Any person dissatisfied with a decision of the Tribunal constituted under this schedule may appeal against such decision on a point of law to the Federal High Court upon giving notice in writing to the secretary to the Tribunal within 30 days after the date on which such decision was given.

The above provision of the Federal Inland Revenue Service (Establishment) Act conflicts with the provisions of section 6(2) of the Constitution. It provides that the judicial powers of a state shall be vested in the courts to which the section relates which is a State High Court.⁹¹ Furthermore, the Act⁹² provides that notwithstanding the provisions of this Act, the relevant provisions of all existing enactments including but not limited to the laws in the first schedule shall be read with such modifications as to bring them into conformity with the provisions of this Act. 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.

The jurisdiction of a court is derived from the statute creating the court and from any other statute specifically conferring jurisdiction on the court or even the constitution itself.⁹³ The section 1(1) and (3) of the constitution is imperative here, which will be read in conjunction with the provision of the constitution under section 272 (1) & (2) and section 6(2), 4(e) and (k). The provisions of the constitution conferred jurisdiction on the state court or other courts to be created by the state House of Assembly to exercise jurisdiction over subject matters relating to state taxes. A law which purports to abrogate the powers granted by the constitution will be void to the extent of its inconsistency.⁹⁴

Following the provisions of the constitution stated above, the State High Court subject to section 251 of the constitution exercises jurisdiction in tax disputes not related to federal taxation. The provisions of sections 59 and 68 of the FIRS (E) Act and section 60 of the Personal Income Tax Act (PITA) are unconstitutional for providing for taking grievances over state taxes before the Tax Appeal tribunal and to further appeal same to the Federal High Court in the name of all disputes relating to tax collection.

Appeal from TAT decision should be to the Federal High Court when the subject matter is federal tax and not state tax. The Federal High Court exercises jurisdiction to entertain matters pertaining to the revenue of the federal government and not state tax. In *Shittu v NACB & ors*,⁹⁵ the Court of Appeal held that the Federal High Court lacks jurisdiction to try any matter pertaining to the revenue of a state government or any authority established by it. The court recognized that the suit arose from a dispute over personal income tax deducted from the income of employees through the PAYE scheme as well as withholding taxes and development levies. The PITA in section 2(2) empowers the state government to impose personal income tax for every year of assessment.....

In the absence of any express or implied provisions in the PITA which confers jurisdiction on the Federal High Court to determine matters relating to the revenue of the state government, it is wrong to prescribe in the FIRS (E) Act that all appeals from TAT will go to the Federal High Court. Even the Federal High Court's old statute does not have the constitutional or statutory provision that could be interpreted from its historical setting to support the conferment on it the jurisdiction on state tax matters.⁹⁶

⁸⁸ FIRS (E) Act, 2007, first and fifth schedule

⁸⁹ Ibid, S.5 (1) (2)

⁹⁰ Ibid, 5th schedule, para 17(1) (3)

⁹¹ CFRN, 1999 as amended, s.6(5) (e)

⁹² FIRS(E) Act, 2007, S 68 (1) (2)

⁹³ *Lekwot v Judicial Tribunal* (1997) 8 NWLR (pt 515)

⁹⁴ *Tukur v Governor of Gongola state* (1989) 4 NWLR (PT 117)1, *Madu v Humphrey Mbakwe* (2008) LPELR -8389.

⁹⁵ All NTC 415 at 428

⁹⁶ Federal Revenue Court Act No 13 of 1973, S.7

On the jurisdiction to collect sales tax, whether called sales tax strict *sensu*,⁹⁷ Value Added Tax⁹⁸ or Consumption tax,⁹⁹ the court has interpreted section 61(a) of the exclusive legislative list in *AG Ogun v Aberuagba*,¹⁰⁰ to imply that while the federal government can legislate on supply of goods and services inter-states, the state governments have power to legislate on the supply of goods and services intra- state. In *Registered Trustees of Hotel Owners and managers Association v AG Lagos State & Anor*¹⁰¹, the major sections of the VAT Act particularly sections 1,2,4,5 and 12 were nullified on 3rd October 2019. These provisions of VAT Act were declared inconsistent and incompetent as it violates the provisions of the constitution. There is nothing presently that is left of VAT Act rather it is for the states to legislate on same and collect same as state tax. Ironically, it was an exercise in futility for the Finance Act, 2020 to have attempted to resurrect a non-existence VAT Act.

6. State Agitations for State Tribunals

The judicial powers in the court are created by the constitution.¹⁰² The court to which this section relates, established by this constitution for the federation and for the states, specified in subsection (5) (a) to (i) of this section shall be the only superior courts of records in Nigeria, and save as otherwise prescribed by the National Assembly or by the House of Assembly of a state, each court shall have all the powers of a superior court of records.¹⁰³ The rider to this provision is that nothing in the foregoing provisions of the section shall be constructed as precluding the National Assembly, or any House of Assembly from establishing courts, other than those to which the section relates, with subordinate jurisdiction to that of a High Court.¹⁰⁴

It is worthy of note that apart from superior courts of record itemized in section 4(5) (a) – (i) of the constitution, section 6(4) (a) and (k) of the constitution provide for the establishment of other courts with subordinate jurisdiction to that of a High Court as a House of Assembly may make laws. It was in consonance with the above that state houses of Assembly of are enacting Tax Appeal commission for the resolution of dispute arising from state taxes. Thus by the above provisions of the constitution state tax related issues or disputes are adjudicated upon by the commissions in states in Nigeria and not by the Tax Appeal Tribunal.

The jurisdiction of the Appeal Tribunal on tax matters does not therefore extend to matters relating to personal income tax due to states. TAT jurisdiction to entertain tax disputes is limited to companies' income tax and taxes subject to income tax of persons subject to the federal government. It is an aberration and an affront to the constitution for the Federal Inland Revenue establishment Act,¹⁰⁵ to subject tax dispute arising from the states to the jurisdiction of TAT.

The various state House of Assembly in Nigeria having in accordance with the constitution created Revenue court (although with different nomenclature) to exercise original jurisdiction and entertain disputes arising from state taxes.¹⁰⁶ For instance, Anambra State House of Assembly enacted the Anambra State Revenue Administration Law¹⁰⁷ like many other state in Nigeria. Under section 56, the law provides:

56 (1) subject to the provisions of subsection (2) of section 5 of this law a taxpayer who having appealed against an assessment made on him to the Tax Appeal commissioners under the provisions of section 53 (1) of this law is aggrieved by the decision of the Tax Appeal commissioners may appeal against the assessment and the decision to the High court of the state upon giving notice in writing to the Board within thirty days after the date on which the decision was given:

(2) Where no body of Tax Appeal Commissioners had been appointed with jurisdiction to hear an appeal against an assessment made on a tax payers, the taxpayer who is aggrieved by the assessment and has failed to agree with the board

⁹⁷ *AG Ogun v Aberuagba & Anor*, Vol. 3 All NTC 17

⁹⁸ *Nigeria Soft Drinks Ltd v Attorney General Lagos State* (1987) 3 NWLR (pt7) 444

⁹⁹ *AG Lagos State v Eko Hotels* (2007) LPELR- 43713 (sc)

¹⁰⁰ *Supra*

¹⁰¹ (2019) 47 TLRN II

¹⁰² CFRN, 1999 as amended, s.6 (1) (2)

¹⁰³ *Ibid*, s6 (3)

¹⁰⁴ *Ibid*, S6 (4) (a)

¹⁰⁵ FIRS (E) Act, 2007, S.59 and 69

¹⁰⁶ *Wilbros v AG of Akwa Ibom State & Anor*, Vol 6 all NTC 161 at 196

¹⁰⁷ Anambra state Revenue Administration Law No A. 26 of 2010. Recently: Rivers State Government enacted Rivers State value added Tax Law No. 4 of 2021, in it's provision under section 20 (3)-(5) it state that appeals against the decision of the board; where a taxable person is dissatisfied with the decision of the Rivers State board of Internal Revenue services, he shall appeal to the Tax Appeal Commission and further appeal to the Rivers State High Court.

in the manner provided in subsection (3) of section 57 (3) of the personal income Tax Act, may appeal against the assessment to the High Court of the state upon giving notice in writing to the board to amend the assessment as desired.

By a community reading of the provisions of section 6 (4) (a) & (k) of the constitution, and section 88 (4) of personal income Tax Act, the state Tax Appeal Commission or Revenues court or High Court of a state shall have the exclusive original jurisdiction to entertain tax disputes arising from;

- i. Personal income Tax of individual (either by self assessment on direct assessment) or under a contract of service or employment through Pay-As-You-Earn (PAYE) scheme,¹⁰⁸ withholding tax individuals only on Rents;¹⁰⁹ on interests,¹¹⁰ royalties,¹¹¹ dividends,¹¹² directors fees¹¹³ and payments in relation to selected activities, services and commissions payable on certain payments.
- ii. Capital gains tax in individuals only¹¹⁴
- iii. Stamp duties on instruments executed by individuals.¹¹⁵
- iv. Value added tax or sales tax or consumption tax in whichever name it appears.¹¹⁶
- v. Any other state tax upon any law made or to be made by the state House of Assembly from time to time.

The items listed above were not accommodated under section 251 of the 1999 constitution as amended. It is then an aberration for FIRS (E) Act under section 59 to provide that further appeal against the decision of TAT shall be subject to the jurisdiction of the federal High court. The Federal High Court cannot exercise jurisdiction in any matter connected with the state tax. In *LSIRB v Motorola & Anor*,¹¹⁷ and *Wilbros v AG Akwa Ibom State & Amor*,¹¹⁸ it was held that there is no provision patent or latent in the personal income Tax Act which confers jurisdiction in the federal High Court to hear and determine civil cases and or matters connected with or pertaining to the revenue accruable to the government of a state Ipso facto.

The National Assembly pursuant to item 59 of the exclusive legislative list, part 1 of the second schedule to the constitution and item D. paragraph 7 of the concurrent list in part 11 of the second schedule and section 315 of the constitution made the personal income Tax Act. The collection of income tax mentioned in item D paragraph 7 of the concurrent legislative list is the constitutional responsibility of the state government.¹¹⁹

6. Practice and Procedure of the Tax Appeal Tribunal (TAT)

Paragraph 13 (1) fifth schedule to the FIRS(E) Act states 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 tax laws, may appeal against such decision or assessment or demand notice within the period of stipulated 30 days from the date which a copy of the order but the tribunal may entertain the appeal after the expiry of the said 30 days. By the paragraph 14, the service may appeal against a taxpayer for non-compliance to the appropriate zone.¹²⁰ By paragraph 15 of the fifth schedule to the Act, it is expected that fairness should be the watch word thus:

- (a) Tax Appeal Commissioners shall meet to hear appeals as often as may be necessary.
- (b) A Tax Appeal Commissioner with direct interest or indirect financial interest in an appeal must disclose it and refrain from sitting in any meeting for the hearing of that appeal.

¹⁰⁸ PITA, 2011, S 54 & 81

¹⁰⁹ Ibid, S.69 (2)

¹¹⁰ Ibid, s. 70 (2)

¹¹¹ Ibid

¹¹² Ibid

¹¹³ Ibid, S 72 (2)

¹¹⁴ Capital gains Tax Act, (GTA, Cap C¹ LFN 2004, S.2(1)

¹¹⁵ Stamp duties Act, S 3 LFN 2004, S.4 (2)

¹¹⁶ Various laws of the states on VAT, sales tax or consumption tax

¹¹⁷ Vol 8 all NTC 47

¹¹⁸ VOL 6 All NTC 181

¹¹⁹ The imposition, enforcement and collection of Pay-As-You-Earn of employees of companies and residents of a particular state is vested in the state government by virtue of the combined provisions of section 81 of PITA and Regulation 2 of the operation of Pay-As-You-Earn Regulation of 2002.

¹²⁰ *Oando Supply & Trading Ltd v FIRS* (2011)4TLRN 113

- (c) The Secretary to the tribunal shall give seven clear days notice to the service and to the appellant of the date and place fixed for the hearing except it was fixed in their presence.
- (d) All notices, documents other than decisions of the Tribunal may be signified under the hand of the secretary.
- (e) Appeals before TAT shall be held in public.
- (f) The onus of proving that the assessment complained of is excessive shall be on the appellant.
- (g) At the hearing, the representative of the service must prove to the satisfaction of the tribunal that :
 - I. The applicant has for the year of assessment concerned, failed to prepare and deliver to the service returns required to be furnished under the relevant provision of the tax laws.
 - II. The appeal is frivolous or vexatious or is an abuse of the appeal process or
 - III. 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 adjourned for heavy an amount on account 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 to that assessment.

H. The Tribunal may after giving the parties an opportunity of being heard, confirm, reduce, increase or annul the assessment or make any such order as it deems fit.

I. Every decision of the Tribunal shall be in writing under the hand of the chairman and shall be certified upon the request of the Applicant or the service by the secretary within 30 days.

The award or judgment of the Tribunal shall be enforced as if it were a judgment of the Federal High court upon registration of a copy of such award or judgment with the chief Registrar of the federal high court by the party seeking to enforce the judgment. Tax Appeal Tribunal Rules is made by the minister in compliance with paragraph 21 of the fifth schedule to the FIRS Act. This is to guide the practice and procedure of the tax tribunal proceedings. The new rules that took effect from 10th June 2021 allows for electronic filing, virtual proceedings, especially for delivery of rulings and applications using technology or platforms.

7. CONCLUSION AND RECOMMENDATIONS

Tax Appeal Tribunal, a legal fiction created by the statute which seems as if the original state of the object is swallowed and lost to the new statutory deeming status. The recognition of the Tax Appeal Tribunal portends that it is only but a vital step towards the resolution of tax related disputes. It is found to be administrative tribunal set up to determine the correctness of assessment to tax without undue fixation and formality.

Following from the state of the law, this administrative framework does not derogate from the jurisdiction of the Federal High Court but rather serves as a condition or step to brining an action before the Federal High Court. An applicant therefore is supposed to explore the avenue first, before going to the Federal High Court. There is need for the amendment of section 251(1) of the constitution at least to accommodate TAT as an inferior court. Again by the combined reading of the constitution and other tax statutes, it does appear that the tax disputes on state taxes should be resolved by a state regulated mechanism or machinery. The position in section 6 (2), (4) (a) and (5) (k) of the 1999 constitution of the Federal Republic of Nigeria 1999 as amended elucidates on the powers of the state House of Assembly to create or establish court or tribunals to exercise jurisdiction in the state tax matters.

From the foregoing, the state has constitutional powers to administer some taxes. It is the state tax dispute resolution mechanism or the state High Court that can entertain matters pertaining to payment or non-payment of such taxes. It is appropriate for states to set up the mechanism for the resolution of the state tax disputes. Moreover, Tax Appeal Tribunal was set up to determine issues pertaining to federal administered taxes. This is the reason it is regarded as a condition precedent for appeal to the federal High Court. The federal High Court that is to entertain appeals from Tax Appeal Tribunal lacks jurisdiction to entertain and determine matters arising from revenue accruing to the state government.

It is therefore recommended thus:

1. Section 59 (2) and paragraph 17 of the fifth schedule to the federal Inland Revenue (Establishment) should be amended to bring it in consonance with the provisions of the constitution.
2. Section 60 of the personal Income Tax and other tax enactments pertaining to the state taxes should be amended to bring it in line with the constitution.

3. The provisions of sections 1 (1) (3) and 6 (2), (4) (a) and (5) (k) of the Constitution of the Federal Republic of Nigeria should be invoked to declare section 59 of the FIRS(E) Act and other enactments made in contradistinction with the provisions null and void.
4. The states should sit up from slumber to enact laws creating or establishing state Tax Appeal commission to exercise jurisdiction on state tax matters.

Bibliography

1. Ayua I A, *Nigerian Tax Law (Ibadan; Spectrum Law Publishing, 1996)*

Journal Articles

1. K.J. Bielu, The Jurisdictional Question on the status of the Tax Appeal Tribunal: reflections on *CNOOC Exploration and Production (Nig) Ltd & Anor v NNPC*, IR1J2 (3) 2020 at 70-75
2. KJ Bielu, Resolving The Jurisdictional conflict between the State Tax Appeal Commission and The Tax Appeal Tribunal ; Lessons from Kenya;; Obafemi Awolowo University Press Ltd , Ile-Ife, Nigeria
3. Umenweke M.N. & KK Ezeibe, *Nigerian National Petroleum Corporation (NNPC) v Tax Appeal Tribunal & 3ors*- The constitutionality of the jurisdiction of the Tax Appeal Tribunal Revisited, International journal of Business & Law Research 3(2) 73-81-April June 2015