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Tax Dispute Resolution in Nigeria: A Storm in a Tea Cup.

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Abstract
The article examined the fact that the Nigerian tax culture has been characterized by a very low level of compliance with tax laws. This has lead to excessive evasion which has prompted successive governments to continually try to improve on Nigerian tax systems with a view to having a tax system that will encourage voluntary compliance, reduce tax evasion to the barest minimum, instill public confidence on the integrity of the tax systems and bring about a fair, uniform and impartial administration of relevant tax laws[1]. Most private companies in Nigeria have continually cited the inefficiency and other problems associated with the tax system as their reasons for relocation to neighboring countries to do business, thereby leaving the shores of Nigeria and depriving the country of major source of revenue. These problems which stem from the Nigerian Tax operations necessitated the need for a new National Tax Policy. Other major challenges inhibiting the growth of internally generated revenue in the country include the high level of tax evasion obsolete tax laws, weak and incapacitated tax administrative machinery, manual tax system and unwieldy operational as well as enforcement procedures. Case laws, reported and unreported cases, opinions of learned jurists was resorted to in this lucid preparation. Another trailing factor listed as a key disincentive to effective tax system in the country is the perception by tax prayers that the government is not accountable to them. The Federal Government was not unmindful of these challenges when it carried out various tax reforms in the country[2]. Part of these reforms was the establishment of the Tax Appeal Tribunal in order to reduce the incidence of tax evasion and to ensure fairness and transparency of the tax system through a quick and efficient method of dispensation of justice.[3]
Keywords: Tax regime, Tax evasion, fairness, transparency, tax appeal Tribunal.

Introduction

To perfect this reform the Federal Government inaugurated a Tax Appeal Tribunal on Thursday 4th February 2010 to handle disputes between aggrieved tax payers and tax authorities. This has in itself created issues of jurisdiction between the Tax Appeal Tribunal created by the Federal Inland Revenue Establishment Act, 2007 and the Federal High Court which is a creation of the 1999 Constitution of the Federal Republic of Nigeria. Although the intention of the legislature is to create room for speedy dispensation of issues relating to taxation and revenue of the Federal Government, the conflict between the authority given to the Federal High Court and the TAT to deal with revenue issues, has raised a storm in a tea cup over which authority should have jurisdiction. The value Added Tax Tribunal and the Body of Appeal Commissioners which were the immediate processors to the Tax Appeal Tribunal did not survive the storm and were extinguished after the case of Stabilini Vissioni Ltd v F.B.I.R.[4] One wonders if the TAT can survive in the face of all objections and oppositions.

Section 59 Federal Inland Revenue Service (Establishment) Act 2007, (FIRSA) provides for the establishment of the Tax Appeal Tribunal, to replace the Body of Appeal Commissioners and the Commissioners of the Value Added Tax Tribunal.[5] It has powers to settle disputes arising from the operations of the Act and other Acts as spelt out in the First Schedule to the Act.

Section 59 Provides that:

1. A Tax Appeal Tribunal is established, as provided for in the fifth Schedule to this Act.
2. The Tribunal shall have power to settle disputes arising from the operations of this Act and under the First Schedule.

The Fifth schedule to the Act provides that the Tax Appeal Tribunal is to exercise jurisdiction, power and authority conferred on it by 5th schedule to the F I R S (Establishment) Act, 2007. By this it shall have power to settle dispute arising from the following taxes;[6]

(a) Companies Income Tax,
(b) Petroleum Income Tax
(c) Personal Income Tax

.[1] Abubakar Yusuf Mahmud, "Tax policy in Nigeria" www.Buzzle.com
[2] Dotun Philips, Nigerian Tax Reforms in 2003 and Beyond: Main report of the study group on the Nigerian Tax System.
[3] Section 59 Federal Inland Revenue Service (Establishment)Act 2007
[4] (2009) 23 NWLR Pt 1157 P220
[5] Paragraph 1(v) of the fifth schedule to the FIRS Act.
[6] Listed in paragraph 1 to 11 of the First Schedule to the FIRS Act.

(d) Value Added Tax
(e) Capital Gains Tax
(f) Any other law contained in or specified in the 1st schedule to the Act or other laws made from time to time by the National Assembly.

Tax appeal is an important component of tax administration system. This is because the tax system offers a multilayered objection and appeal process which compels the complainant to go through a mechanism before gaining access to the regular court system.

The various courts in the country are vested with powers by the Constitution of the Federation of Nigeria.[1] Sections 6 and 36 of the 1999 Constitution make it clear that other bodies besides the regular courts could adjudicate on matters affecting the rights of the citizen in the country[2].

Section 36 of Constitution provides for fair hearing before "A court or other tribunals established by law and constituted in such a manner as to secure its independence and impartiality".

The Federal High Court

Section 251 of the Constitution provides for the exclusive jurisdiction of the Federal High Court to the exclusion of any court, on matters relating to revenue of the nation.

The Federal Revenue Court[3] was renamed the "Federal High Court" by Section 228 (1) and 230 (2) of the Constitution of the Federal Republic of Nigeria, 1979.[4]

Although the need was noted during the Constitutional Conference leading to Independence[5], to establish a High Court for the determination of causes and matters within the Exclusive Legislative list, as is customary in countries with the Federal System of Government , no step was taken in that regard until the promulgation of the Federal Revenue Court Decree in 1973. This Decree created the Federal Revenue Court.

The Federal Revenue Court began its operation with a President (as the head of the court was then called) and four judges. From its inception, controversies over its jurisdiction followed every step of the Court's jurisdiction. However, such controversies were finally settled with the enactment of Section 230(1) of the Constitution of the Federal Republic of Nigeria 1979. Section 230(1) of the 1979 Constitution was replicated in the Federal High Court Decree (Amendment) 1991 cap (60) which amended Section 7 of the Federal High Court Act (1973); and conferred exclusive jurisdiction on the court in relation to the subject matters covered by section 7 of that Act, as amended.

Section 7 of the Federal High Court (Amendment) Act 1991 has now been reenacted as section 251(1) (a) to (s) and of the Constitution of the Federal Republic of Nigeria 1999 as amended. Its jurisdiction in criminal matters are as provided in Section 251 (2) and (3) of the Constitution[6] and in such criminal matters as the National Assembly may by Act, confer jurisdiction on it. The Federal High Court has concurrent jurisdiction with the High Court of the Federal Capital Territory FCT and State High Courts in respect of Fundamental Rights matters by virtue of Section 46(1) of the Constitution of the Federal Republic of Nigeria, 1999 [7].

It is expressly provided for under Section 251 (1) (a) & (b) that, the Federal High Court shall have jurisdiction on matters;

(a) Relating to the revenue of the Government of the Federation in which the said Government or any organ thereof of a person suing or being sued on behalf of the said Government is a party.
(b) Connected with or pertaining to the taxation of companies and other bodies established or carrying on business in Nigeria and all other persons subject to Federal taxation.

Thus while the FIRS Act by section 59 mandates the Tax Appeal Tribunal to deal with all tax disputes, S. 251 (1) of the Constitution also gives that power to the Federal High Court. In relation to this provision of Constitution[8] all issues pertaining to the revenue of the Federal Government and taxation of Companies are vested exclusively on the Federal High Court.

The Tax Appeal Tribunal (TAT)

[1] S. 251 (1) vests powers of resolution of tax disputes on the Federal High Court of the constitution of the 1999 Federal Republic of Nigeria
[2] http://tat.gov.ng/content/tax-tribunal-move-engender-confidence-nigeria, 26th March 2014
[3] Was established by the Federal Revenue Court Decree (1973 No. 13)
[4]The sections were reenacted by the 1999 Constitution (as Amended) as S. 251(1)(2) and (3)
[5] Nigeria gained independence from colonial rule in 1960.
[6] Federal Republic of Nigeria, 1999 as amended
[7] http://www.fhc-ng.com/about.htm, 27th March, 2014.
[8] In Nigeria the constitution of the Federal Republic of Nigeria is the grund norm and takes procedence over every other legislation like the FIRS Act setting up the Tax Appeal Tribunal.

The Tax Appeal Tribunal (TAT) is a very important and critical administrative body in the enforcement of tax in Nigeria. In discussing TAT, regards would be had to its establishment composition, its jurisdiction and its sustainability in the face of threatening Constitutional provisions and challenges. The Tax Appeal Tribunal is a son of necessity born out of the desire to fill up the gaps opened by the nullification of the defunct VAT Tribunal via judicial declaration[1], as well as to provide an umbrella body to take care of all tax related disputes. The Tribunal was established by section 59 of the Federal Inland Revenue Service (FIRS) Act, 2007 which provides: (1) A Tax Appeal Tribunal shall have power to settle disputes arising form the operation of this Act and under the first schedule. The Tax Appeal Tribunal therefore has jurisdiction over disputes arising from the Companies Income Tax, Petroleum Profit Taxes, Personal Income Tax, Capital Gains Tax, Value Added Tax, Stamp Duties, Taxes and Levies[2]. It was established in 2010 in eight different locations namely Bauchi, Kaduna, Jos, Ibadan, Enugu, Benin, Lagos and Abuja[3], and vested with powers to settle dispute arising from the operations of the FIRS Act and other tax laws as spelt out in the First schedule to the Act. Its scope also covers any other law for the assessment, collection and enforcement of revenue accruable to the Government of the Federation as made by the National assembly from time to time or regulations incidental to those laws, conferring any power, duty and obligation on the Service. Other laws include laws imposing taxes and levies within the Federal Capital Territory; laws imposing collection of taxes, fees and levies collected by government agencies and companies, including signature bonuses, pipeline fees, penalty for gas flared, depot levies and licence fees for Oil Exploration Licence (OEL) Oil Mining Lease (OML) production Licence, royalties, rents (productive and non – productive), fees for licence to operate drilling rigs, fees for oil pipeline licenses, haulage fees and all other fees prevalent in the oil and gas industry.

While inaugurating the Tribunal, The former Minister of Finance, Mansur Muhtar said that the Federal Government's commitment to make the country a haven for investors informed the setting up of tax tribunal. According to him,

> This government is committed to making Nigeria a preferred destination for both local and foreign investors by making the economy more investment friendly. You will agree with me that this is a step in the right direction towards the attainment of that objective. The responsibility being entrusted to you is indeed enormous, but I have no doubt in my mind that given your qualifications and experiences in both the public and private sectors of the economy you will discharge this responsibility creditably.[4]

Commenting on the significance of the tribunal, the then Chairman of the FIRS, Mrs. Ifueko Omogui-Okaru said at the inauguration that it would help to engender public confidence in the tax system.

A person aggrieved by an assessment of the Service or one aggrieved by the non-compliance with tax laws, may appeal to the Tribunal, by virtue of Para 14 of the 5th Schedule to the FIRS Act.

It is worthy of note to observe that the provisions of any statute of limitation shall not apply to appeals brought before the Tribunal[5].

Composition Of The TAT:

The fifth schedule empowers the Minister of Finance to specify the number of zones within which the Tax Appeal Tribunal is to exercise jurisdiction. Accordingly, the Minister of Finance vide Section 1 of the Tax Appeal Tribunals (Establishment) Order of 2009 created 8 zones of the Tax Appeal Tribunal. The division was to attend to each of the geopolitical zones as well as Lagos and Abuja[6]. Each TAT division is composed of five tax appeal commissioners headed by a chairman who must be a lawyer with not less than fifteen years cognate experience in tax matters while the other commissioners must be knowledgeable about tax laws, regulations, norms, practices and operations of taxation in Nigeria[7] Such a person must have shown capacity in the management of trade or business or been a retired public servant in tax administration. The chairman is to preside over the sittings of the tribunal, though in his absence another commissioner may be nominated to preside[8]. The quorum of the tribunal is three. The zoning of the Tax Appeal Tribunal is a welcome development since it has made it easily accessible to would be disputants. The emphasis on the qualification of the

[1] Stabilini visioni's case supra
[2] First Schedule to the FIRS Act 2007.
[3] Tax Appeal Tribunal Establishment order 2009, Supplement to Gazette No. 77.
[4] http://tat.gov.ng/content/tax-appeal-tribunal-move-engender -confidence-nigeria, 23th March 2014
[5] Para 2 (1) Ibid
[6] In Nigeria the 6 geopolitical zones are the South South, South West, South East, North Central, North West and North East.
[7] Paragraph 2 (3) ibid

commissioners is also commendable as this would guarantee that highly experienced professionals capable of delivering quality and well considered verdicts are appointed as commissioners.
A tribunal shall by virtue of Paragraph 2 (1) & (2) consist of five members called 'Tax Appeal Commissioners' to be appointed by the Minister of Finance.
A Tax Appeal Commissioner shall hold office for a term of three years renewable for another term of three years only[1]

Appeal From The Decisions Of The Service

Appeal before the Tax Appeal Tribunal shall be held in public[2]. Once the judgment is registered in the Federal High Court, with the Chief Registrar; it is as effective as the judgment of the Federal High Court when it is on issues of facts[3]. Appeals from the decision of the Tribunal shall lie to the Federal High Court on issues of law and then to the Court of Appeal. While those on issues of facts shall lie to the Court of Appeal [4]. The fact that a decision on point of fact can lie straight to the Court of Appeal as opposed to the Federal High Court is an attempt to reduce or remove the powers given to the FHC by S.251 of the Constitution.

Powers Of The Tribunal

The tribunal shall have powers to:[5]

i. Summon and enforce the attendance of the person and examine him on oath
ii. Require the discovery and production of documents.
iii. Receive evidence on affidavits
iv. Call for the examination of witnesses or documents.
v. Review its decisions
vi. Dismiss an application for default or deciding matters exparte;
vii. Set aside any order or dismissal of any application for default or any order passed by it exparte; and
viii. Do anything which in the opinion of the Tribunal is incidental or ancillary to its functions.

Controversy of Jurisdiction Between The Tax Appeal Tribunal And The Federal High Court

The inauguration of the Tax Appeal Tribunal has not presented problems as to the powers of the executive arm in providing a mechanism for the administration of tax in Nigeria but, the seeming similarities with the jurisdiction of the Federal High Court as provided for under Section 251 of the Constitution of the Federal Republic of Nigeria has provided the highlights of controversies between the Tax Appeal Tribunal and the Federal High Court.
Tax practitioners are quite apprehensive as to whether the Nigerian Tax Appeal Tribunal ("TAT") would suffer a similar fate as the extinct Value Added Tax (VAT) Tribunal, which suffered premature extinction post the 1999 Constitution of Nigeria. In **Stabilini Visioni Ltd v FBIR,[6]** the Court of Appeal held that the VAT Tribunal was not an administrative tribunal, since appeals from there did not lie to the Federal High Court (FHC) but to the court of Appeal, and further, that Section 20 of the VAT Act that had set up the VAT Tribunal was inconsistent with Section 251 of the Constitution of the Federal Republic of Nigeria that had solely conferred jurisdiction of the federal revenue exclusively on the FHC. Similarly, in **Cadbury (Nig.) Plc v FBIR[7],** the FBIR had directed Cadbury to render VAT returns based on Cadbury's payment to its Parent Company in Britain. Upon Cadbury's refusal, FBIR instituted tax recovery proceedings before the VAT Tribunal. With FBIRs success, at the VAT Tribunal, Cadbury appealed against VAT Tribunals' jurisdiction to the Court of Appeal. The Court of Appeal sustained Cadbury's objection, and held that the VAT Tribunal had no jurisdiction to entertain VAT issues since such tax issues touched on the exclusive jurisdiction of federal revenue, conferred solely upon the FHC. **Omokri JCA** echoing the principle in the case of **N.P.A v Enyamba[13]** held that:
By virtue of the provisions of section 251(1) (a) of the 1999 Constitution, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil cases and matters relating to the revenue of the Federal Government of the Federation or any organ therefore of a person giving being used on behalf of the said Government as a party or the administration and control of the Federal Government or any of its agencies of the Federal Government.

[1] Para 4 Ibid
[2] Para 15 (5)
[3] Para 16 (2)
[4] Para 17(1) & (3) Fifth Schedule
[5] Paea 20 (2) Fifth Schedule to the FIRS (Establishment) Act, 2007
[6] (2009) 13 NWLR (Pt 115) 200
[7] (2010) NWLR (Pt 117) 561

Per Ogunbiyi JCA held thus: **Also in the case of Faskin Foods (Nig) Ltd V Shosanya[1] the Apex court made the following pronouncements and said: the Constitution is supreme, it is the organic or fundamental law and it is the grund norm of Nigeria. The court has therefore the jurisdiction to declare any other law or act inconsistent, invalid and therefore null and void. This is because the Constitution has also been described as the fons et erigo……Any Act which infringes or runs contrary to those organic principles or systems or provision must be declared to be inconsistent.**

In relation to the jurisdiction of the Federal High Court the court held further that, **Whatever proceeds, revenue, etc accruing to the Government Agency or is being paid to others by the agency must be regarded to be addition to or reduction from the Federal Government and it relates in essence to the Federal Government"**

In the latter part of 2013, two separate and conflicting decisions of the Federal High Court were issued that put the jurisdiction and constitutional validity of the TAT in issue. First, on October 30, 2013, Justice Adeniyi Ademola of the Abuja FHC in **TSKJ II Construces Internationals Sociadade LDA v FIRS**, [2] struck down the composition of the TAT, on the ground that, the Federal Inland Revenue Establishment Act No. 13 of 2007 ("FIRSEA") and the Tax Appeal Tribunals (Establishment) Order of November 25th, 2009 (TAT Order) under which the TAT was established conflicted with the exclusive jurisdiction of the FHC conferred by section 251 of the Constitution. This case involves a company named TSKJ II Construces Internationals Sociadade LDA ("TSKJ")[3], a non resident company who secured a contract for the construction of a gas plant in Nigeria and used TSKJ Nigeria to provide support services in the course of executing the contract. In filing its return on deemed profit basis, TSKJ II deducted the recharges paid as cost to its subsidiary. The FIRS disallowed the deduction on the basis that recharges were not deductible costs under the deemed profit basis of assessment. The FIRS issued additional assessment of about US$12million on the company. TSKJ II appealed to the TAT sitting in Abuja but the Tax Appeal Tribunal (TAT) decided in favour of the FIRS, that the taxation of non-resident companies on the deemed profit basis is a rule of thumb derived from Section 26 of the Companies Income Tax Act (CITA) which gives the FIRS discretion in certain circumstances, to determine the "fair and reasonable percentage of the turnover" of the company to be assessed to tax. It was noted that in practice, the FIRS deems a profit rate of 20% on turnover derived from Nigeria (implying a cost ratio of 80%). The estimated profit rate of 20% is taxed at 30 % which result in an effective tax rate of 6% of turnover. Thereafter, the non resident company sued FIRS claiming for determination of the following from the Federal High Court (FHC) :

1. Whether on the state of the law, the Tribunal had the jurisdiction to entertain the matter. TSKJ argued that the FHC had the exclusive jurisdiction to entertain matters relating to federal revenue and taxation of companies to the exclusion of any other Court.
2. Whether the Tax Appeal Tribunal properly interpreted the provisions of CITA especially Section 26(1) in arriving at the deductions. TSKJ II's argument was that the TAT erred in not following the decision of the FHC in the case of **Halliburton West Africa LTD V FIRS**[4]and that the TAT misinterpreted Section 26 of CITA. According to TSKJ II, Section 26 refers to "that part of the turnover" of a foreign company where it executes a contract with its fixed base and not contracts with a third party.
3. Whether the TAT was right in refusing to follow the previous decision of the FHC in the case of **Halliburton West Africa Limited V FBIR**[5].

TSKJ II[6] contended that the TAT was duty bound to follow the decision of the FHC since the facts of the case were similar to the of the Halliburton's case. The FIRS on the other hand, argued that the jurisdiction of the TAT did not conflict with the exclusive jurisdiction of the FHC since the TAT is merely an administrative panel created by the FIRS (Establishment) Act and not a court with competing jurisdiction as contemplated by Section 251(1) of the Constitution. To buttress this position, the FIRS stated that appeals lie directly to the FHC and not to the Court of Appeal as was the case with the defunct VAT Tribunal. On the issues of jurisdiction, the FHC dismissed the FIRS' argument that the TAT was a mere administrative panel on the basis that the decisions of the TAT affect the civil rights and obligation of companies in relation to taxation in Nigeria. It held that certain sections of the FIRS Establishment Act relating to the powers of the TAT to determine disputes on companies' taxation and federal revenue are inconsistent with the provisions of section 251(1) of the Constitution and therefore void to the extent of such inconsistency. On the other issues raised by TSKJ II, the FHC ruled that

[1] (2006) ALL FWLR (Pt 320) Pg 1059 @ 1076
[2] Suit No. FHC/ABJ/TA/11/12
[3] www.pwc.com,pwcnigeria.ttypepad.com/...novenber.2013-tax-alert-tat-jurisdiction, 26th March 2014
[4] Supra
[5] supra
[6] Supra

based on the principle of 'stare decisis', the TAT is bound by the decision of the FHC in the Halliburton's case[1] and should have decided this case in the same way.

The implication of the decision may be considered retrogressive by many taxpayers who consider the TAT as the fastest way to resolve pending dispute with tax authorities. It could also give some taxpayers who have been aggrieved by decisions of the TAT a basis to request that such be set aside. However a more recent authority gave the TAT a lease of life, while awaiting the decision of the Court of Appeal in TSKJ II[2]. In **Nigerian National Petroleum Corporation (NNPC) V Tax Appeal Tribunal** (TAT) (Lagos zone),[3] NNPC urged the Federal High Court in Lagos to review a ruling by the Tax Appeal Tribunal (TAT), Lagos Zone, on a dispute over an oil mining lease (OML) 118 Production Sharing Contract (PSC). The issue related to the NNPC being the agent of the Federal Government in collecting Petroleum Profits tax assessed against the contractors in OML 133, as well as the exact Education Tax liability for the OML for the 2010 year. NNPC sought a declaration that TAT, Lagos Zone (the first respondent) lacks the jurisdiction to adjudicate over rights and obligations conferred on parties to the Bonga petroleum Sharing Contract PSC. It said the TAT cannot determine contractual disputes arising from the interpretation of the contract and that the Tribunal wrongly assumed jurisdiction on the natter. At the Tax Appeal Tribunal, Shell, Esso, Agip and Total had sought declaratory reliefs over the determination of tax incidence of parties to the PSC involving NNPC, and the Tribunal, in its July 3 ruling, assumed jurisdiction in the case. It held: that the tax assessment challenged in this appeal is within the remit of the Tax Appeal Tribunal. NNPC therefore urged the Federal High Court to declare the Tribunal's decision "ultra vires, illegal, wrong, null and void and of no effect whatsoever. It also sought an order of certiorari urging the Federal High court to take over the Tribunal's proceedings, quash the ruling and also make an order prohibiting the TAT from further hearing and making any decision in the matter.

NNPC argued that, the tribunal erred when it assumed the powers conferred by Section 251 of the 1999 Constitution on the Federal High Court to entertain and determine matters relating to government revenue. It claimed that, by the provisions of the PSC, the 3rd,4th, 5th and 6th respondents are not tax payers known to the FIRS and as such are unable to successfully maintain an action before the TAT against FIRS. NNPC added that the reliefs before the TAT are such that when determined, will have direct impact on the Federal Government's revenue and the contractual relationship in the Bonga contract.

NNPC , the concession owner and holder of Oil Prospecting License (OPL) 212 , executed the Bonga PSC dated April 19, 1993, with Shell as contractor to the operations of OPL 212. Shell, Esso, Agip and Total constitute the "contractor" through a joint venture in the Bonga contract. By the PSC's provisions, NNPC files Petroleum Profit Tax (PPT) returns for itself and the contractor. According to NNPC, the contractor was to prepare accurate PPT returns and submit to NNPC while NNPC in turn files the returns to FIRS. The applicant said in 2010, the contractors prepared "incorrect" PPT returns for the 2009 assessment in respect of the Bonga license and forwarded same to the NNPC. NNPC alleged that the returns it received from the contractor were "inaccurate, incorrect and non-compliant with contractual terms of the PSC," It claimed it was compelled to file accurate tax returns with the FIRS, which resulted in a disagreement with the contractor. The oil firms then instituted an appeal at the tribunal. seeking "a declaration that although chargeable tax for the year is USD2,042,706,851, however, by virtue of the overpayment of PPT in previous years of assessment, the PPT for the Bonga Contract Area in the 2010 year of assessment is nil."[4] Consequently, the Federal High Court held that:

The Tax Appeal Tribunal's Jurisdiction did not interfere with the exclusive jurisdiction of the Federal High Court but was only an administrative body set up to determine preliminary matters before proceeding to the Federal High Court.

Justice Buba held that the FIRSEA that established the TAT was fundamentally different from the VAT Tribunal Act that purportedly set up the defunct VAT Tribunal. In defining the jurisdiction of the TAT and whether the FIRSEA violated the exclusive jurisdiction of the FHC under Section 251 of the Constitution, Justice Buba started by examining Section 251 (1) which provides thus:

Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters…..

He then explained that the tenor of the first portion of Section 251 is to the effect that the National Assembly may make laws from time to time, so as to confer additional powers and jurisdiction on the FHC, and that the

[1] Supra
[2] Supra
[3] Suit No. FHL /L/CS/630/2013
[4] http://onyinyechicynthiaigodo.wordpress.com/2013/12/19/nnpc-urges-fhc-to-review-tats-ruling/,accessed22/4/2014.

intent of this provision is to enable the Legislation expand the jurisdiction of the FHC, and in no way can this provision be construed as empowering the National Assembly to remove, or restrict the original jurisdiction of the FHC. Justice Buba also compared the two statutes that set up the VAT Tribunal and TAT with each other. Para 24(1) of the 2nd Schedule to the VAT Act provided for an appeal from the VAT Tribunal to the Court of Appeal. In contrast, the TAT was created as an administrative framework by which taxpayers could resolve their tax disputes with the FBIR (now FIRS) before resorting to the FHC by invoking the FHC's appellate jurisdiction. Justice Buba, therefore held that the administrative framework did not derogate from the FHC's original jurisdiction but rather "serves as a condition precedent to bringing an action before the Federal High Court". Relying on previous decisions relating to the Body of Appeal Commissioners (predecessors to TAT), which allowed appeals from them to the FHC, Justice Buba held that decisions such as **Eguamwense v Amaghizemwen**[1], and **Ocean & Oil Ltd**. v **FBIR,** [2]confirmed that TAT was validly created and that its jurisdiction does not conflict with the FHC. Further, relying on Section 41 of the Petroleum Profits Tax Act and Paras 13(1) & 17(1) of the 5th Schedule to the FIRSEA (2007), Justice Buba noted that neither of those statutes provided for a direct appeal to the Court of Appeal, unlike the VAT Tribunal which proposed to usurp, and sidestep section 251's exclusive jurisdiction to FHC. Finally, he held that the Legislature was right to have added an appellate jurisdiction to the FHC, in accordance with Section 28 of the Federal High Court Act which provides that**: The Court shall have appellate jurisdiction to hear and determine appeals from- (a) the decision of Appeal Commissioners established under the Companies Income Tax Act and the Personal Income Tax Act in so far as applicable as Federal law……**

He further held that, since the TAT did not attempt to usurp the original jurisdiction of the FHC, its constitutionality was affirmed. Justice Buba's opinion in NNPC v TAT[3] attempts to cure the lacuna, and has the effect of preserving the status of the TAT. The exclusive jurisdiction of the Federal High Court from provisions of the Constitution and the supremacy of the Constitution over every other enactment also supports the view held in the above referred case as was determined in the popular case of **Stabilini Visioni Ltd v F B I R[4].**

The argument from other quarters refer to the Tax Appeal Tribunal as a quasi judicial tribunal and a fact finding tribunal which is not likened to a court of competent jurisdiction. The fact that the Tax Appeal Tribunal does not have criminal jurisdiction confirms the assertion that it is not a court but a fact finding tribunal set up to aid the speedy resolution of complaints against tax assessment and remove completely the delays which are the reoccurring experiences with litigation in our Court. However, it is undeniable that the Tax Appeal Tribunal has overlapping jurisdiction with the Federal High Court in the sense that matters are of revenue nature.

THE SUSTAINABILITY OF TAT

In TSKJ II's case[5] the court held that: **whilst not denying the desirability and efficacy of Tax Appeal Tribunals (TAT) in Nigeria's Tax Regime there is need for constitutional provisions to be enacted as in USA, India, Australia, China etc. to give them the legitimacy they lack…. In the absence of a constitutional provision empowering the Tax Appeal Tribunals, one cannot help but notice the conflict of its jurisdiction with that reserved for the Federal High Court by virtue of section 251 (1) (a) and (b) of the Constitution of the Federal Republic of Nigeria.**

The establishment of the Tax Appeal Tribunal was necessitated by the demise of the VAT tribunal which was declared unconstitutional by the court of appeal in the case of Stabilini[6]. A close look at the conditions that led to the demise of VAT tribunal and a comparison between such conditions and legal foundation upon which the TAT operates gives one a serious cause of concern as to whether the TAT, as we know it today, can stand the test of time. The VAT tribunal, like TAT, was a statutory creation. Section 20 of the VAT Act provides that

"Any tax, penalty or interest which remains unpaid after the period specified for payment may be recovered by the Board through proceeding in the value added tax tribunals".

Consequent upon the above provision the VAT tribunal swung into action and was used as a platform for settling assessment related disputes arising from VAT administration until its jurisdiction was challenged in the case of **Stabilini Visioni Ltd vs FBIR** [7]. In that case, the learned counsel to the appellant whose client was

[1] (1993) 9 NWLR (Pt 315)
[2] 2011 4 TLRN 135
[3] Supra.
[4] (2009) 13 NWLR Pt 1157 Pg @ 226
[5] Supra
[6] Supra
[7] Supra

dragged to the VAT tribunal for VAT arrears, among other things argued that the tribunal lacked the jurisdiction to entertain the matter, it being an issue that has to do with the revenue of the Federal Government, an exclusive preserve of the High Court. In support of the argument, counsel for the Appellant cited, among other authorities, section 251 of the 1999 Constitution which, prescribes issues of revenue of the federal government to be in the exclusive jurisdiction of the Federal High Court. In her response, counsel to the respondent argued, among other things, that the VAT tribunal did not usurp the powers of the Federal High Court as enshrined in the Constitution since it was just an administrative body whose decisions were subject to review by the Federal High Court. The Court of Appeal relied on the supremacy clause of the Constitution as provided by section 1(1) and 1(3) of the 1999 Constitution and buttressed same with the case of **Orhiunu v. F.R.N**[1] where it was held that **Where the constitution has given a jurisdiction, it cannot be lightly divested. Where it is intended to be divested it must be done by clear, express and unambiguous words and by a competent amendment of the constitution**

Based on the above and other relevant authorities, the court went ahead to hold that, the only way the VAT tribunal could have had jurisdiction to entertain the action was, through a process of competent amendment of the Constitution. In the absence of such amendment, the court held that "no authority, Act or person can without due amendment alter, curtail or seek to restrict the jurisdiction of the Federal High Court"[2].

Distinction Between Tax Appeal Tribunal And Value Added Tax Tribunal

The distinctions are:

(a) Value Added Tribunal handled only issues relating to Value Added Tax while Tax Appeal Tribunal (TAT) has universal application i.e the Tribunal has the power to adjudicate on matters of all taxes listed in the First Schedule to the FIRS Act.

(b) Another remarkable distinction is that an appeal from Value Added Tax Tribunal lies to the Court Appeal while appeals From Tax Appeal Tribunal on issues of law lie to the Federal High Court. Note that appeals on points of fact lie to the court of Appeal.

(c) Tax Appeal Tribunal has rules of procedure while Value Tax Tribunal has no rules of procedure[3].

(d) Body of Appeal Commissioners (BAC) had only one office in Nigeria and this was in Abuja. Value Added Tribunal had only three offices in Nigeria (i.e. Kaduna, Enugu and Ibadan had one office each) while Tax Appeal Tribunal has a wider spread with one office in each of the 6 geopolitical zones[4] in Nigeria as well as Lagos and Abuja.

The Case For and Against TAT

First, it must be stated that the legal foundation of the defunct VAT tribunal share striking resemblance with that of the TAT. For instance, both are creations of legislation other than the Constitution[5]. The respective legislation give the two bodies power to deal with revenue accruable to the Federal Government. Both tribunals, by their nature are quasi-judicial and both have their decisions subject to review by the Federal High Court and then on appeal to Court of Appeal and to Supreme Court.

Despite all the above, it has been argued in the favour of the TAT that it is mere administrative tribunal whose decisions are to facilitate speedy resolution of tax disputes, and are still subject to appeal to the Federal High Court. The decisions of the Tribunal must first be registered at the Federal High Court before enforcement[6]. It is also argued that the TAT being a Tribunal, instead of a court, would not come under the operation of section 251 of the Constitution which excluded every other court.

While the operators argue that the tribunal is mere administrative body, some have argued that the instrument establishing it has stated clearly that it's proceeding shall be deemed as a judicial proceeding and that the Tribunal shall be deemed to be a civil court. Same goes to the issue of the tribunal having its award subject to a review by the Federal High Court. This is because, such appeal according to the law, must be on point of law only. One may still argue that the proceedings of the TAT is deemed to be a judicial proceeding like a civil court because the TAT is not a court. A court is a court and would not need any deeming provision to be so recognized. Furthermore its judgment would have its own force and would not need to be registered in any other

[1](2005) INWLR (Pt 906) 39 at 57.
[2] Orhiunu V F.R.N. (2005) I NWLR (Pt906) 39 at 57
[3] The Tax Appeal Tribunal Procedure Rules 2010 have been gazetted in the Federal Official Gazette as No. 67 Volume 97 0f 2010
[4] These include, the South South in Benin South East in Enugu South West in Ibadan, North East in Benin North West in Jos and North Central in Kaduna
[5] While the TAT was created by S.59 FIRS (Est) Act 2007, the VAT was created by 5.20 VAT Act.
[6] Para. 16 (2) of the 5th schedule to FIRS A.

court to be given the force of law. In any case, the Tribunal's award is to be registered and enforced as the judgment of the Federal High Court[1] and not as judgment of the Tribunal. The fact that issues of fact determined by the Tribunal do not go to the FHC may clearly qualify as "alteration, detraction or restriction" of the jurisdiction of the Federal High Court, an act forbidden by the authority of **N.P.A v. Eyamba,**[2] cited with approval in **Stabilini's case**[36]. It is also instructive that the alteration, detraction, or restriction as mentioned above is forbidden irrespective of current position as shown in the case of **NNPC v TAT**[3] that there is no conflict of jurisdiction. It has been submitted in favour of TAT that civil disputes, as seen in arbitration matters, that parties who willingly submit to a panel, person or authority for adjudication have chosen their own tribunal and therefore are estopped from reneging from carrying out the decision of such authority, person or panel. Therefore, parties who submit to TAT are bound by the award and cannot pull out on ground of competency.

This argument finds support in the case of **Chinon Nanhai Oil Joint Service Cpn vs Gee Tai Holdings Co. Ltd**[4], where a party who submitted to an arbitral tribunal different from the one prescribed in the arbitration agreement was estopped from challenging the award on that ground having knowingly submitted to the jurisdiction of the tribunal.

In the Nigerian legal system, and perhaps the whole world, the issue of jurisdiction is sacrosanct and can be raised at any stage of the proceedings therefore even if both parties had submitted to jurisdiction they can raise issues of jurisdiction when they notice it. While arbitration and voluntary submission of matter to arbitral panels always arise out of mutual agreement between the parties, referral of disputes to the TAT is a legal obligation with little or no room for an option on the side of the parties. It follows therefore that the doctrine of estoppel cannot operate to estope a party that never had an option in determining a forum upon which to bring his matter.

Conclusion

Although there are conflicts of opinion as to whether the express provisions of Section 251 of the Constitution of the Federal Republic of Nigeria is inconsistent with the jurisdiction of the Tax Appeal Tribunal as provided for under Section 59 of F I R S (Establishment) Act, 2007, the current position as shown in the case of NNPC v TAT (Lagos zone)[5] is that there is no conflict of jurisdiction.

This conclusion can be gleaned from the following:

1. That the Appeals against the decision of the TAT on points of law lie to the Federal High Court while on facts they lie to the Court of Appeal. Permit me to say that on points of facts the exclusive jurisdiction of the Federal High Court is thereby usurped since the FHC will have no opportunity of hearing such a matter at all. From the Tribunal the matter, goes straight to the Court of Appeal.
2. The argument of some quarters is that it is a tribunal and not a court so constituted. The case of **Cadbury Nigeria Plc** v. **Federal Board Of Internal Revenue**[6] has argued to the contrary that, a fact finding tribunal can only recommend and not venture into giving judgment or decision? It could however be argued that since such decision or judgment is still subject to the overriding acceptance of the parties who may appeal to the Federal High Court if they are dissatisfied, it could operate as a recommendation. The case of **NNPC V TAT**[7] is authority that the jurisdiction of the TAT does not conflict with that of the FHC since is an internal dispute resolution body of the FIRS set up by the government.
3. The fact that the TAT was not conferred with Criminal Jurisdiction is an indication that it was never the intention of Minister of Finance to make the TAT of concurrent jurisdiction with the Federal High Court. The fact that its decision can only be enforced after registration with the Chief Registrar of the Federal High Court[8] also goes to show that on its own, it does not carry the force of law as it is with a court judgment. The proceeding before the Tribunal is deemed to be a judicial proceeding because it is neither a judicial proceeding nor a civil court.[9] The decisions of a tribunal set up as a court will not need to be deemed to be a judicial proceeding because it would be a judicial proceeding for all intents and purposes.

In order to achieve the whole essence of the establishment of the TAT which is amongst other things, the fastest way to resolve pending disputes with the tax authorities and to restore confidence in the taxing authorities, the Federal Government must as a matter of urgency refer a bill to the National Assembly to address salient issues

[1] Para 16 (2) ibad
[2] (2006) All FWLR (PT 320) 1022
[3] Supra.
[4] (1995) xxyBk P. 88
[5] Supra
[6] (1960-2010) 2 N. T.R Pg 737 @ Pg 753
[7] supra
[8] Para 16 (2) of 5th Schedule to FIRSA
[9] Para 20 (3) of 5th Schedule to FIRSA

raised above and incorporate the Tax Appeal Tribunal in the Constitution. It must be shown to derive its authority with regards to specific functions from the Constitution. This way, its powers as a first instance dispute resolution center which are not inconsistent with the jurisdiction of the Federal High Court will be reflected in the Constitution. This was done recently done with the establishment of the National Industrial Court of Nigeria under the 1999 Constitution (as amended) as well as the Investment and Securities Tribunal.

Until this is done, it is feared that what happened to VAT Tribunal may still happen to the TAT. Urgent steps should therefore be taken to address the issues raised above. Creation of a tax Tribunal backed up by a constitutional amendment would be the most appropriate decision. The constitution can then make TAT resolution a condition precedent to gaining access to a regular court.

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