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Tax Litigation in Nigeria and A Review of Recent Nigerian Court Decisions on Taxation

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I. INTRODUCTION

In Nigeria, the tax system is progressive, with a top marginal rate of 25% with effect from 1996.[1] Nigeria is a nation with a fast-growing market that attracts a considerable amount of foreign investment.[2] With the recent global economic downturn, International Oil Corporations (IOCs)[3] are increasingly focused on exploring business opportunities in regions with significant projected growth opportunities such as Africa and Asia.[4] Several IOCs have recently flocked to Nigeria, a prominent West African country, with the recent stable political climate, immense population (about 170 million), and projected double digit growth rate, and so the country has quickly become a destination of choice for small and large international companies, alike, seeking to take advantage of the perceived business opportunities therein.[5]

Earlier on, on May 29, 1999, Nigeria returned to civilian democratic system jettisoning the autocratic military dictatorship, and, by this, opening the Nigerian oil and gas market to foreign direct investment (FDI), with emphasis on the relaxation of strictures imposed against influx of foreigners and foreign funds. Nigeria, therefore has witnessed tremendous increase in FDI.[6]. Along with FDI also came foreign expertise to manage the foreign investment transferred to Nigeria, i.e., closely associated with the flow of capital is the flow of skilled manpower and other requisite intangibles.[7]

Under Section 54 of the Companies and Allied Matters Act (CAMA),[8] every foreign company carrying on business in Nigeria is obligated to re-incorporate along with having a physical office address in Nigeria. In doing this, to adhere to domestic provisions and to pursue the business opportunities, The IOCs usually incorporate entities in Nigeria. Yet, such newly incorporated companies, which are predominantly staffed with indigenous citizens, do not always possess the necessary knowledge, experience, or skill sets necessary to carry out the business for which the company has been formed. Accordingly, it is common for such companies to employ the services of international experts commonly referred to as "expatriates" to perform these essential services.[9]

II. CHANGES IN NIGERIAN TAX POLICIES

In Nigeria, tax is defined as a compulsory monetary charge imposed by government on persons, entities, transactions, or properties to yield public revenue, embracing all governmental impositions on the person, property, privileges, occupations, and enjoyment of the people, and includes duties, levies and imposts, but

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[1]. See Bimpe Balogun, Taxation of Expatriates, tax Practice Series No. 25, The Chartered Institute of Taxation of Nigeria (2003) at 1.

[2]. Olivia Agbajoh, Review of the Corporate Immigration Framework in Law & Human Rights—VANGUARD NEWSPAPER, August 22, 2013. Available at: http://www.vanguardngr.com/2013/08/review-of-the-corporate-immigration-framework/#sthash.ggPUtAbZ.dpuf.

[3]. The term Corporations and companies are used interchangeably in this paper and they both refer to same thing—registered entity used by shareholders to carry on business with a separate personality aside from the business owners.

[4]. Akinbiyi Abudu, Taxation of Expatriates in Nigeria—Trap for the Unwary, in Ernst & Young: Our African Footprints. Tax focus News and updates across the African continent Issue 5, Vol. 51, 2011. Available at: http://emergingmarkets.ey.com/wp-content/uploads/downloads/2011/11/Tax_Focus_Vol_51.pdf.

[5]. *Ibid*. at 19.

[6]. See, Deloitte, InsideTax: Determination of expatriate tax status: relevance of entry, visas & work permits, Available at: http://www.deloitte.com/assets/Dcom-Nigeria/Local%20Assets/Documents/Tax%20Publications/Inside%20Tax/Inside%20Tax%20-%20Issue%2037.pdf.

[7]. *Ibid*.

[8]. CAMA refers to the current operative Companies/Corporations law legislation in Nigeria, known as the Companies and Allied Matters Act. This was formerly referred to as the Companies and Allied Matters Decree, 1990. However, by the consolidation of the Laws of the Federation of Nigeria in 1990, it was re-designated as the Companies and Allied Matters Act, Cap 59, Laws of the Federation of Nigeria, (LFN) 1990. This 1990 Act is now replaced and amended by the Companies and Allied Matters, Act Cap C20, Laws of the Federation of Nigeria (LFN), 2004. For ease of reference, it will be referred to as "CAMA" in this paper.

[9]. See, Akinbiyi Abudu, *supra* note 4, at 19.

excluding penalties, administrative fees and direct user charges.[1] The system of tax law, collection and enforcement in Nigeria has evolved from adversarial litigation to a system by which the various governments seek to partner with relevant stakeholders towards encouraging participatory democracy through the promotion and sustenance of voluntary tax compliance, and thus eliminating illegal taxes and corruption.[2] Hitherto, under the past military regime, illegal taxation, touting and corruption at all levels of the tax system were endemic.[3] Nigerian tax policy now entails inter-agency cooperation, creation of efficient, objective and people-friendly structures for tax and revenue administration at all levels and in all departments of government, consolidation of similar taxes and levies, enactment of appropriate legislation and entrenchment of oversight agencies.[4] Tax authorities commenced aggressive tax collection by removing impediments in tax payment, making tax assessment and payment easier for tax payers via establishment of mini-tax offices in markets around the country. Voluntary compliance is now vigorously encouraged. Personal electronic tax clearance cards (e-TCC) have also been introduced, making tax collection more open to taxpayers, who could assess their records via the internet.[5]

The 1970's oil boom created surplus oil revenue in Nigeria to the extent that Internally Generated Revenue (IGR) took the second position in sources of revenue with Nigeria putting heavy reliance on oil. As a result, many states and local governments started to depend, almost exclusively, on monthly statutorily allocations from the central vault to carry out their businesses. Thus, prior to the return of democracy in May 1999, the emphasis for the funding of each tier of government was on allocations from federation account. Starting from the late 1990s during the military regime of General Sani Abacha, revenues from oil dwindled as prices fell on the international market and allocation from the Federation Account became inadequate for many States and local government councils, even for the payment of civil service salaries.[6] Currently, the Nigerian Federation Account sharing formula stipulates that the federal government is given 52%, the states have 26%, while the local governments are given 20%. This is excluding the 13% derivation which the oil producing states have to share.[7]

Earlier response to low revenue included the adoption of "Accelerated Revenue Generation Programmes" and the use of consultants to audit and seal off business premises. Further, Local Government authorities also started to collect sundry levies, leading to an outcry by the organized private sector. In response, for instance, on April 10, 2010, the Lagos State House of Assembly passed the Local Government Levies (Approved List for Collection) Law.[8]

Also, with the decreasing revenue accruing from oil, several states also increased the IGR as a veritable means of financing projects. For instance, Lagos State, within the last eight (8) years has witnessed its monthly IGR rising from N6billion to over N20billion.[9] Prior to May 1999, Lagos' IGR stood at an average of N600million monthly. However, by 2005 there was a 500% steep rise to N3.6billion monthly.

It is apposite to point out that Nigeria operates a federal system consisting of three (3)-tier federal, state, and local governments,[10] and each of these tiers of governments has separate constitutional authority to impose and enforce certain taxes and levies.[11] Thus, the Constitution has set up the Exclusive, Concurrent and Residual Lists dividing legislative powers between federal and state authorities.[12] The federal government can exclude the state and local governments from legislating on matters listed under the Exclusive List.[13] As for the Concurrent Legislative List, both the National and State Assemblies can competently legislate on such matters concurrently[14] subject to the doctrine of "Covering of the Field."[1] Any matter not mentioned either in the

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1. Ade Ipaye, *Multiple Taxation: Lagos State Government Assessment And Response, Being an address to European Union (EU) Business Meeting in Lagos (2010)*.
2. *Ibid*.
3. *Ibid*.
4. *Ibid*.
5. "*The Lagos tax collection model,*" in Business Section, Vanguard Newspaper of April 20, 2014.
6. *See Ipaye, supra note 10.*
7. Michael Oseni, *Internally Generated Revenue (IGR) in Nigeria: A Panacea for State Development*, 21 Euro. J.Hum. Soc. Sci. (2013) 1051.
8. See, the Local Government Levies (Approved List for Collection) Law, signed into law on April 10, 2010, fashioned after the Federal Act, i.e., The Taxes and Levies (Approved List for Collection) Act, Cap T2 LFN 2004.
9. "*The Lagos tax collection model,*" in Business Section, Vanguard Newspaper of April 20, 2014.
10. See the Constitution of the Federal Republic of Nigeria, 1999.
11. *AG Ogun State v Aberuagba*, [1985] 1 N.S.C.C. 487
12. The Exclusive List is set up under Part 1 of the Second (2nd) Schedule to the Constitution, which empowers the federal legislature to enact laws to the exclusion of states. In turn, the Concurrent List refers to the "List" of matters set out in the First Column in Part II of the Second Schedule to the Constitution with respect to which both the Federal and State legislative houses have overlapping authority and may make laws to the extent prescribed. See *Oyeniran vs Egbetola* (1997) 5 NWLR (Pt 504) 122 at 131.
13. Section 4(2),(3),(4)&(5) of the Constitution and Part II, 2nd Schedule of the Constitution.
14. Section 4(7)(b)&(c) of the Constitution and Part II, 2nd Schedule of the Constitution.

exclusive or concurrent list becomes a residual matter. Local Government Councils are allowed to make byelaws subject to legislation passed by the States allowing such byelaws.[2]

III. COMMENCING DISPUTES

A person aggrieved by an assessment or demand notice made upon him or aggrieved by any action or decision of the Relevant Tax Authority (RTA)[3] may, within 30 days, appeal to TAT. Generally, an action may be commenced either by a writ of summons, originating summons or an originating motion/petition. A writ is used where the facts are in dispute and the case is most likely to be contentious. The writ, after endorsement, is filed along with statement of claim setting out the plaintiff's claims and relief sought in detail. Where the facts are not in substantial dispute, such that only the construction/interpretation of a statute or document is necessary, an originating summons is used. Where the statute expressly demands it—then an originating motion or petition is used.[4]

Where, the tax dispute is before the TAT, the procedure is different, and specialized.

a. Commencing Proceedings Before the Tax Appeal Tribunal (TAT).[5]

Towards accelerating resolution of tax disputes and removing the endemic bureaucratic strictures with the traditional judicial process, the TAT[6] was established under Section 59(1) of FIRSEA thus: "***The Tax Appeal Tribunal is established as provided in the fifth schedule of this Act***." Further, the TAT was conferred with powers to settle disputes arising from the operations of FIRSEA and under the first schedule to the FIRSEA,[7] which include: CITA; PPTA; PITA; the Capital Gains Tax Act (CGTA);[8] (CITA); the Education Tax (Amendment) Act;[9] the Stamp Duties Act;[10] the Taxes and Levies (Approved List for Collection) Act;[11] and the Value Added Tax Act (VAT);[12] all regulations, proclamation, government notices or rules issued in terms of the listed legislation; and any other law for the assessment, collection and accounting of revenue accruable to the federal government. However, the FIRSEA provides that TAT's jurisdiction does not extend criminal or fraudulent conduct which must be referred to the appropriate law enforcement agency, including the Office of the Attorney-General or the Police for prosecution.[13]

Generally, to proceed before the TAT, a taxpayer (individual or corporate) that is aggrieved by an assessment or a demand notice from an RTA[14] may file an ***objection*** to the assessment with the RTA.[15] The RTA will either amend or refuse to amend the assessment. Where the RTA refuses to amend the assessment, the RTA will then issue a Notice of Refusal to Amend ("NORA"). Upon receiving the NORA, and within 30 days,[16] the taxpayer may file an appeal with the TAT.[17] In fact, the FIRSEA allows both the RTA and taxpayer to appeal to the TAT under section l3(1)&14 of the 5th schedule of FIRSEA.[18] If the taxpayer neglects to comply with the tax assessment and/or file an appeal within 30 days, without sufficient cause for the delay, then, the assessment or demand notice or action by the RTA becomes final and conclusive and the RTA authority may go after him/her to recover the outstanding tax liabilities and may charge interest and impose penalties.[19]

There are 8 zones of the TAT and each zone is headed by a Chairman and 4 Commissioners/Members who are not required to be lawyers. However, most have legal and tax training with sufficient knowledge of tax

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1. See, *AG Federation v AG Lagos State* (2013) 12 TLRN 55 at 155-156.
2. Section 7(1) of the Constitution.
3. A Relevant Tax Authority (RTA) may be either the Federal Inland Revenue Service (FIRS), State Board of Inland Revenue, or a Local Government Council.
4. For example, Petition for Winding Up.
5. Olumide K. Obayemi, *Tax Appeal Tribunals' Jurisdiction viz-a-viz The Federal High Court* in ThisDay Newspaper (Nigeria), May 13, 2014; See, also, Prof. C.J. Amasike, *Brief Notes on the Adjudication of Tax Disputes in Nigeria-The Tax Appeal Tribunal Perspective*.
6. The commencement date for TAT was 16th April, 2007.
7. See, Section 59(2) of the FIRSEA
8. The Capital Gains Tax Act, Cap C1, LFN 2004.
9. The Education Tax (Amendment) Act, Cap E4 LFN 2004.
10. The Stamp Duties Act, Cap S9 LFN 2004.
11. The Taxes and Levies (Approved List for Collection) Act, Cap T2 LFN 2004.
12. The Value Added Tax Act, Cap V1 LFN 2004 (VAT)
13. See Section 12 of the 5th schedule of FIRSEA
14. If the tax in issue is a federal tax, such an Objection would be filed with the Federal Inland Revenue Service (FIRS). If is a state tax, the objection would be filed, in Lagos State, for instance, with Lagos State Inland Revenue Service (LIRS).
15. See Section 58 of PITA on Objections.
16. Section l3(2) of the 5th schedule of FIRSEA and Order III, Rule 2, TAT Procedure Rules
17. Section 59 of FIRSEA, Section 11 of the Fifth Schedule to the FIRSEA and Paragraph 5 of the TAT Order
18. The RTA, if aggrieved by the taxpayer's non-compliance, is allowed to file an appeal before TAT to prosecute the defaulting taxpayer. See, Section 14 of the 5th Schedule of FIRSEA and Order III, Rule 1, TAT Procedure Rules.
19. Section 13(1) of the 5th schedule of FIRSEA

laws, and tax administration, policy and practice. The quorum for every sitting is three with the Chairman presiding, or, in his absence, an Acting Chairman would be appointed by the Commissioners present.[1]

To commence proceedings before TAT involves filing a Notice of Appeal (Form TAT l) in the zone where the underlying facts took place. The Notice of Appeal must contain the following: the ground of Appeal; whether the whole or part only of a decision is contested (indicating such part); the exact nature of the relief sought; the names and addresses of all parties directly affected by the appeal; and the address for the service on the appellant and the respondent must be endorsed on the Notice of Appeal.[2] As is with the frontloading pleading rule,[3] the Notice of Appeal must be filed concurrently with the list of witnesses, witnesses' sworn written statements on oath, and copies of every document to be relied on at the trial.

After the originating pleadings have been endorsed by the TAT secretary, they should be personally served on the opposing party, who then has thirty (30) to file his opposition with Form TAT 3, which similarly contains his defences, supporting facts and frontloaded witnesses' list, sworn testimonies and documents. All documents shall be served personally, except the TAT grants an application for substituted service.[4]

Once the opposition papers have been received by TAT, the case is set for hearing and determination.[5] TAT hearings are guided by a number of laws and rules including: the Nigerian Constitution, the FIRSEA, the relevant Tax Laws and the TAT Rules of Procedure, and, after the presentation of evidence and hearing of testimonies from witnesses, the TAT, subject to rules of relevance and admissibility will take evidence and then invite written addresses and oral arguments for clarification of knotty issues.[6] The TAT must then give a written judgment that must be signed by the chairman.[7] Pursuant to Section 15(8) of the 5th schedule of FIRSEA, the Tribunal has the power to confirm, reduce, increase or annul the RTA's assessment or make any such order as it deems fit, and, in addition, under Order XIX of TAT Procedure Rules, the decision of the Tribunal may be unanimous or taken by a majority of members. However, where there is a tie, the Chairman or presiding member shall have a casting vote, and such decision shall be recorded in a document which, save in the case of a decision by consent, shall contain a statement of the reasons for the decision and shall be signed by the Chairman. Interested parties are allowed apply for certified true copies of the judgment or ruling within thirty (30) days of the date of the chairman's signature. Under Order XXIV of TAT Procedure Rules, a party dissatisfied with a decision of the TAT may appeal to the FHC.[8]

The judgment of the TAT is enforceable as if it were a judgment of the Federal High Court upon registration of a copy of the judgment or award with the Chief Registrar of the Federal High court by the party seeking to enforce the award or judgment.

b. **Amendments to the TAT Rules and Procedure as Contained in the *Oando Supply & Trading Ltd v FIRS (2011) 4 TLRN 113 (Oando I)* Decision.**

The issue in ***Oando I*** was whether a taxpayer, can appeal to the TAT against a tax assessment, while the taxpayer's objection against the assessment is yet to be resolved by FIRS. The TAT held that a taxpayer does not have to wait for a formal resolution, since there is no provision in FIRSEA requiring a NORA as a condition precedent for instituting a case with TAT, pursuant to Paragraph 13 of the 5th Schedule and Section 68 of FIRSEA. The effect of this ruling is that it gives an aggrieved taxpayer four options when faced with an assessment from the tax authorities which are:

a) To pay up the assessment as required in the notice of assessment
b) To object to the assessment by sending a notice of such objection in writing to the FIRS within 30 days of the receipt of such assessment[9].
c) Appeal against such assessment to the Tax appeal tribunal[10].
d) Pursue option b and c above.[11]

It is important to point out that the ruling is without prejudice to the taxpayer's freedom to explore the taxman's in-house review mechanism.[12]

Another issue dealt with in ***Oando v FIRS*** was the deeming provisions under paragraph 13(2) of the

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1. Amasike, *supra* note 28, at page 6.
2. *Ibid.* at page 4.
3. See, High Court of Lagos State Civil Procedure Rules (2004), and Federal High Court Civil Procedure Rules (2009).
4. See Orders VI, TAT Procedure Rules
5. Amasike, *supra* note 28, at page 5.
6. *Ibid.*
7. In cases of consent judgment, the parties may state the good faith of the settlement.
8. Section 23 of the 5th schedule of FIRSEA.
9. Section 69(2)(a).
10. Paragraph 13 of the fifth schedule, FIRS Act.
11. Ayoleke Owolabi, *Oando v FIRS: Implications for Tax Policy, Law and Administration in Nigeria*, LLM Thesis, University of Lagos.
12. *Ibid.*

Fifth schedule to the FIRSEA, i.e., where the taxpayer sends his objection and the FIRS fails to respond beyond 30 days. The TAT held that the FIRS must issue a NORA within a reasonable time-equal to 90 days, after which the taxpayer may approach TAT. According to TAT: "*The tax collector should not be allowed to hang the dread of an impending NORA over the taxpayer's business- that would turn the taxman into a hangman*".

IV. COURTS AND TRIBUNALS

Depending on the amount and whether the relevant tax/levy was imposed by a state or federal law, tax disputes in Nigeria may be commenced either before the (a) customary courts, (b) magistrate courts, (c) State's High Courts, (d) TAT, or (e) FHC. Further appeals lie to the Court of Appeal and Supreme Court.[1]

i. The State's Customary, Magistrate and High Courts Are the Venue for Levies and Taxes Imposed By Local Government Authorities and Taxes Under State Tax Laws.

Where the subject matter of the case involves levies/taxes collected by the Local Government Authorities and taxes under State Tax Laws, an action may be commenced before the customary or magistrate courts. If the total amount claimed does not exceed N600,000.00, the claim may be filed before the customary court.[2] Claims in excess of N600,000.00 but less than N10million, may be commenced before the magistrate court.[3]

For claims for taxes imposed by State laws, e.g. Lagos State Revenue Administration Law (LSRA),[4] and that are above N10million, the case must be commenced before the State High Courts which are courts of unlimited jurisdiction under Section 272 of the Constitution.

ii. TAT is the Venue for Taxes Imposed By the Federal Legislature.

Under Part 1 of the Second Schedule of the Constitution, the taxes imposed by the Federal Government including: CGTA, CITA; Education Tax (Amendment) Act; PITA, PPTA, Stamp Duties Act, Taxes and Levies (Approved List for Collection) Act, and VAT Act. Further, the PITA applies only in the Federal Capital Territory, Abuja. All disputes touching any of the above legislation must commence before TAT, with appeals from TAT to the FHC, on questions of law. The FIRS is the authority that enforces the above federal legislation. Ultimately, the enforcement of tax laws in Nigeria is vested in the courts.

V. RECENT DECISIONS ON NIGERIAN TAX LAW AND PRACTICE

With the dwindling profits from international oil and gas transactions, focus has shifted from glossing over tax returns filed by Non-Resident Companies (NRCs), to conducting full audits towards finding means to tax global incomes of NRCs, so as to enlarge the Nigerian government revenue. Thus, during the past twelve (12) months period, the courts issued notable tax decisions that, mostly, expanded government's tax bases:

a. *Statoil (Nig.) Petroleum vs. Nigeria National Petroleum Corporation*[5]

In ***Statoil vs. NNPC***, the court dealt with the applicability of Nigerian Arbitration and Conciliation Act ("ACA")[6] to the Nigerian tax jurisprudence and further expanded the frontiers of the Nigerian tax practice. In a case involving a Production Sharing Contract (PSC) between NNPC and Statoil who were parties to an Oil Prospecting Lease (OPL) that was later converted to an Oil Mining Lease (OML) under a PSC that expressly mandated arbitration of all disputes arising during the operation of the PSC. A dispute later arose, and Statoil served a Notice of Arbitration and a Statement of Claim on NNPC. NNPC objected to the arbitration and the jurisdiction of the arbitral panel by filing a Notice of Preliminary Objection, a Statement of Defence, and a Counter-claim. Curiously, NNPC, in paragraph 1.3 of its counterclaim stated that NNPC's counterclaim, arising under the same PSC, was arbitrable and that the arbitral panel has jurisdiction over NNPC's counterclaim. Subsequent to Statoil joining issues with NNPC, the Court of Appeal held that under Section 34 of the ACA, once parties have agreed to arbitrate their disputes, the court are compelled to enforce every arbitration agreement, even where the tax issues. By conceding that the counterclaim was arbitrable, NNPC has wholly waived its objection.

b. The *JGC Corporation vs FIRS*[7] and *Saipem Contracting Nigeria Ltd vs FIRS*,[8] Decisions

The Nigerian tax authorities (especially, the Federal Inland Revenue Service—FIRS) financial policy aimed at generating income and taxes from NRCs (especially, International Oil Companies (IOCs) received substantial judicial support in 2014 after the courts readily found legal bases to tax the global income of NRCs, by readily

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[1]. Appeals from TAT on questions of law go to the Federal High Court. However, appeals from the TAT on questions of facts solely, go directly to the Court of Appeal.
[2]. See, e.g., Section 20(1) and First Schedule of the Customary Courts Edict, (1984), applicable in Edo and Delta States.
[3]. Section 28(2) of Magistrate Court's Law of Lagos State (2011).
[4]. LAGOS STATE REVENUE ADMINISTRATION LAW (2006).
[5]. (2014) 15 TLRN 1.
[6]. Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria (2004).
[7]. (2014) 15 TLRN 105.
[8]. (2014) 15 TLRN 76.

finding that NRCs either have fixed bases, permanent establishments, sales outlets or dependent agents in Nigeria so as to wholly tax the NRCs' global income in Nigeria under Sections 9, 13 and 30 of the Nigerian Companies Income Tax Act (CITA).[1] Therefore, just as in previous decisions in *Offshore International vs FBIR*[2] and *Shell International v. FBIR*,[3] the courts in 2014, in both *JGC Corporation vs FIRS* and *Saipem Contracting Nigeria Ltd vs FIRS*, re-examined the rules under Sections 9, 13 and 30 of CITA governing the taxation of income accruing from onshore and offshore to foreign parent companies and their Nigerian subsidiaries.[4]

i. *JGC Corporation vs FIRS*

In *JGC Corporation vs FIRS*, JGC had executed a contract in Nigeria with Mobil Production Nigeria Unlimited (MPNU) to be performed at the East African Projection (EPC) Bonny River Expansion Terminal project. The FIRS later issued additional assessments for 2004, 2005, 2006, 2007 and 2008 tax years, arguing that JGC's income was subject to additional taxes on the deemed profits basis under Section 13(2) and 30(1) of CITA, because it has a fixed base in Nigeria. The court agreed with the FIRS, while relying on *Addax Petroleum vs FIRS*,[5] and held that the an examination of the Principal Contractual Document showed that JGC had a fixed base in Nigeria and that services and works carried out in Nigeria were therefore taxable. The court adopted a definition of "fixed base" thus:

> "*To establish a fixed base within the meaning of the statutory provisions, any significant territorial connection to Nigeria will suffice if the Nigerian location is a place of regular resort for the foreign company, for business purposes*."[6]

Continuing, the court also held that where a company's profit cannot be ascertained from the company's financial returns pursuant to Section 55 of CITA, it would follow that Section 30(1)(b) of CITA (on deemed profits/income) would apply to JGC, since it is an NRC with a Nigerian fixed base whose profits cannot be assessed or ascertained. Therefore JGC was rightly taxed on the turnover basis attributable to the fixed base:

> "*In that case, the taxman looks at the portion of the turnover attributable to the Nigerian base. The taxman can look at the whole turnover attributable to the fixed base. This of course does not necessarily mean the company's entire turnover. But it does mean 100% of the turnover attributable to the fixed base, not any fraction of it. The Appellant fits snugly into this category of foreign companies*."[7]

Foreign companies aiming to do business in Nigeria must take the pains to make sure that where there are onshore and offshore parts of a contract, all works relating to the offshore portion must be completed prior to importation into Nigeria because, installation, fabrication, and/or construction done in Nigeria will make the entire global income taxable in Nigeria. Further, the financial statements of the NRCs must be complete and exhaustive, otherwise, the FIRS will apply the deemed/turnover basis as means of calculating the NRC's income.

ii. *Saipem Contracting Nigeria Ltd vs FIRS*

In *Saipem vs FIRS*, the court was faced with three (3) issues for determination: (a) whether, in the event that a turnkey/single consortium contract covering both onshore and offshore works is to be performed, an NRC could be taxed on profits accruable from works/services performed outside Nigeria, (b) the effect of an FIRS' opinion/circular; and (c) application of Double Tax Treaty (DTT).

The facts of *Saipem* case were that the Plaintiffs, Saipem Nigeria, Saipem Portugal and Saipem Parent Company (France) entered into a Consortium/Turnkey contract for the construction, installation and fabrication that were to be performed in Portugal and Nigeria, respectively. The importer of the finished products was Shell. Section 11, Article 36.8 of the contract stated that both offshore and onshore elements of the contract were taxable in Nigeria and that Saipem was liable as the taxpayer. Further, Section 11, Article 22.2(b) also stated that where Saipem was able to provide a tax exemption certificate, Shell, would not withhold 10% tax due to FIRS under Section 82 of CITA. *Prior* to execution of the contract, in 2009, Saipem engaged astute Tax Consultant, who, thereafter, obtained a Tax Opinion from FIRS which stated that profits from services performed in Portugal will not be taxable in Nigeria. Nevertheless, in 2011, the FIRS resiled and withdrew their Tax Opinion of 2009, claiming that the earlier tax exemption letter issued to Saipem was in error. FIRS thereafter imposed VAT tax, Withholding Tax and tax under CITA on Saipem. The court in summary held that (a) since all the necessaries leading to the single consortium/turnkey contract including execution and payment were taking place in Nigeria, the Saipem companies were deriving profit in Nigeria, and that, that part of the income attributable to Nigeria is subject to CITA tax. Therefore, under Sections 9(1)(a), 11(2), 13(2)(c), 26(b) and 30(b)(iii) of CITA as well as

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1. Companies Income Tax Act, Cap C21, Laws of the Federation of Nigeria (2004)
2. (2011) 4 TLRN 84
3. (2004) 3 NWLR (Pt 859) 46.
4. This entails the application of parameters such as: Fixed Base, Permanent Establishment, Arm's Length Principle, Sales Outlet; and Dependent Agent rules.
5. (2013) 1 NRLR 33.
6. See *JGC vs FIRS*, (2014) 15 TLRN 105 at 115.
7. *Ibid.* at 117.

the decision in *Offshore International vs FBIR*,[1] the entire contract was a single contract, and so, Shell had a legal obligation to withhold tax on payments to Saipem. In effect, a wholistical examination shows a single contract under Section 13(2)(c) of CITA that did not fall under any of the exemptions under Section 23(1) of CITA, and therefore, under Section 82 of CITA, the profits flowing from the single contact are subject to withholding tax in Nigeria; (b) the FIRS was entitled to withdraw their earlier tax opinion since payment of tax were stated under the CITA, such could not be privately altered between Saipem and FIRS; (c) since it was not the global income of Saipem that was being taxed but profits from Nigerian contract, the exemption under the DTT does not apply; and (d) VAT tax would not apply. In particular, Justice Saidu had held thus:

> *"Notwithstanding whatever representation [that] the 1st Defendant [FIRS] might have made to the Plaintiffs [Saipem] as to their tax regime or status, it is the law that guide payment of tat that [must] prevail...Therefore, it is not the issue of resiling of earlier statement that is important now. What is important are the various provisions of law guiding payment of tax in this country. I hereby hold that nothing stopped the [FIRS] from resiling their earlier statement to the Plaintiffs, where such statement does not conform with the law. Issue of payment of Tax is completely that of law.*"[2]

This view is in line with an earlier decision in *Global International Drilling vs FIRS*,[3] where the court also held that the FIRS is not bound by its own opinions and circulars, since FIRS has freedom to change its policy:

> "……The respondent must have the freedom to interpret the revenue laws and give general practice guidance to tax payers when the tax policy and enactment suggests."

On the status of the FIRS' Information Circular, the court in *Global International Drilling vs FIRS* also held that such is merely an explanatory note, which

> "Cannot by any stretch of statutory interpretation override or supersede the clear and unambiguous meaning of any statutory provision. Therefore, it cannot be clothed with any legal authority giving it statutory flavour."

Based on *Saipem*, we are of the opinion that it is important for foreign companies entering into contracts with Nigerian companies, to properly structure their agreements and watch out for loose provisions which may potentially expose them to Nigerian income tax under the deeming provision of sections 13 and 30 of CITA. Therefore, the best solution is to have a split contract where there are two distinct contracts of supply and construction or installation, so that only the onshore Nigerian services and works may be subject to Nigerian withholding contract.

c. *AG Federation vs AG Lagos*[4]

In *AG Federation vs AG Lagos*, where the federal government had sought to invalidate Lagos State laws that regulate hotel occupancy and licensing and restaurant operation within Lagos State, the Supreme Court held that the federal government's power to enact laws on Tourists Traffic under Item 60 of the Exclusive List[5] would not oust Lagos State's power to regulate intra-state hotel businesses.

We submit that clear judicial pronouncement is still required to resolve the issue as to whether it is legal for the federal government to continue to collect VAT tax on goods and services relating hotel licensing and occupancy or other restaurant operations, in view of the fact that the Supreme Court has ruled that such subject-matters are clearly *ultra vires* of the federal government and are solely reserved for States.

d. *Independent Television/Radio vs Edo State Board of Inland Revenue.*[6]

In *Independent Television/Radio vs Edo State Board of Inland Revenue* (ESBIR), the court extensively considered the powers of the tax authority to distrain property belonging to a defaulting taxpayer[7] within the context of the constitutional provisions to fair hearing,[8] especially where the distrain order was obtained *ex parte*.

Here, the Nigerian tax policy underlying the collection of taxes was exhaustively discussed. After a final assessment of taxes against Independent, ESBIR obtained an *ex parte* order to seal off Independent's business premises to enforce collection pursuant to Section 104 of the Personal Income Tax Act (PITA).[9] After the lower court refused to set aside the distrain order, on appeal, the Court of Appeal held that Sections 36 and 44 of the 1999 Nigeria constitution were not violated.[10] Likening a distrain procedure to garnishee/garnishor proceedings to collect a debt that has become final, the distrain process was upheld.

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1. *Offshore International vs FBIR* (2011) 4 TLRN 59, at 78-82
2. *Saipem Contractors vs FIRS*, (2014) 15 TLRN 76, at 97-98.
3. (2013) 12 TLRN 1.
4. (2013) 12 TLRN 55.
5. Part 1 of Second Schedule to the Constitution.
6. (2014) 16 TLRN 37.
7. See Section 104 of the Personal Income Tax Act, Cap P8 LFN 2004 and amendment thereto (PITA).
8. Section 36(1) of the 1999 Constitution.
9. Personal Income Tax Act, Cap P 8 LFN 2010 and amendment thereto (PITA)
10. While Section 36 mandates fair hearing and the right to a fair trial rules, section 44 prescribes that a person's property cannot be taken without due process and compensation.

For foreign companies entering Nigeria to do business, we are of the opinion that companies must exercise their "objection rights" under Section 58 of PITA timely and judiciously, i.e., both *after* the initial assessment by the tax authority and *after* receiving the Letter of Intent to Obtain Warrant of Distrain (LIOWD). The "objection" procedure is the most veritable means available to the taxpayer to prolong the assessment procedure and also prepare for litigation.

e. *Nigerian Agip Oil Company Limited vs FIRS*[1]

In *Nigerian Agip Oil Company Limited vs FIRS*, the court conducted a historical review of the Petroleum Profits Tax Act (PPTA)[2] starting from 1959 until 1999, and also examined the concept of "expense deductibility test" under Section 24 of CITA. In Nigeria, the "expense deductibility test" states that any expense that is "*wholly, exclusively, necessarily and reasonably incurred*" by a company is deductible by the company in filing its returns. Under the PPTA, the applicable tax is 85% in Nigeria. Agip had taken a loan from its sister corporation (Eni) in 2001[3] and Agip had repaid the instalments between 2001 and 2011, along with interests. The terms of the loan were open-market and also satisfied the London Inter-Bank Offer rate (LIBOR). FIRS sought to disallow the deductibility of the interests by Agip. FIRS relied on Section 13(2) of PPTA that was originally enacted in 1959, which expressly disallowed the deduction of interests paid on a loan between related entities. However, Agip relied on the 1999 amendment to the PPTA as contained in Section 10(1)(g), which similarly expressly allowed deductibility of interests paid on loans between related corporations, in so far as the terms of the loan were open-market and also satisfied the LIBOR.

The court had to determine which of the clearly conflicting legislation would apply. In resolving the quagmire, the court expressly adopted the dictum of *Tobi JCA* (as he then was) in. *Onagoruwa* v. The State,[4] that one can examine the legislative history of an Act of Parliament to determine, construe and interpret the law. In sum, the court upheld and allowed the deductions by Agip Oil, by holding that the legislative intent was to allow Section 10(1)(g) as an exception to bars imposed under Section 13(2) of PPTA.

f. *Oando Plc vs FIRS* (*Oando IV*),[5]

No tax case generated comments and attention in 2014 as *Oando Plc vs FIRS* (*Oando IV*), where the court again, considered the vexed "Excess Dividend Tax" rule under Section 19 of CITA. In particular, Section 19 of CITA states thus:

> "Where a dividend is paid out as profit on which no tax is payable due to-
> (a) no total profits; or
> (b) total profits which are less than the amount of dividend which is paid, whether or not the recipient of the dividend is a Nigerian company, the company paying the dividend shall be charged to tax at the rate prescribed in subsection (1) of section 40 of this Act as if the dividend is the total profits of the company for the year of assessment to which the accounts, out of which the dividend is declared, relates".

Further, the *Oando IV* court also considered Section 80(3) of CITA, i.e., that dividend received by a company after deduction of withholding tax constitutes "Franked Investment Income" (FII), which should not be subjected to further tax (income tax) and by extension withholding tax (WHT). Section 80(3) of CITA specifically provides that:

> "Dividend received after deduction of tax prescribed in this section shall be regarded as franked investment income of the company receiving the dividend and shall <u>*not*</u> be charged to further tax as part of the profits of the recipient company................"

In *Oando IV*, Oando had made profits and also received dividends from its subsidiaries ***prior*** to 2005—and these are exempt profits/income under Section 80(3) of CITA. Further, Oando had previously paid tax on the *pre-2005* profits at the rate of 30% under CITA. In 2005, 2006, and 2007, at a period when there were no profits or when the amount of dividends exceeded Oando's profits, Oando distributed dividends to its shareholders from its retained earnings, The FIRS sought to tax Oando for those years, when, in actual fact, Oando did not make profit between 2005-2007. The court, using the excess dividend rule under Section 19 of CITA held that Oando could be deemed to have made profit during those years and that the total value of dividend so distributed were the total value of profits made by Oando which must be taxed at 30%.

We agree with other tax practitioners in Nigeria that Section 19 of CITA amounts to double taxation on retained earnings and should be abolished. Since the company had been taxed previously at 30% at the time that it originally acquired the profits, although the company may not have distributed the profits then, it is unfair to tax the same profit for the second time, simply because the taxpayer decided to keep the original profits as

1. (2014) 16 TLRN 25
2. Petroleum Profits Tax Act, Cap P13, LFN (2004).
3. The loan satisfied the "expense deductibility test."
4. (1993) 7 NWLR (Pt 303) page 49 at page 102.
5. (2014) 16 TLRN 99.

retained earnings rather than to distribute dividends at during very first original date of making the profits.

Further, the excess dividend rule as applied in the *Oando IV* case appears to impose tax on an exempt income, i.e., a 30% tax rate is now imposed on franked investment income that has been exempted by Section 80(3) as payment received by Oando from its subsidiaries—income which had been subjected to a 10% withholding tax, after a previous tax on the profits of the subsidiary. By imposing a 30% tax under section 19, because the exempt income was distributed to the shareholders of the parent company at time when the parent company had no income would amount to a cumulative tax of 70% on the same income.

g. *TSKJ II Construces vs FIRS*,[1] and *Nigerian National Petroleum Corporation vs Tax Appeal Tribunal*,[2]

Finally, the controversy surrounding the constitutionality of the Tax Appeal Tribunals (TAT),[3] starting from *CNOOC Exploration vs FIRS*,[4] continues to rage. In *TSKJ II Construces vs FIRS*, the court, 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 Federal High Court (FHC) conferred by section 251 of the Constitution. However, Justice I.N. Buba, in *Nigerian National Petroleum Corporation vs Tax Appeal Tribunal*, upheld the creation and establishment of TAT.[5]

VI. AREAS OF FUTURE PRACTICE FOCUS

Similar to most other developing countries, Nigeria does not have a universal social-security system to protect the elderly against economic deprivation, and so the various Pension reform legislation in Nigeria are welcome steps towards instituting pension reforms, with the Nigerian government moving from a defined-benefit pension to a defined-contribution-based pension system.[6] On July 1st, 2004, the Contributory Pension Act of 2004 otherwise known as Pensions Reform Act 2004,[7] came into force.[8] The 2004 Act has now been overtaken by the Nigerian Pension Reform Act of 2014 in July 2014. The old Direct Benefit system is now replaced by the improved funded contribution pension scheme under the 2014 Act which offers a wide gamut of investment options to employees, and, at the same time, helping the Nigerian Government to reduce its pension liabilities. Thus, of particular attention is Section 10 of the 2014 Act providing thus:

(1) Notwithstanding the provisions of any other law, contributions to the Scheme under this Bill shall form part of the tax deductible expenses in the computation of tax payable by an employer or employee under the relevant income tax law.

(2) All interests, dividends, profits, investment and other income accruable to pension funds and assets under this Act shall not be taxable.

(3) Any amount payable as a retirement benefit under this Act shall not be taxable.

(4) Without prejudice to the provisions of subsection (2) of this section, any income earned on any voluntary contribution made under Section 4(3) of this Act shall be subject to tax at the point of withdrawal where the withdrawal is made before the end of 5 years from the date the voluntary contribution was made.

Clearly, Section 10 of the 2014 Act specifically provides that interests, profits, dividends, investments and all income flowing to pension funds and assets are not taxable. There is also a 5-year tax free treatment accorded to voluntary contribution.

Because Nigeria has the largest labour force in Africa, it expected that claims of exemption under the 2014 Pension Act will constitute largest part of FIRS and TAT's docket in the next 12 months.

VII. OUTLOOK AND CONCLUSIONS

The future of tax practice in Nigeria continues to be an exciting and challenging one. Definitely, there would be amendments in the tax legislation. For instance, the Section 4 of the Deep Offshore and Inland Basin Production Sharing Contracts Act dealing with the Production Sharing Contract/Agreement (PSC) must be amended to harmonize the status of PSC's Incentives, i.e., (a) the Investment Tax Credits (ITC) and (b) the Investment Tax Allowances (ITA) regarding PSCs created between January 1st, 1993 and March 29, 1999.

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1. (2014) 13 TLRN 1.
2. (2014) 13 *TLRN* 39.
3. Abiola Sanni, *CITN Position on the Conflicting Decisions on the Federal High Counts on the Constitutionality or Otherwise of the Tax Appeal Tribunal*, Prepared by the Indirect Tax Faculty, 23rd April 2014.
4. (2013) 9 TLRN 28.
5. Both matters are on appeal, with a stay having been granted against disbanding the TAT, pending appeal.
6. Akhiojemi, S. I. (2004) ; Contributory Pension fund.: Being a paper presented on The New Pension Reform to ASCON Pension Board of Trustees in Sept. 2004
7. Pension Reform Act No. 2 (2004), Cap P4, Laws of the Federation of Nigeria, (2004).
8. Ikotun, A. O. Nov. (2004); "Explanation and Proper Understanding of Pension Reform Act 2004": Administrative Staff College of Nigeria (ASCON) Paper, 19th November, 2004.

Further, clear rules must be made in the VAT Act allowing the ultimate taxpayer to claim refunds arising from refunds rather than the middleman businesses. Sections 16 and 17 of the VAT Act's definition of the "taxable person" must be amended to allow the ultimate bearer of the output tax burden to claim refunds.

The legislators must also expunge the vexed "Excess Dividend Tax" rule under Section 19 of CITA because it simply amounts to double taxation of the same income which is substantially "retained earnings." The decision in *Oando Plc vs FIRS* (*Oando IV*),[1] must be reversed on appeal, as well. If the *Oando IV* stands, under Section 19 any dividend paid in the instances set out in the section will be treated as taxable profits subject to tax at the rate of 30%, i.e., if applied without measure, this invariably means an effective corporate income tax rate of 60% where previously taxed retained earnings are distributed, and at least 30% in all other cases including exempt income and gains taxable exclusively under the Capital Gains Tax legislation.[2]

Finally, the Court of Appeal must seize the opportunity in the appeals pending in *TSKJ II vs FIRS* and *NNPC vs TAT* and finally settle the jurisdiction of TAT as an administrative tribunal on tax issues so that there can be speedy and expedient resolution of tax disputes.

The above amendments notwithstanding, future tax practice in Nigeria will continue to be of intense intellectual, informative and evolving area of law.

[1]. (2014) 16 TLRN 99.

[2]. Taiwo Oyedele, Nigerian companies are now liable to income tax at 60% , Guardian Newspaper, Wednesday, 27 August 2014.